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THE TIMES LAW REPORTS,

FRIDAY, NOVEMBER 5, 1926.

Prob., Divorce, and Adm. Div. (Hill, J.) } 1926. Oct. 12.

PEPPER v. PEPPER AND BAKER.*

Divorce—Wife's petition—Husband and married woman made respondents—Decree *nisi*—Costs against both—Limitation to separate estate in case of married woman—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 177.

This suit was the first in the records of the Division in which a woman with whom a husband was alleged to have committed adultery had been made a respondent in an action by a wife petitioning for divorce.

Mrs. Jessie Winifred Pepper, *née* Reekes, of Cambridge-road, North Harrow, petitioned for the dissolution of her marriage with Horace Harvey Pepper, a solicitor's clerk, on the ground of his adultery with Mrs. Gertrude Hyde Baker, the licensee of the Crown Hotel, Diss, Norfolk, who was also a respondent in the suit. The petition was undefended.

Mr. L. J. ACTON PILE, for the petitioner, said that in this suit the first successful application had been made since the Matrimonial Causes Act, 1857, came into operation for an order to make the woman accused of adultery with the husband a respondent against her will. The application had been made to his Lordship on June 28 under section 177 of the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacting section 28 of the Act of 1857, and had been strenuously opposed by counsel on behalf of Mrs. Baker. The order had been made, but Mrs. Baker had entered no appearance and made no defence. The object of the application was to secure an order against her for the costs of the action. As regards her separate means, she had signed cheques in payment of the alimony due from Mr. Pepper to his wife.

Mrs. Pepper, in reply to counsel, said that the marriage took place at St. Gabriel's Church, Willesden, on August 14, 1906, and one child was born, a son, now aged 19. The witness described the circumstances of her husband's leaving her, and other evidence was given to the effect that adultery had taken place between Mr. Pepper and Mrs. Baker.

His LORDSHIP held that adultery had been proved.

Mr. ACTON PILE asked for a decree *nisi*, and for an order for costs to be paid by Mrs. Baker, and that any costs not recovered or recoverable from Mrs. Baker should be paid by the husband. He pointed out that in many cases women named in wives' petitions had intervened and orders for costs had been made against them. In this case Mrs. Baker had been brought in against her will, but was in the same position in regard to costs as an intervener. As regards Mrs. Baker's separate estate, she was an hotel licensee, she was separated from her husband, and the cheque for £1 which he (counsel) produced had been drawn and sent by her in payment of Mr. Pepper's alimony.

His LORDSHIP said that an order for costs against two parties could be satisfied by execution on either, and granted a decree *nisi*, with costs against both respondents, but limited the order in the case of Mrs. Baker to her separate estate.

[Solicitors—Messrs. Webster Butcher and Sons.]

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

K.B. Div. (Lord Hewart, C.J., Avory and Salter, JJ.) } 1926. Oct. 13.

JONES v. HARRIS.*

Agriculture—Minimum wage—Benefit or advantage reckoned as payment—Set-off—Onus of proof—Misrepresentation of age by worker—Agricultural Wages (Regulation) Act, 1924 (14 and 15 Geo. V., c. 37), s. 7 (1), (2), (3), (11).

The employer of an agricultural worker is not entitled in proceedings under the Agricultural Wages (Regulation) Act, 1924, to set off as a debt due from the worker the amount of any benefit or advantage which he is prohibited from reckoning as a payment in lieu of payment in cash.

Where an employer is charged with paying a worker in agriculture less than the minimum rate of wages applicable, the onus of proof is on the prosecution to show what is the minimum rate applicable, and, as one of the elements on which the rate depends, to prove the age of the worker. When the prosecution have established what the minimum rate is it is for the accused (under s. 7 (2) of the Agricultural Wages (Regu-

* Reported by J. W. HALL, Esq., Barrister-at-Law.

lation) Act, 1924) to prove that he has paid not less than that rate. The rate payable is governed by the actual age of the worker, and it is no defence that he misrepresented his age.

This was a case stated by Monmouthshire justices. Two informations were preferred on September 17, 1925, by William Morgan Jones (hereinafter called the appellant) against Francis John Harris (hereinafter called the respondent) for that he on July 25, 1925, and August 1, 1925, at Bettws Farm, Raglan, in the County of Monmouth, being a person who employed Frederick Daniel Pugh, a worker in agriculture, did not pay wages to the said Pugh at a rate not less than the minimum rate as fixed under the provisions of the Agricultural Wages (Regulation) Act, 1924 (14 and 15 Geo. V., c. 37), and the Order of the Agricultural Wages Board made thereunder No. 70, dated March 10, 1925, and the Orders of the Agricultural Wages Committee for the said County of Monmouth, Nos. Mon. 1 and 2, and dated March 7, 1925, and July 4, 1925, respectively. On September 26, 1925, the respondent was convicted and fined the sum of 2s. 6d. in respect of the offence committed on August 1, 1925, and was also ordered to pay the said Pugh a sum of 3s. 7d., being arrears of wages due to the said Pugh for the week ending August 1, 1925, being the sum which appeared to be due to the said Pugh on account of wages in accordance with the provisions of the Agricultural Wages (Regulation) Act, 1924, and the Order of the Agricultural Wages Board aforesaid.

Upon the hearing of the said informations, the following facts were proved or admitted :—

(*a*) That the appellant was a person duly authorized by law to institute proceedings under the said Agricultural Wages (Regulation) Act, 1924, and that he accordingly laid the said informations against the respondent on September 17, 1925.

(*b*) That the Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the Administrative County of Monmouth material to this case were :—

(i.) An Order of the Agricultural Wages Board (No. 70), dated March 10, 1925.

(ii.) An Order of the Monmouthshire Agricultural Wages Committee (No. Mon. 1), dated March 7, 1925.

(iii.) An Order of the Monmouthshire Agricultural Wages Committee (No. Mon. 2), dated July 4, 1925.

Copies of the said Orders were annexed to and formed part of the case.

(*c*) That the respondent on or about August 11, 1924, did enter into a contract with the said Pugh whereby the respondent was to employ the said Pugh as a worker in agriculture—namely, a general farm labourer on respondent's farm called Bettws Farm, Raglan, in the county aforesaid, at a weekly wage of 8s., together with board and lodging to be provided by the respondent, and that the said Pugh continued in the service of the respondent until August 6, 1925, under the said contract.

(*d*) That the value of the board and lodging provided by the respondent was 17s. per week.

(*e*) That at the time when the said contract of service was entered into the said Pugh informed the respondent that he was 18 years of age, whereas at the hearing it was stated that he was then 21 years of age, though no certificate of birth was produced. The said Pugh did not at any time, while in the employment of the respondent, inform him that he was 21 years of age.

It was contended on behalf of the appellant :—

(*a*) That as and from the date of the Order of the Monmouthshire Agricultural Wages Committee, dated July 4, 1925, above referred to, the respondent was prohibited from reckoning as payment of wages the benefit of the board and lodging provided by the respondent, and that the respondent was bound to pay the said Pugh such wages in cash without any deduction or set-off for any amount which might be owed by the said Pugh for board and lodging.

(*b*) That inasmuch as the said Pugh was at all material times in fact over 21 years of age, the respondent was bound to pay the said Pugh wages in cash at a rate not less than the minimum rate fixed for workers of that age by Order of the Agricultural Wages Board, dated March 10, 1925, above referred to, and that the respondent was not excused from paying wages at a rate less than the rate fixed by the said Order for workers of 21 years and over by reason of his belief in the truth of the statement made by the said Pugh.

(*c*) That under the provisions of section 7, subsection 3, of the Act, the Court was bound to make an order for the payment by the respondent of all such arrears of wages as might be found to be due to the said Pugh in respect of the period between March 28, 1925, and August 6, 1925.

It was contended on behalf of the respondent :—

(*a*) That the respondent was entitled during the whole period of the employment of the said Pugh to set-off against wages payable to the said Pugh the value of the board and lodging provided by the respondent as a debt due to the respondent.

(*b*) That the respondent was not bound to pay wages to the said Pugh at a rate higher than the minimum rate applicable to workers of the age of the said Pugh as stated by the said Pugh to the respondent.

(*c*) That the wages paid by the respondent to the said Pugh were in fact at no material time less than at the minimum rate applicable to the said Pugh.

Upon the facts proved or admitted the justices held :—

(*a*) That there was no obligation on the respondent to pay out to the said Pugh the full amount of his weekly wages in cash without having regard to any sums which might be due from the said Pugh to the respondent in respect of board and lodging, but that the respondent was entitled to set-off as a debt due to him the amount of any weekly rent for board and lodging due and payable under any agreement in force entered into between him and the said Pugh in arriving at the amount payable by him to the said Pugh.

(*b*) That inasmuch as no agreement had in fact been arrived at between the respondent and the said Pugh as to the amount which should be payable by the said Pugh as rent for board and lodging aforesaid, the respondent was not strictly entitled to treat the said sum of 17s. a week as a debt due from the said Pugh (although such sum of 17s. was in the opinion of the justices a reasonable sum for him to pay), and that a technical offence had been committed by the respondent.

(*c*) That a sum of 3s. 7d. was in fact due from the respondent to the said Pugh. [The case did not state how this sum was arrived at.]

The justices therefore in the circumstances convicted the respondent and imposed upon him a fine of 2s. 6d., and ordered him to pay the sum of 3s. 7d. to the said Pugh.

The Agricultural Wages (Regulation) Act, 1924, section 7 :—

Subsection (1) : "Where any minimum rate of wages has been made effective by an Order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine not exceeding twenty pounds, and to a fine not exceeding one pound for each day on which the offence is continued after conviction.

(2) In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate.

(3) In any proceedings against an employer under this section the Court shall, whether there is a conviction or not, order the employer to pay in addition to the fine, if any, such sum as may be found by the Court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period. . . .

(11) Subject to any definition under this Act of the benefits or advantages which may be reckoned as payment of wages in lieu of cash and the value at which they are to be reckoned, and to any limitation or prohibition under this Act of the reckoning of benefits or advantages as payment of wages in lieu of cash, the Court may, in any proceedings under this Act, reckon as a payment of wages such amount as in the opinion of the Court represents the value of any benefits or advantages (not being benefits or advantages prohibited by law) received by a worker under the terms of his employment."

Section 8 gives power to the Minister of Agriculture to make regulations for requiring wages committees to define the benefits or advantages which may be reckoned as payment of wages in lieu of payment in cash, and to prohibit the reckoning of benefits or advantages.

The Order No. 70 of the Agricultural Wages Board, dated March 10, 1925, gave effect to the schedule of minimum rates fixed by the Monmouth Agricultural Wages Committee ; the Order No. Mon. 1, dated March 7, 1924, defined certain classes of employment ; the Order No. Mon. 2, dated July 4, 1925, stated that "The Agricultural Wages Committee for the area comprising the administrative County of Monmouth . . . do, by this Order, prohibit the reckoning of any benefit or advantage as payment of wages in lieu of payment in cash for the purpose of the application of any minimum rate of wages fixed by the said Committee."

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Hubert Hull appeared for the appellant ; Mr. J. E. Singleton, K.C., and Mr. W. H. Williams for the respondent.

By an oversight the information as to July 25 was not dealt with by the Justices, but the Attorney-General did not ask for the case to be sent back for a formal decision upon it.

The Lord Chief Justice.—This is a case stated by justices, and the questions to which it gives rise have to do with the true interpretation of certain provisions of the Agricultural Wages (Regulation) Act, 1924. It is not necessary, I think, to re-read the facts of the case. In substance, there are two questions. The first is : Whether in arriving at the amount of wages payable to an agricultural worker coming within the provisions of this statute a deduction may be made on account of board and lodging provided for him by his employer, and the answer to that question depends not only upon the terms of the statute itself, but also upon the Orders made under it. The second question is a question relating to the age and the mode of proof of the age of the worker concerned in the present case on the facts of this case.

Now, so far as the first question is concerned it is, I think, clear from the way in which this case was stated, whether one looks at the contentions of the appellant or at the contentions of the respondent or at the findings of the justices, that the main contest was whether it was right to reckon as payment of wages any benefit of the board and lodging received by the respondent.

[His Lordship read the contentions and findings and proceeded] :—

Now the terms of the Act, one would think, are sufficiently clear on that point. This undoubtedly drastic statute imposes the clearest statutory duty to pay a certain sum, and if there is default in payment the matter is not to be reckoned as one limited to the individual employer and the individual labourer. It is a matter in which the public has a concern because of the purposes sought to be accomplished by the Agricultural Wages (Regulation) Act, 1924. The section goes on in subsection (11) to make provision with reference to the benefits or advantages which may be reckoned as payments. That Act having come into force the various stages subsequently fulfilled have been made plain by the production of statutory Rules and Orders, and it is enough to say that this Agricultural Wages Committee having been duly empowered to limit or prohibit the reckoning of benefits or advantages as payment of wages in lieu of payment in cash for the purposes of any minimum rate which has been fixed under the Act the Committee proceeded on July 4, 1925, to prohibit the reckoning of any benefit or advantage as payment of wages in lieu of payment in cash for the purposes of the application of any minimum rate of wages fixed by the said Committee. Now it is apparent that in the earlier stages of this case at any rate it was contended that although after that prohibition the provision of board and lodging could not be treated as payment in lieu of cash, nevertheless in proceedings of the present kind under the statute there might be an equivalent set-off. That contention is no longer adhered to. On the contrary, Mr. Singleton frankly admits that the point about the reckoning of benefits and advantages was wrong, and ought not to have been taken before the justices. The matter is indeed made plain, not only by the words of the statute itself, but also by the case of *Williams and Others v. North's Navigation Collieries* (1889), *Limited* (22 *The Times* L.R., 372 ; [1906] A.C., 136), where the Lord Chancellor, Lord Loreburn, at page 140, speaking of the Act of Parliament there in question, said : "A reference to section 23 shows, to my mind, that this would be a wrong interpretation even if the language of the Act admitted of it. Section 23 provides, with elaborate care, and under strict safeguards, the cases in which debts due from the workman may be deducted from the wages due to the workman when the employer is paying the wages. These provisions would be wholly unnecessary if an employer were already authorized by section 3 to deduct anything that the workman owed him and to pay in coin merely his balance." Those observa-

tions seem to me to be applicable *a fortiori* to the question raised on this first point under the Agricultural Wages (Regulation) Act of 1924. It is apparent, therefore, that in the present case, as from July 4, 1925, there was an improper deduction of the sum of 17s. per week, and by subsection (3) of section 7 of the statute there is an imperative duty laid down : " In any proceedings against an employer under this section the Court shall "—(not " may," but " shall ")—" whether there is a conviction or not, order the employer to pay in addition to the fine, if any, such sum as may be found by the Court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period." It is now, in the course which the argument has taken, common ground that as from July 4, 1925, the sum of 17s. was improperly deducted.

With regard to the other question it has been argued, or at any rate suggested, that under the provisions of section 7, subsections (1) and (2), the whole burden of proving the age of the worker referred to falls upon the employer. That seems to me to be an erroneous interpretation of these subsections. The first subsection provides that : " Where any minimum rate of wages has been made effective by an Order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate." It is provided by another section, section 9, subsection (4), that : " Any officer so appointed shall have power in pursuance of any special or general directions of the Minister to take proceedings in respect of offences against this Act," and by section 7, subsection (2), it is provided : " In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate." What is the meaning of those provisions ? In my opinion, it is the duty of the prosecution in proceedings of this nature to establish a *prima facie* case. The prosecution does not get the case upon its legs, so to say, unless and until it appears that something less was paid than that which ought to be paid, unless indeed there is some provision of the statute to which no reference has been made in the course of the argument. To say that less has been paid than the minimum rate which is applicable assumes, and must assume, that there is a certain minimum rate applicable, and when one looks to the schedule it is apparent that the rate which is applicable depends upon the age of the worker ; unless therefore there is some provision in the statute to which our attention has not been directed the prosecution here ought to have begun by showing the age of this worker, so as to put the Court into a position to do the arithmetical sum, and to ascertain whether the proper number of pounds, shillings, and pence had been paid. The prosecution having then made it appear that a less sum was paid than ought to have been paid, a thing which is based upon the proposition that a particular sum should have been paid, the burden shifts to the defendant to prove that he has paid wages at not less than the minimum rate. Now here, so far as the prosecution was concerned, it is tolerably obvious from this case that the chronological and logically fundamental question : What was the age of this young man at all material times ? was left vague. He went into the box and said that somebody had told him he was born somewhere at such-and-such a date ; he also admitted that he had told his employer when he entered his employment that he was 18 years of age ; he now said he was 22 years of age, and he further admitted that he had never informed his employer at any time during the employment that he was as much as 21 years of age. In those circumstances, the justices appear—I say " appear " because the matter is not by any means certain—to have come to the conclusion that they were entitled to accept the evidence of the employer that the youth had said he was 18 years of age, and that age not being contradicted by any satisfactory evidence of any other age, they were at liberty to treat the youth as being of that age. It is obvious that where the amount of a minimum rate of wages depends on the age of the worker, what is in question is his true age, not statements which he may have made about it, because it is not to be forgotten that in proceedings of this kind it is an official acting on behalf of the community, and in the interests of the community, who is raising the question. The test is : What was the true age, and what was the minimum rate applicable to the true age ?

When one passes to the further question, the present case having taken the course which we now know, ought the prosecution to have the opportunity of amending its case and offering at a later stage evidence as, for example, a certificate of birth, which should have been offered at the outset ? I think not. I do not think that we ought to give the prosecution a second opportunity of proving that matter, and, therefore, although I am clearly of the view that what is of real importance is the true age, I think that, for the purpose of the present case, we must take it that the justices were not satisfied, and were entitled not to be satisfied, that this young man's age was different from the age which he had represented to his employer.

In these circumstances, I think that the case must go back to the justices with the direction that they took a wrong view about the deduction of the estimated value of the board and lodging, and that that sum be calculated for the appropriate period after July 4, 1925. To that extent, I think that this appeal succeeds.

Mr. Justice Avory.—I concur in the judgment which has just been delivered, and I only wish to add that notwithstanding what Lord Bowen once described as the tutelary shelter which the Legislature has thrown around the workman in this case, subsection (2) of section 7 ought not to be construed in the way in which it was suggested it might be construed—namely, that whenever a summons under the Act is taken out against an employer, the whole burden is at once cast upon him of proving that he has not committed any offence under the statute. That would be so contrary to the principles on which the penal and criminal laws are administered in this country that one ought to seek by any means to avoid such a construction of this subsection. I agree that what it means is, that the prosecution, as in every other case, must at all events present a *prima facie* case against the accused person, and in order to present a *prima facie* case here, it was essential that they should give some evidence of the age of this worker. In the circumstances, as the matter stood, the justices were entitled, I think, to assume that this worker was 18 years of age only, and to deal with the case on that footing. In dealing with it on that footing, it does not appear that there was any evidence of any arrears due to him for the period prior to July 4. Upon the admission which

has been made on that, the real error into which the magistrates fell was in holding, as they did, that if there was an agreement to set-off the amount of any weekly rent for board and lodging the employer could deduct that. The magistrates calculated the sum of 3s. 7d. on the footing apparently that that might be set-off if there were any agreement, and apparently, according to the admission made at the Bar in arriving at that sum of 3s. 7d., they must have taken into account in some way that 17s. which they describe as a reasonable sum for the board and lodging. I agree that the case must go back for them to determine what amount of arrears were due since July 4, up to the date when these proceedings were taken.

MR. JUSTICE SALTER.—I am of the same opinion. The important question in this case is the construction of subsection (2) of section 7. I think that subsection (2) applies both to subsection (1) and to subsection (3). With regard to its effect upon subsection (1) I have nothing to add to what has been said by my Lord and Mr. Justice Avory, with which I agree. With regard to its effect upon subsection (3), I think that the prosecution have to prove the total minimum amount payable by the accused to the worker during the period of six months as defined in the subsection. For that purpose, they have to prove the relation of employer and employed, that there was a worker in agriculture, and they have to prove the age of the person alleged to have been underpaid in order to establish the amount due. When the total amount payable has been proved by the prosecution the onus is upon the accused to prove that he has paid within the period not less than the sum named, and in so far as he fails to prove that, the Court is to make an order for the payment of the difference.

[Solicitors—Solicitor to the Ministry of Agriculture and Fisheries ; Messrs. Ellis and Fairbairn.]

Chan. Div. (Eve, J.) } 1926. Oct. 22.

GROSS, SHERWOOD, AND HEALD, LIMITED v. ESSEX COUNTY COUNCIL.*

Arbitration—Lands—Compulsory acquisition—Illness of arbitrator—Replacement—Authority of Reference Committee—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 and 10 Geo. V., c. 57), s. 1.

Where an arbitrator, appointed by the Reference Committee under s. 1 of the Acquisition of Land (Assessment of Compensation) Act, 1919, becomes incapable of continuing a particular arbitration, the authority of the Reference Committee includes the power to replace him by someone else.

This was a motion by the plaintiffs, Gross, Sherwood, and Heald, Limited, to restrain the defendants, the Essex County Council, from proceeding with an arbitration in the following circumstances :—

The plaintiffs were the owners of certain lands situated on the banks of the river Witham, which were acquired compulsorily for the purpose of constructing a bridge to carry one of the new arterial roads. An arbitrator was appointed to determine the compensation which was payable. While the matter was in the course of hearing the arbitrator fell ill. The plaintiffs alleged that he was removed from his office by a Government department, and another arbitrator appointed. They sought to restrain the defendants from proceeding with any arbitration otherwise than before Sir Anker Simmons, the official arbitrator appointed by the Reference Committee.

By section 1 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919, "Where by or under any statute . . . land is authorized to be acquired compulsorily by any . . . public authority, any question of disputed compensation . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section."

By rule 6 of the Acquisition of Land (Assessment of Compensation) Rules, 1919, "The Reference Committee may, in the case of the death or incapacity of the arbitrator, or if it is shown to the Committee that it is expedient so to do, in any other case, at any time before the arbitrator has made his award, revoke the reference of the question to the selected arbitrator and select another arbitrator for the purpose of determining the question."

Sir Lynden Macassey, K.C., and Mr. Swords appeared for the plaintiffs ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. Giveen for the defendants.

SIR L. MACASSEY said that the case raised a very important question—namely, whether a Government department could for reasons which they thought fit intervene in an arbitration and take the matter out of the arbitrator's hands and give it to another. Before 1919 those matters were dealt with under the Lands Clauses (Consolidation) Act, 1845. In 1919 a new and different procedure was established in the case of lands acquired for public purposes. Under the new Act, the Acquisition of Land (Assessment of Compensation) Act, 1919, rules were made by the Reference Committee established thereunder, consisting of the Lord Chief Justice, the Master of the Rolls, and the President of the Surveyors' Institution.

The arbitrator had resigned on account of ill-health from the panel, but subject to the completion of any existing arbitration. There was no power to appoint another arbitrator where one had already been duly appointed under the rules.

His LORDSHIP.—Suppose he became *non compos mentis* ?

SIR L. MACASSEY.—That is not this case. There was no power to make the rule under which the authority purported to act.

His LORDSHIP.—The resignation apparently empowered them by the rule to appoint another arbitrator.

SIR L. MACASSEY submitted that that was not so.

The Solicitor-General was not called on to argue.

MR. JUSTICE EVE, in giving judgment, said that the object of this action—it being agreed to treat the motion as the trial of the action—was to obtain a declaration that the notice served by the secretary of the Reference Committee in August was *ultra vires*, and to ask for consequential relief. In order to see whether that was so one must look at the statutory powers and also see how those powers had been exercised. (His Lordship referred to them and continued.) No point was raised about the appointment of the first arbitrator. In the course of the hearing he became seriously ill, and on June 11 wrote to the secretary that with great regret he must resign his appointment as official arbitrator.

* Reported by A. W. CHASTER, Esq., Barrister-at-Law.

In the interval before the resignation became effective his health improved, and it appeared that he had been attending to the business of his own firm. He therefore was treating his position as a member of the panel as determined under the Act. On August 1 his position as arbitrator was determined. In those circumstances the question was whether the rule was *ultra vires*. One must realize that a person appointed might die or become hopelessly incapacitated, and it must be assumed that the Legislature intended not that the power of selection should be exhausted by one exercise of it, but that it should be a recurring power.

On the facts he was quite satisfied that the man first appointed had become incapable of continuing the arbitration under the panel. The authority of the committee included the power to replace him by someone else. That was what they purported to do. The action would be dismissed, with costs.

The SOLICITOR-GENERAL said that Sir Lynden Macassey had described the reference committee as a public authority. That was not so. It consisted of the Lord Chief Justice, the Master of the Rolls, and the President of the Surveyors' Institution.

[Solicitors—Messrs. Bircham and Co.; the Treasury Solicitor.]

Judicial Committee of the Privy Council. (Viscount Cave, L.C., Lord Atkinson, Lord Carson, Sir Thomas Warrington, and Sir John Wallis.) } 1926. Oct. 21.

STEVENSON v. FLORANT.*

Canada—Quebec—Custody of a child—Rights of tuteur and parent.

The appointment of a tuteur to a child under the provisions of the Civil Code of Quebec does not deprive the mother of her natural rights in regard to the custody and education of the child.

This was an appeal, by special leave, from an order of the Supreme Court of Canada affirming a decision of the Court of King's Bench for Quebec (Appeal Side) and a decree of Mr. Justice Coderre, sitting in the Superior Court of Montreal, who, under section 1114 of the Quebec Code of Civil Procedure, ordered the appellant to surrender to the respondent (the mother) the care and custody of Gertrude Stevenson, a girl between nine and ten years of age.

Mr. A. S. Bruneau (of the Canadian Bar) appeared for the appellant; Mr. P. Lacoste (of the Canadian Bar) for the respondent.

SIR THOMAS WARRINGTON, delivering their Lordships' judgment, said:—

This is an appeal, brought by special leave of his Majesty in Council, from an order of the Supreme Court of Canada, affirming an order of the Court of King's Bench, Appeal Side, which itself affirmed an order of the Superior Court of Montreal.

The last-mentioned order was made upon an application under section 1114 of the Quebec Code of Civil Procedure, and ordered the appellant to surrender to the care and custody of the respondent a child named Gertrude Stevenson, at that time (the 22nd May, 1924) of the age of nine years and six months or thereabouts.

The respondent is the mother of the child. The appellant is her paternal grandfather and was duly appointed her tuteur under the provisions of the Civil Code of Quebec.

The questions raised by the appeal are:—

1. Whether the tuteur can successfully resist the mother's demand for the custody of her child by asserting his position as tuteur.

2. Whether proceedings under section 1114 of the Code of Civil Procedure were proper for the purpose of determining the question.

3. Whether on the merits and in the interest of the child the order for her delivery into the care and custody of the mother ought to have been made.

These questions have all been answered by the Canadian Courts in the respondent's favour.

The child is the daughter of Archibald Stevenson and the respondent. Her parents were married on April 30, 1912.

The respondent is a Roman Catholic. Archibald Stevenson was brought up as a Protestant, but shortly before his marriage was baptized as a Roman Catholic. The marriage took place in a Roman Catholic church.

Archibald Stevenson died on February 26, 1914, the child was born at the house of her maternal grandmother on September 19, 1914, and was baptized as a Roman Catholic on the following day.

The respondent was left entirely without means to support herself and her child, and in the month of November, 1914, when the child was about two months old, she and her mother went to live with the appellant and his wife at their farm at St. Sophie, about 30 miles from Montreal.

After a time, however, the respondent desired to return to Montreal and endeavour to make her living, and it was ultimately arranged that steps should be taken to obtain the appointment of the appellant as tuteur, the respondent surrendering her right to be appointed tutrice.

The family council was accordingly summoned and advised the appointment of the appellant, and on December 28, 1914, the parties all appeared before a Deputy Prothonotary of the Superior Court of Quebec, who ratified and confirmed the advice of the council and ordered that the appellant should be and remain tuteur to the child, the mother (the respondent) having renounced the charge of tutrice.

From that time the appellant and his wife (now dead) have had the sole custody of and have maintained and educated the child, but the respondent has frequently visited her and has taken her presents of clothes, toys, and so forth. The child has been educated as a Protestant.

The respondent had a hard struggle to make a living, but towards the end of 1923 she was in the employment of the Canadian Pacific Railway Company, receiving a salary of $100 a month. She then, considering herself in a position adequately to support her child, requested the appellant to place her in her charge, informing him that for the purpose of education she proposed to place her as a boarder at a Pensionnat in Montreal kept by nuns and to make such arrangements for holidays as would enable her to see as much as possible of her grandparents. The appellant, however, refused to give her up and, after an ineffectual attempt to obtain possession of her by force, the present application was made under section 1114 of the Code of Civil Procedure, being in substance of the same nature as an application in this country for a writ of *habeas corpus*.

The result in Canada of these proceedings has been stated above.

The Courts in Canada have all come to the conclusion that it is in the best interests of the child that the care and custody of her person and the direction of her education should be entrusted to her mother, the respondent. Their Lordships agree with this view. The tuteur, her grandfather, is now over 80

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

years of age. Since the commencement of the present proceedings her grandmother has died, and the only female influence of which there is any evidence is that of a great-aunt, who must be of considerable age, and a school teacher of the Jewish faith. On the materials before the Courts in Canada there was no suggestion of any immorality or other defect in character on the part of the respondent which would disqualify her from having the care of her daughter. Under these circumstances it seems to their Lordships that the Courts in Canada were right in holding that it is in the interests of the child that she should now have the advantage of the natural care of and association with her mother, and learn to treat her home as her own and to look up to her as the person having authority to direct her education and conduct. As to the question of religion, the child is now under 12 years old; at the time of the institution of the proceedings she was more than two years younger. It is not likely that she has formed such definite views on religious matters that a possible change in this respect would be a serious shock to her, and their Lordships, therefore, do not think that there is anything on this head which would counterbalance the advantages of a change of custody and control already referred to.

Under these circumstances the appellant is driven to attack the order appealed from on legal and technical grounds only.

The first and principal ground of attack is founded on the contention that, according to the true construction and effect of the Code Civil, the tuteur, so long as he occupies that position, is the only person entitled to have the care of the child, and that accordingly before the mother can exercise her parental authority she must obtain the removal of the tuteur by an order of the Court after consideration of the advice of the *conseil de famille*.

On this question their Lordships have the advantage of a carefully considered and reasoned judgment of Mr. Justice Rinfret, concurred in by Chief Justice Anglin and Justices Duff, Mignault, and Newcombe. Of these five judges two—Mr. Justice Rinfret himself and Mr. Justice Mignault—have special experience in the law of Quebec, and Mr. Justice Mignault is the author of a well-known commentary on the Code Civil. The judgment is illustrated by copious references to authorities.

Their Lordships have read this judgment several times with the assistance of counsel on both sides, and in particular with the help of the criticisms of counsel for the appellant. This part of the judgment concludes with the following passage:—

"Il faut donc décider que la qualité de tuteur de l'appelant ne lui confère pas sur la personne de Gertrude Stevenson des droits qu'il puisse opposer à l'autorité paternelle de l'intimée, qui est la mère. C'est donc à la mère et non au tuteur, qu'appartient le droit de garde et d'éducation de Gertrude Stevenson."

This decision their Lordships accept as correct, and they must, therefore, deal with the remaining objections of the appellant on the footing that according to the true construction and effect of the Code Civil, and in view of the fact that to give effect to the mother's right to the exercise of her authority is in the interests of the infant, the order appealed from is correct unless the technical objection to the form of the proceedings now to be mentioned is to be sustained.

The objection is that at the date of the issue of the writ the infant was in the custody of the appellant "under an order in a civil matter granted by a Court or judge having jurisdiction," viz., the order appointing him tuteur, and that a return to the writ stating that fact is a sufficient return.

The answer to this objection as it seems to their Lordships is that, holding as they do that the authority of the mother and her right to the custody of her child ought to prevail over the authority conferred on the tuteur by the order in question, and, further, that a transfer of custody from the tuteur to the mother is in the interests of the infant, they would not be disposed to treat these proceedings, in which the whole question has been considered on the merits by three Canadian Courts, as ineffective by reason of a defect in procedure, and to require the respondent to institute proceedings in another form which (according to their Lordships' view) would end in the same result.

If there be a valid technical objection to the form of proceedings, and if they ought to have been instituted by an ordinary writ of summons, the Court would properly in the interests of both parties and acting under Article 3 of the Code of Civil Procedure set aside the objection and make the order which would have been made if the form had been strictly correct.

On the whole, their Lordships are of opinion that the order appealed from is correct and the appeal ought to be dismissed, with costs, and they will humbly advise his Majesty accordingly.

There is, however, a further matter to be mentioned. A petition was presented to this Board asking leave to adduce further evidence, the object of such evidence being to attack the moral conduct of the respondent in the period immediately succeeding the death of her husband, now 12 years ago. Their Lordships are of opinion that this petition cannot be entertained and should be dismissed, with costs, but without prejudice to any fresh application which may be made to the Courts in Canada founded on further evidence, and they will on this matter also humbly advise his Majesty accordingly.

[Solicitors—Messrs. Lawrence Jones and Co.; Messrs. Blake and Redden.]

Court of Appeal. (Bankes and Scrutton, L.JJ.) 1926. Oct. 25.

IDEAL FILMS, LIMITED v. RICHARDS AND OTHERS.*

Practice — Striking out claim — Representative action — Unregistered association — Trustees joined as defendants—Claim against trustees —Order XXV., r. 4.

The plaintiffs brought an action of contract against certain members of an unregistered association, who were sued as representing the general body of members, and against the trustees of the property of the association. The plaintiffs by their statement of claim asked (*inter alia*) for an order directing the trustees to pay the sum claimed and the costs of the action out of the property of the association. On an application to strike out the names of the trustees as defendants on the ground that so far as they were concerned the statement of claim was frivolous and vexatious,

Held, that the plaintiffs were entitled in a representative action to insert this particular

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

form of claim against the trustees, and the application must be refused.

This was an appeal by the plaintiffs from an order of Mr. Justice Horridge, made in Chambers on July 29, striking out from the statement of claim under Order XXV., r. 4, the names of certain defendants sued as trustees.

When the appeal came on for hearing on October 13 the matter was adjourned to give the plaintiffs the opportunity of amending their statement of claim under Order XXVIII., r. 2.

The statement of claim as amended was as follows. (The words in italics constitute the amended portion) :—

(1) The Llanbradach Workmen's Hall and Institute is an unregistered association of miners and other workmen employed at Llanbradach, South Wales. The first 11 defendants are and were at all material times members of the said association, and also are and were members of a committee appointed by the general body of members to conduct the affairs of the association on the members' behalf, *and are sued as representing the general body of the members.* The remaining defendants are and were at all material times the trustees of the said association, and the funds of the association and certain leasehold premises situate at Llanbradach the property of the association are and were vested in them as such trustees. *The said funds and premises are and were at all material times the common property of the members of the association and vested in the trustees upon trust for the members.*

(2) The said association has for some years carried on upon the said premises a cinematograph theatre for the benefit of the members, and has hired films for the purpose of exhibition at the said theatre.

(3) By various contracts in writing made between the plaintiffs and the said committee acting for and on behalf of the members of the said association by one W. T. Jones, the secretary of the said association, the plaintiffs agreed to supply the films therein mentioned for exhibition at the said theatre upon the terms and at the prices specified in the said contracts. The plaintiffs duly supplied the said films together with posters ordered by the said committee acting as aforesaid, and the sum of £234 7s. 8d. is due and owing to the plaintiffs in respect of the said films and posters and the carriage thereof.

The plaintiffs claim :—(1) *A declaration that the sum of £234 7s. 8d. is due and owing to the plaintiffs from the members of the association.* (2) An order directing the trustees to pay the said sum, *together with the costs of this action,* to the plaintiffs out of the property and assets of the association in the hands of the trustees. (3) An order charging the property and assets with payment of the said sum *and costs* to the plaintiffs.

Mr. Justice Horridge made an order striking the names of the trustees out of the writ of summons and statement of claim.

The plaintiffs appealed.

Mr. W. E. P. Done appeared for the appellants ; and Mr. A. W. Cockburn for the respondents.

Lord Justice Bankes, in giving judgment, said that the statement of claim, as originally framed, was open to objection, and that the Judge below was justified in the course which he took. Upon the statement of claim as now amended, however, it seemed to him that it raised a question of very general importance. As to the form of the statement of claim it seemed to him to be impossible to say that it should be struck out as being frivolous and vexatious in so far as it referred to the persons named as trustees of an unregistered association.

His Lordship then proceeded to contrast the two statements of claim, and said that, in view of the decision of the Court of Appeal in *Walker v. Sur* (30 *The Times* L.R., 171 ; [1914] 2 K.B., 930), the present claim in its revised form had been correctly drawn for the purposes of a claim against representative members of an unincorporated society. The references which had been made to trade union cases were no real help to a correct appreciation of the particular form in which this claim had been put forward. In the case of trade unions the rights and obligations were all statutory, and the question in those cases had always been whether the action was maintainable having regard to the provisions of the particular statute. The present case was quite free from any such statutory provisions, and the only question was whether the plaintiffs had a right to this particular form of claim against trustees, and whether any inconvenience was caused by their having it.

On behalf of the respondents, that right had been contested. It was said by them that the proper course to adopt was to obtain a declaratory judgment and then to apply for the specific remedy. He (the Lord Justice) could see no reason why the plaintiffs were not entitled in a proper case to insert this particular form of claim in a representative form of action. He thought that authority for a claim of that kind was to be found in the speech of Lord Lindley in *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (17 *The Times* L.R., 698 ; [1901] A.C., at p. 443) when contrasting trade unions and unincorporated societies. What Lord Lindley said there was :—

"I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union."

That was a direct authority of a Judge of great experience in this class of case that these plaintiffs were entitled to do what they had done in this case. Confining himself to the facts of this particular case, he thought that it was impossible to say that the statement of claim, as now amended, should be struck out. It seemed to him to be a convenient way of enforcing an alleged liability against an unregistered association of individuals who had incurred liabilities in respect of which there was difficulty in recovering judgment. The appeal must therefore be allowed.

Lord Justice Scrutton, after stating the facts, said that he did not wish to lay down any general principle, but it appeared to him that it would in some cases be convenient to join persons, who were alleged to be trustees, as parties to the original action, so that they might be present at the trial, when the question would arise whether a declaration of liability should be made against them. In this particular case he could see no difficulty in the trustees remaining as defendants to the action.

[Solicitors—Mr. Hugh V. Harraway ; Messrs. Martyn and Martyn, for Messrs. Edward Horley and Son, Cardiff.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1926. Oct. 25.

IN RE DEBTORS (NO. 771 OF 1926).*

Bankruptcy—Bankruptcy notice—Act of bankruptcy—Validity of notice disputed—Fresh bankruptcy notice issued—Whether debtor bound to comply with fresh notice—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), ss. 1 (*g*), 2, 37.

Creditors having obtained judgment issued a bankruptcy notice for £945 and served it on the debtors. The debtors paid a sum of £100, including £5 for costs, nine days later, but in the belief that the notice would be disputed the creditors issued and served a fresh bankruptcy notice about two months later for £857, and, that notice not having been complied with within seven days, a petition based on the fresh bankruptcy notice was presented and served. The debtors gave notice of an application to set aside service of the petition, but the Registrar refused to do so, and made a receiving order on the fresh bankruptcy notice. On appeal,

Held, that the debtors could not refuse to comply with the fresh bankruptcy notice on the ground that as the previous notice had resulted in an act of bankruptcy this had put it out of the power of the debtors to make any payment in compliance with the fresh notice or otherwise deal with their property. If, however, they did make a payment in compliance with the fresh notice it might be that if a trustee were appointed under the previous bankruptcy notice the payment might be set aside, and the money made available for the general body of creditors.

Ponsford, Baker and Co. v. Union of London and Smiths Bank (22 *The Times* L.R., 812 ; [1906] 2 Ch., 444) explained and distinguished.

These were two appeals from decisions of Mr. Registrar Warrington, in Bankruptcy. Three bankruptcy notices were issued upon a judgment debt (afterwards reduced) of £1,452. The first was withdrawn and the second was disputed, so a third was issued. The debtors then contended, *inter alia,* that they were not bound to comply and could not comply with the third notice as an act of bankruptcy had supervened upon the second notice and they were thereby debarred from making any payment to the creditors or dealing with any assets in their business. The facts are more fully stated in the judgment of the Master of the Rolls. The Registrar refused to set aside the service of the petition and made a receiving order, and the debtors appealed.

Mr. Edward Clayton, K.C., and Mr. Oscar Kean appeared for the appellants ; Mr. R. Fortune for the respondents.

By the Bankruptcy Act, 1914, section 1 (1), "A debtor commits an act of bankruptcy . . . (*g*) if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England . . . either comply with the requirements of the notice or satisfy the Court that he has a counterclaim set-off or cross demand, which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained. . . ."

By section 2 : "A bankruptcy notice under this Act shall be in the prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the Court, and shall state the consequences of non-compliance with the notice, and shall be served in the prescribed manner. . . ."

The Court dismissed the appeals.

The Master of the Rolls, in giving judgment, said that these were two appeals from the Registrar, one against his refusal to set aside service of a petition, and another from a receiving order in bankruptcy made by him. It appeared that the debtors were partners in a business known as the King's Galleries, Chelsea, until January 27, 1926. They had been entrusted with certain pictures to be sold by the petitioning creditors, Captain and Mrs. Hibbard. The pictures were not sold or returned, and an action in detinue was brought against the debtors claiming the pictures or their value, which was put at £1,452. Judgment was given for the return of all the pictures, and fourteen pictures were in fact returned, but five pictures valued at £945 were not returned. It was plain that at all material times part of the judgment remained unsatisfied.

It was said that on January 27, 1926, the partnership was dissolved and ceased to exist and that the debtors' business and premises were assigned to a company. But on the facts as found by the learned Registrar it was impossible to accept the evidence that the firm had ceased to exist and that the company had taken its place. The firm was still carrying on, but its business was in course of being wound up.

On February 17, 1926, the first bankruptcy notice was served. On February 27 notice was given to dispute this notice and it was withdrawn on March 2. On the latter date a second bankruptcy notice was issued and served by a solicitors' clerk on one of the debtors at the business premises of the firm. It was not complied with, so the act of bankruptcy was complete on March 10. On March 11 the debtors paid a sum of £100, being £95 on account of the debt and £5 on account of costs. On May 14 a third bankruptcy notice, No. 1329, was issued for the £857 3s. 4d. and costs then remaining due on the judgment. On May 31 it was served on the lady debtor at 55, King's-road. It was not complied with, and the act of bankruptcy was complete on June 8. For the purpose of there being an available act of bankruptcy section 4 (1) (*c*) of the Bankruptcy Act, 1914, must be complied with. The act of bankruptcy must have taken place within three months before the presentation of the petition. The period of three months ran out on June 10, and it became impossible to found the petition on the second bankruptcy notice. It was argued that there was no service of the third bankruptcy notice sufficient to comply with the terms of the Act and the rules. For the reasons he had given, he (his Lordship) thought that the service was a good service. The first appeal to set aside service of the petition must therefore fail.

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

On July 28 a receiving order was made on the petition, the Registrar having on July 27 refused to set aside service of the petition. On the second appeal, however, a different point was taken. He (his Lordship) had pointed out that an act of bankruptcy had been committed by failure to comply with the second bankruptcy notice. But it was argued for the debtors that when the third bankruptcy notice was issued during the currency of the second notice, there was an available act of bankruptcy dating from March 10, in which the debtors were put in an uncertain position as to whether they would be made bankrupt under it. It appeared to be by no means an uncommon practice to issue more than one bankruptcy notice, leading to more than one act of bankruptcy. But it was said, however, that there was a principle which gave a right to the debtors to refuse to comply with a second bankruptcy notice while a previous one was pending. In *Ponsford, Baker and Co. v. Union of London and Smiths Bank* (22 *The Times* L.R., 812 ; [1906] 2 Ch., 444) Lord Justice Fletcher Moulton, delivering the judgment of the Court, said :—

"For the purpose of deciding this point it is necessary to examine carefully the exact legal position of a man who has committed an act of bankruptcy under the statutes at present in force. Until commission of the act of bankruptcy he was, of course, the beneficial owner of whatever assets he possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy which leads to a receiving order being made. If such receiving order be made the whole of the assets vest in his trustee as from the date of the act of bankruptcy. He is, therefore, in the position that should such a contingency occur he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed either by a receiving order or by lapse of time, he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice."

It was argued that applying that doctrine, a debtor against whom there was an available act of bankruptcy could not and ought not to comply with a fresh bankruptcy notice, for if compliance were made there would be an offence committed by him in paying money, as he had no right to deal with any assets in his hands. To deduce such an argument was to place much too wide an interpretation on the judgment referred to. His Lordship then read section 2 of the Bankruptcy Act, 1914, and proceeded : Therefore the bankruptcy notice was a notice to the debtor that the money due must either be paid, secured, or compounded for to the satisfaction of the creditor or the Court. It might be that the debtor if he paid did not give an indefeasible title to the money paid, for his trustee might demand the money for the creditors as a whole. There was no statement by Lord Justice Fletcher Moulton to suggest that the debtor had no right to comply with a second bankruptcy notice, and a debtor could not use a previous act of bankruptcy to refuse to comply with it. His Lordship then referred to *In re G. E. B.* (*a Debtor*) ([1903] 2 K.B., 340). In that case a debtor claimed that he ought not to be compelled to comply with a bankruptcy notice, because if he did he would have a right of set-off against the very debt which was the foundation of the bankruptcy notice, but which he could not set up in the action against him. The Court felt the difficulty and the hardship that might be involved if the debtor were compelled to pay, but Lord Justice Vaughan Williams said that the debtor must have an effective and not a mere inchoate right of set-off. Regard must be had to the terms of the Act, and not to some other right which might supervene. When, therefore, the third bankruptcy notice was served there was no right on the part of the debtors to refer to the previous notice served upon them and to refuse to comply with the third one. The decision of the Registrar was right, and the appeal must be dismissed.

Lord Justice Sargant, after dealing with the facts and the first point, said that the second point argued raised a very much more important question, and a decision in the appellants' favour would have far-reaching effects. If the contention was correct it was one which must apply to any previous bankruptcy notice or act of bankruptcy. It would involve the startling result that the payment by the debtor of his creditor's debt after a bankruptcy notice would be illegal. Upon the proper interpretation of the judgment in *Ponsford, Baker and Co. v. Union of London and Smiths Bank* (22 *The Times* L.R., 812 ; [1906] 2 Ch., 444) the question there was not whether it was illegal for the debtors to pay the money to the bank, but whether if they did so the bank would obtain an indefeasible title to the money. Lord Justice Fletcher Moulton pointed out that the debtors had no absolute right to the money, but only a title liable to be defeated by subsequent adjudication in bankruptcy. Here, if the debtors had made a payment to the petitioning creditors under the third bankruptcy notice, all that would have happened would have been that the creditors might have had to repay the money to the trustee if and when appointed under the second bankruptcy notice. Objections had been taken to the second bankruptcy notice which had not been conclusively satisfied, and therefore a third notice was issued.

Lord Justice Lawrence agreed.

Leave to appeal to the House of Lords was asked for and was refused.

[Solicitors—Messrs. Pollock, Booth, and Addis ; Messrs. Langford and Redfern.]

House of Lords.
(Viscount Dunedin, Lord Shaw of Dunfermline, Lord Sumner, Lord Wrenbury, and Lord Blanesburgh.)

1926.
Oct. 28.

CLEMENT v. D. DAVIS AND SONS, LIMITED.*

Master and Servant—Compensation for injury by accident—Compensation paid during incapacity—Death resulting from injury—Sum payable to dependants—Right to deduct weekly payments—Workmen's Compensation Act, 1906 (6 and 7 Edw. VII., c. 58), Schedule I. (1) (*a*)—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), ss. 24 (2), 30.

Section 24 (2) of the Workmen's Compensation Act, 1923, which abolishes the right of the employer to deduct weekly payments made to an injured workman during his lifetime from compensation payable to his dependants upon his death so as to reduce the sum payable to the

* Reported by H. B. Hemming, Esq., Barrister-at-Law

children of the workman under s. 2 of the Act, or to reduce the amount payable under the principal Act below £200, does not apply to a case where the accident happened before January 1, 1924, when the Act of 1923 came into force.

This was an appeal from an order of the Court of Appeal affirming an award of the Deputy County Court Judge of Glamorgan under the Workmen's Compensation Acts.

An accident happened to a workman before January 1, 1924, entitling him to compensation under the Workmen's Compensation Act, 1906, and his employers paid compensation to him during incapacity. The workman died, as a result of the accident, after January 1, 1924. The question raised by the appeal was whether the employers were prevented by the operation of section 24, subsection 2, of the Workmen's Compensation Act, 1923, from deducting from the amount claimed by the dependants of the deceased workman the sum paid by the employers to the workman by way of weekly compensation. In other words, the question was whether this subsection applied to cases where the accident happened before the date of the commencement of the Act.

The Deputy County Court Judge held in favour of the respondents that the subsection did not apply. His award was affirmed by the Court of Appeal (the Master of the Rolls, Lord Justice Scrutton, and Lord Justice Sargant), without argument, on the ground that the case was governed by the previous decision of that Court in *Moakes v. Blackwell Colliery Company* (41 *The Times* L.R., 296 ; [1925] 2 K.B., 64).

The facts are fully stated in the opinion of Lord Dunedin.

Mr. Upjohn, K.C., and Mr. A. T. James appeared for the appellant ; Mr. E. W. Cave, K.C., and Mr. Victor Evans for the respondents.

Viscount Dunedin.—My Lords,—George Clement, the husband of the appellant, was employed by the respondents as a collier, and on November 28, 1918, personal injury was caused to the said George Clement by accident arising out of and in the course of his employment. The respondents admitted their liability under the Workmen's Compensation Act, 1906, to pay compensation to the said George Clement in respect of the said injury, and paid him compensation from the said November 28, 1918, to the date of his death, which occurred on January 24, 1925. These payments were, between the said November 28, 1918, and the said January 24, 1925, a total sum of £533 18s. 5d., being as to the sum of £363 7s. 6d., part thereof, weekly compensation at the rate of £1 per week from November 28, 1918, to January 1, 1924, and at the rate of £1 15s. 0d. per week from January 1, 1924, to January 24, 1925, and as to the sum of £170 10s. 11d., the additional compensation payable to the said George Clement under the provisions of the Workmen's Compensation (War Addition) Acts, 1917 and 1919.

The appellant, after the death of her husband, filed a request for arbitration, claiming for herself and dependants the sum of £200. The respondents did not admit that any sum was due, the sum already paid to George Clement in his lifetime having exceeded £300, and being deductible from the compensation otherwise payable on his death to his dependants under the provisions of paragraph 1 (*a*) (i.) of the First Schedule to the Act of 1906. That paragraph is as follows :—

"The amount of compensation under this Act shall be—(*a*) Where death results from the injury—

"(i.) If the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer. . . ."

The appellant founded her claim on section 24 (2) of the Act of 1923. Section 24 (2) is as follows :—

"No deduction shall be made under paragraph (1) (*a*) (i.) of the First Schedule to the principal Act, as amended by section 2 of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section 2, nor so as to reduce the amount payable under the principal Act below two hundred pounds."

By subsection (3), "Paragraph (1) (*a*) (iii.) of the First Schedule to the principal Act shall have effect as if 'fifteen pounds' were substituted for 'ten pounds.'"

This last subsection referred to burial allowances.

The sole question in this case is therefore whether subsection (2) applies to the case of liability arising out of an accident which occurred before the coming into operation of the Act of 1923, to wit, January 1, 1924. The learned arbitrator and the Court of Appeal, both finding themselves bound by the judgment of the Court of Appeal in the case of *Moakes v. Blackwell Colliery Company* (41 *The Times* L.R., 296 ; [1925] 2 K.B., 64), decided by the same Court of Appeal, decided against the appellant. The present case is therefore an appeal against the decision in *Moakes's* case (*supra*), in which case the opinions of the learned Judges of the Court of Appeal will be found.

The other sections of the Act which must be quoted are sections 2 and 30.

Section 2 of the Act of 1923 provides under (*a*) and (*b*) certain additional benefits to the scale of compensation under the principal Act, and in a proviso says that the total amount of compensation payable to the dependants shall in no case exceed £600.

Section 30 provides that the provisions of sections 2 to 10 of the Act shall not apply to any case where the accident happened before the commencement of the Act.

The terms of the Interpretation Act, 1889, have been prayed in aid by some of the learned Judges. Strictly speaking, it does not apply, as it only deals with repealing Acts, not with amending Acts, but in truth that matters not, for the Interpretation Act, 1889, is only putting into statutory form a canon of construction which would be applied independently of it. When you are construing an Act which makes changes in the law, which changes can be well referred to what the law is to be after the passing of the Act, you will not construe the words, unless they are clearly to that effect, so as to upset vested rights and liabilities which are complete in themselves.

Applying that canon to the construction of the provisions now in question, one finds that in the case of accidents arising out of and in the course of employment in the past, certain rights and certain liabilities accrue at once to the workman and his dependants on the one hand, and the employer on the other. The exact pecuniary amount had to depend on the particular circumstances of the quality of the injury, the supervention of death, and the state of the workman's family, but the method of calculation was fixed once and for all, and therefore it would not be probable that an Act which was greatly extending benefit and liability would apply to the accidents of the past, and section 30 makes this quite clear to a great extent by expressly declaring that the additional benefits conferred by sections 2 to 10 are not to enure to any class out of accidents in the past. This, however, is only a general proposition. If the words are clear they must be given effect to, although they may lead to a result the opposite of that antecedently expected.

Now, the argument of the appellant has two main points : she says, first, that section 30 excludes as regards past accidents sections 2 to 10, but it does not mention section 24 (2), and she says, secondly, that section 24 (3) clearly applies to present accidents, and that therefore *prima facie* the whole section so applies. Now, an argument based on the brocard *Exclusio unius est inclusio alterius,* when applied to sections of an Act of Parliament, is only powerful when the section which is sought to be included is so framed that it needed an exclusion ; if in its terms it is so conceived as not to be included, then the argument has no weight, and here it is that the second argument hurts the first. Section 24 (3) is expressed absolutely without any reference to the excepted sections, and there is no reason why it should not apply in terms to all accidents. Therefore, says the appellant, the whole subsections should so apply. But section 24 (2) has a marked difference of expression, and by reference includes some of the sections excepted in the case of old accidents.

My Lords, I am of opinion that the result come to by the Court of Appeal is right. The direction as to a deduction not being allowed to reduce the amount payable to less than £200 is only as to a deduction which is to be made from the sum calculated on paragraph 1 (*a*) (i.) of the First Schedule as amended by section 2, and the schedule as amended by section 2 is a schedule which can only apply to new accidents, because the amendments effected by section 2 are specifically excluded from applying to old accidents.

I am therefore of opinion that the proper interpretation of the section is in accordance with, and not against, the antecedent probability of what would have been expected. I move, therefore, that the appeal be dismissed with costs.

Lord Shaw of Dunfermline concurred.

Lord Sumner (read by Lord Shaw of Dunfermline). —My Lords,—The event out of which liability under the Workmen's Compensation Acts arises, is the injurious accident in the course of the workman's employment. In the present case this happened in 1918. The appellant's husband, the injured workman, died after the amending Act of 1923 came into operation. Under this Act, by section 24 (2), "no deduction shall be made under paragraph (1) (*a*) (i.) of the First Schedule to the principal Act, as amended by section 2 of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the amount payable in respect of the children of the workman under the said section 2, nor so as to reduce the amount payable under the principal Act below two hundred pounds." The appellant claims the benefit of this section. She has therefore to show, that the Act of 1923 is retrospective so as to apply these new provisions to a case in which the initial injury was sustained before the Act came into force, and that it alters the provisions of the Act of 1906, under which the sum payable on death might be exhausted by previous weekly payments, which were to be set off against it.

By the general rules for the construction of statutes the Act of 1923 is presumed not to be retrospective. If it were so, the effect would be to make a serious change for the worse in the position of the employer by mere implication. Before that Act an employer who had on his books a continuing present liability to make weekly compensation payments to an injured man, would also be entitled to write down, week by week, *pro tanto* his contingent liability, which would accrue in the event of that workman's death. In the present case the employers had thus written it off altogether. Week by week their payments had vested in them a corresponding right—a diminution of their contingent liability until it reached zero. Unless the Act of 1923 somewhere clearly states that the earlier legislation, under which that result had been automatically brought about before the Act of 1923 came into force, is retrospectively altered by its provisions, I am of opinion that the statutory presumption against a retrospective operation must prevail.

My Lords, after careful consideration, I have not been able to construe the Act of 1923 in the way which the appellant's case requires. Neither the fact that some sections are expressly stated not to be retrospective, among which the section in question is not mentioned, nor the fact that the allowance for funeral expenses, payable on the death of the injured workman, has been increased, in terms which I will assume, without deciding it, to apply to the death of a workman after the commencement of the Act from injuries received before it, appears to me to produce the result for which she must contend. The first provision does not necessarily involve that the Act is generally retrospective, except as to the named exceptions. The second is obviously intended to meet the well-known increase which has taken place in the cost of the necessaries of life and of death also. I think the case of *Moakes* (41 *The Times* L.R., 296 ; [1925] 2 K.B., 64) was rightly decided, and in this opinion I am confirmed by the fact that in the case of *Talbot v. Vickers, Limited* ([1925] 2 K.B., 669), two Lords Justices, who were not parties to the earlier decision, specially expressed their agreement with its reasoning instead of merely bowing to its authority.

Accordingly, my Lords, I think that this appeal fails.

Lord Wrenbury.—My Lords,—The accident having taken place on November 28, 1918, and death having ensued on January 24, 1925, the question is whether upon the true construction of section 24 (2) of the Workmen's Compensation Act, 1923, deduction is or is not to be made so as to reduce the amount payable to the dependants. Under the Workmen's Compensation Act, 1906, First Schedule, paragraph (1) (*a*) (i.), deduction would be made. If section 24 (2) of the Act of 1923 applies it will not. The accident being before and the death after the date at which the Act of 1923 came into operation (viz., January 1, 1924), the question is whether deduction is to be made or not. The appellant says that

section 24 (2) of the Act of 1923 applies and that deduction is excluded.

On looking through the Act of 1923 I find that a principal purpose of the Act is to enlarge the benefits which the workman and his dependants are to have. Sections 2 to 6, both inclusive, are all to this effect. They form a group under the heading "Amendment of benefits under principal Act." Sections 7 to 10, both inclusive, deal with some further advantages to be given to the workman. But section 30 of the Act provides that sections 2 to 10 shall not apply when the accident happened before the commencement of the Act. The additional benefits created by the Act by the sections above mentioned are therefore not to be enjoyed when the accident was before the Act. It is with this in view that I come to look at section 24 (2). Am I to read that section as applicable to every case, including that in which the amendment made by section 2 of the Act of 1923 does not apply—or in other words, including that in which the benefits to be enjoyed by the workman are not enlarged—or am I to read it as confined to the case in which section 2 of the Act does apply and the Act is enlarging the benefits which the workman is to enjoy? My Lords, I think I must do the latter, and must read section 24 (2) as if after the words "as amended by section 2 of this Act" there were inserted the words "in any case to which the amendment made by section 2 of this Act applies."

The intention of the Act, in my judgment, is that where the accident happened before the Act neither the increased benefits given affirmatively by sections 2 to 6 nor those resulting from the absence of deduction under section 24 (2) shall be enjoyed by reason of the accident.

For these reasons I am of opinion that this appeal fails.

Lord Blanesburgh.—My Lords,—It is clear on a careful consideration of the terms of paragraph 1 (*a*) (i.) of the First Schedule to the Workmen's Compensation Act, 1906, that while there is no fatal accident to a workman in respect of which the sum payable under that Act on account of dependants can exceed £300, the sum of £150 mentioned in the paragraph represents in the case of very many such accidents the maximum amount so payable. And in arriving at these maxima any payments under the Act made to the injured workman himself before his death in respect of the same accident, whether in the form of weekly payments or a lump sum, are to be brought into account by way of deduction. If these simple facts are borne in mind, they will, I believe, be found to supply the clue to the solution of the problem in this case presented to the House.

My Lords, the Act of 1923 modified or amended that paragraph 1 (*a*) (i.) of the principal Act in several respects, two of which are here relevant.

First of all, the Act of 1923 provided—and the form of words may be found to be material—that the paragraph in question "shall have effect as if for the words 'one hundred and fifty pounds' there were substituted the words 'two hundred pounds'"—section 3. That is to say, the sum of £200 was to take the place of the £150 already referred to. Secondly, the total amount of compensation payable to the dependants might now reach, but was in no case to exceed, £600—section 2.

But these variations or amendments of the principal Act, contained as they were in sections 3 and 2 of the Act of 1923, are not, as a result of section 30, to apply to any case where the accident happened before the commencement of that Act, that is to say, before January 1, 1924. Accordingly, it being conceded by the appellant that no claim to any further compensation is now competent to her under paragraph 1 of the First Schedule to the principal Act—and it is not suggested that any claim is competent to her under any other provision of that statute—it follows that her present claim can only be made good if it is brought within some provision of the Act of 1923 which does not in turn presuppose alterations or amendments of that paragraph, operative only with reference to an accident happening after the commencement of the later Act.

The only provision of the Act relied upon for this purpose is section 24 (2). The true effect of that subsection in the light of the facts already stated becomes accordingly in the result the only question at issue upon the appeal. For convenience of reference, I venture again to transcribe the subsection at length:—

"No deduction shall be made under paragraph 1 (*a*) (i.) of the First Schedule to the principal Act, as amended by section 2 of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section 2, nor so as to reduce the amount payable under the principal Act below £200."

My Lords, in terms, that subsection in the first branch of it applies only to the provisions of paragraph 1 (*a*) (i.) of the First Schedule to the principal Act "as amended by section 2 of this Act." That branch, at any rate, has no application to any accident which happened before January 1, 1924. The only question therefore which remains is whether the £200 referred to in the second branch of the subsection is in like case, as being in truth none other than the £200 referred to in the third section of the Act, or whether it is a new sum now referred to for the first time and only accidentally coincident with the £200 which by section 3 is in paragraph 1 (*a*) (i.), and in relation only to accidents on or after January 1, 1924, to be substituted for the original £150.

My Lords, to the question so presented it appears to me there can be only one answer. The subsection in this second branch of it is dealing with a "principal Act" which imposes, as a relevant liability in every case exigible, a sum of at least £200. The deduction in respect of weekly payments is not to "reduce" the amount payable under the principal Act below £200. Such a provision is inapplicable to an Act under which no more than, say, £150 may, in this behalf, be payable.

That this was the position under the principal Act, unamended by the Act of 1923, I have already shown. A "principal Act" with a liability in the same behalf extended to £200 is only brought into existence by section 3 of the Act of 1923, and then exclusively in relation to accidents of which the fatal accident to the workman here was not one.

Accordingly, my Lords, it appears to me to be clear that the sum of £200 mentioned in this subsection can be none other than the £200 referred to in section 3 of the Act, and that the second branch of the subsection does not any more than the first apply to accidents which happened before the commencement of the Act. If a further reason in support of this conclusion be needed it will be found in this consideration, that the alternative construction would, in effect, write out of the Act as otiose the express provision of section 30, by virtue of which

section 3 has no application to any such accidents. Possibly the particular phraseology of section 3 may explain why it is that what is in effect an amendment thereby made in paragraph 1 (*a*) (i.) of the principal Act is not in section 24 (2) so referred to.

It was, my Lords, conceded by Mr. Upjohn that if, on construction, the figure of £200 mentioned in this subsection could be held to have direct reference to the "two hundred pounds" in section 3, the case of the appellant was at an end. His contention, of course, was that the two sums were only accidentally identical and had no connexion the one with the other.

That contention is, in my judgment, and for the reasons I have given, erroneous, and on this short ground I am of opinion that the decision of the Court of Appeal in *Moakes v. Blackwell Colliery Company* (41 *The Times* L.R., 296 ; [1925] 2 K.B., 64) was right.

There are other and more general grounds upon which, as it seems to me, the same conclusion may be reached. But I prefer to rest my judgment on what appears to be a neat point of construction.

This appeal should, I think, be dismissed.

[Solicitors—Messrs. Smith, Rundell, Dods, and Bockett, for Messrs. Morgan, Bruce, and Nicholas, Pontypridd ; Messrs. Bell, Brodrick, and Gray, for Messrs. Kensholes and Prosser, Aberdare.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926. Oct. 29.

SWAYNE v. HOWELLS AND ANOTHER.*

Rating—Fishery—Licensee of fishing rights—No deed of grant—Non-liability of licensee to to be rated—Rating Act, 1874 (37 and 38 Vict., c. 54), ss. 3, 6.

A person who has an exclusive licence to fish a river, but who holds no deed of grant of the fishing rights, is not liable to pay rates thereon.

A question of interest to anglers was raised in this case stated by Herefordshire justices. A complaint was preferred by the respondents, Aaron Howells and Thomas Williams, the overseers of the parish or township of Longtown, Herefordshire, under the Rating Act, 1874, against George Champeny Swayne, the appellant, for failure to pay rates amounting to £41 16s. 10d. in respect of 1924 and 1925. The justices ordered a distress warrant to issue, but stated a case.

The rates in question were levied in respect of certain alleged fishing rights enjoyed by the appellant in the rivers Monnow and Eskley. Subject to the objections that there was no right to rate the appellant and that his name was wrongly placed on the rate book, it was admitted that the rates in question had been duly made, published, and demanded, and were unpaid, and that if any sum were due the sum of £41 16s. 10d. was correct.

The appellant had for a considerable number of years obtained an exclusive right to fish over reaches of the said rivers by payment of an annual sum to each of eight different owners or occupiers in respect of separate holdings which together made up the whole.

Before November 19, 1924, neither the respondents nor their predecessors had rated the appellant in respect of the fishing. In one year the appellant paid over £106 in all for the exclusive right of fishing, and he exercised that right in each case during the times covered by the rates in question. In July, 1925, the appellant gave up the fishing of two of such owners or occupiers, and their fishing was thereafter let to someone else.

The appellant was assessed in one assessment in respect of the fishing obtained by him. He appealed to the assessment committee on the grounds that he was not the person liable to pay and that the fishing was extravagantly rated. The assessment committee confirmed the assessment.

There was no deed of grant to the appellant of the fishing rights.

Mr. Croom-Johnson appeared for the appellant ; Mr. Blanco White for the respondents.

Mr. Croom-Johnson contended that the right of fishing being an incorporeal hereditament lying in grant must be transferred by deed, and that in the absence of such a deed the appellant had a mere licence to fish, which did not make him rateable. In the absence of a legal severance by deed of the fishing rights there was no rateable hereditament on which a rate could be levied. Before the Rating Act, 1874, sporting rights were not assessable at all ; that Act was designed to get over the difficulty by making incorporeal hereditaments rateable, but there must still be a legal severance, which was a term of art, and not a mere licence. He referred to *Duke of Somerset v. Fogwell* (5 B. and C., 875) ; *Bird v. Higginson* (2 Ad. and E., 696) ; *Kenrick v. Overseers of Guilsfield* (5 C.P.D., 41).

Mr. Blanco White drew attention to the practical importance of the question. If fishing rights were rated with agricultural land they paid only a quarter of the ordinary rates ; if rated separately they were liable to full rates. Therefore overseers preferred if possible to rate them separately. He cited *Alton U.D.C. v. Spicer* (20 *The Times* L.R., 296 ; [1904] 1 K.B., 678). It was held in *Holford v. Pritchard* (3 Ex., 793) that there could be "use or occupation" of fishing rights.

Mr. Justice Salter.—You have no right to rate the appellant except under the statute. The four questions are : (1) Is there a right of sporting ? (2) If so, is it separated from the land ? (3) If so, is it let ? (4) Is it occupied ?

Mr. Blanco White contended that there was a demise in equity though not at common law, and that it would have been specifically enforceable.

Mr. Justice Salter.—The appellant could not maintain an action for trespass in his own name.

Mr. Blanco White.—In fact and in equity he is the occupier of the right which was made rateable by the Act of 1874. Mr. Croom-Johnson had said that "severance" was a term of art ; it was an ordinary English word of which everyone knew the meaning, and which was treated in some cases as interchangeable with "separated," which was the word used in *Reg. v. Inhabitants of Thurlstone* (1 E. and E., 502). If the appellant's contention was correct the question whether the sporting rights were to be rated at their full value or at one-quarter of it depended on whether the owner affixed a seal or merely signed his name to a letter.

Mr. Croom-Johnson, in reply, said that equity so far resembled nature that it did nothing in vain. and never granted specific performance of an agreement to take land for a year which might expire

* Reported by J. W. Hall and G. F. L. Bridgman, Esqrs., Barristers-at-Law.

before the decree became enforceable. An incorporeal hereditament lay only in grant, not in livery, and could never be conferred except by deed.

The LORD CHIEF JUSTICE read the following considered judgment of the Court :—The question which this case involves arises out of the complaint preferred by the respondents, Aaron Howells and Thomas Williams, the overseers of the parish or township of Longtown, Herefordshire, against the appellant, Mr. George Champeny Swayne, for that he being a person duly rated and assessed to the relief of the poor in certain sums had not paid the several instalments and had refused to do so. The justices having heard the information made an order that a distress warrant issue against the appellant. The question raised by this case is whether in so deciding the justices were right in law.

The rates which were in question were levied in respect of certain alleged fishing rights enjoyed by the appellant. It was admitted that subject to certain objections the rates had been duly made. The case adds that the appellant had by payment of an annual sum obtained an exclusive right to fish, and had fished, over the rivers referred to for a considerable number of years, and that his right to do so was obtained each year from eight different owners or occupiers, each in respect of a separate holding making up the whole.

Before November 19, 1924, neither the respondents nor their predecessors had ever rated the appellant in respect of that fishing. The appellant paid an annual sum to each of the owners or occupiers for the fishing, and in one year the total came to over £106. For that payment the appellant obtained the exclusive right of fishing over the rivers in question. The appellant was assessed in one assessment in respect of the fishing so obtained by him. The appellant appealed to the assessment committee on the grounds that he was not the person liable to pay and that the fishing was extravagantly rated. The assessment committee, howver, confirmed the assessment. Finally it is found that there was no deed of grant to the appellant of the fishing rights.

On those facts the appellant contended that he had merely a licence to fish, and that, as the licensee, he was not rateable in respect of the fishing rights. Moreover, he contended that the right of fishing, being an incorporeal hereditament lying in grant, must be transferred by deed, and that in the absence of such a deed, no such right was at any material time vested in him ; and that there had been no severance of the fishing rights, and, therefore, there was no rateable hereditament on which a rate could be levied. The respondents contended that no legal severance was required under the Rating Act, 1874 ; that sporting rights were rateable when severed from the occupation of the land ; and that the term "severed from the occupation of the land" did not contemplate a legal severance. The justices found as a fact that the appellant enjoyed the beneficial occupation of the fishing, and that he was liable to be rated.

By section 3 of the Rating Act, 1874, rights of sporting, which include rights of fishing when severed from the occupation of the land, were brought within the category of rateable hereditaments, and, if the Act had contained no further provision with respect to them, the liability to be rated would have fallen on the person in beneficial occupation or enjoyment of the right. But in our view, section 6 of the Act must be read as prescribing the person upon whom this liability is to fall, and unless the appellant is shown to be a person liable under that section, he is, we think, entitled to succeed on this appeal.

Subsection 1 of that section applies to a case where the owner of the land has let the land, reserving to himself the rights of sporting—*Rogers v. St. Germans Union* (40 J.P., 807). In that case the right of sporting is not to be separately rated. Subsection 2 appears to apply only to a case where the sporting right is let on lease, and it, therefore, has no application to the present case.

The question remains whether the appellant can be said to be "the owner of the right of sporting" within the meaning of subsection 3 of section 6, construed in the light of subsection 4. It is difficult to suppose that the word "let" in subsection 4 was intended to be construed in a different or wider sense than in subsection 2, but in either view, looking at the latter part of subsection 4, we do not think that a person who has only a licence to fish is contemplated as owner of the rights of sporting within the meaning of section 6. The Legislature must, we think, be taken to have known when this Act was passed that these sporting rights are frequently let for the season only, and, therefore, made special provisions that, in the absence of a lease, the landlord should be deemed to be the occupier.

It was further contended on behalf of the appellant that, there being in this case no grant by deed of the fishing rights, there was in law no severance from the occupation of the land. The cases of *Rogers v. St. Germans Union* (*supra*) and *Brigstocke v. Rayner* (40 J.P., 245) appear to support this view, but, in any case, for the reasons given, we are of opinion that the appellant was not rateable and that the appeal should be allowed. That is the unanimous judgment of the Court.

The appeal was accordingly allowed, with costs.

[Solicitors—Messrs. Darley, Cumberland, and Co., for Mr. A. Jefferay Mawer, Wells ; Messrs. E. F. and H. Landon, for Mr. John Moore, Hereford.]

K.B. Div. (Roche, J.) } 1926. Nov. 2.

GALE v. MOTOR UNION INSURANCE COMPANY, LIMITED.

LOYST v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.*

Insurance (Motor Car)—Policies excluding risk covered by another policy—Provision for rateable contribution—Construction.

G. took out with the M. company a motor-car insurance policy covering himself and any friend driving with G.'s consent, and providing as follows :—"Condition 6.—The extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed and competent driver and not being insured under any other policy.

"Condition 10.—If at the happening of any accident, injury, damage, or loss covered by this policy . . . there shall be subsisting any other insurance or indemnity of any nature whatever covering the same, whether effected by the insured or by any other person . . . then the company shall not be liable to pay or contribute

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

towards any such damage or loss more than a rateable proportion of any sum payable in respect thereof for compensation."

L., who was G.'s brother-in-law, took out with the G. company a similar policy providing that "The insured will also be indemnified hereunder while personally driving a car not belonging to him provided . . . that there is no other insurance in respect of such other car whereby the insured may be indemnified," and that "If at the time of the occurrence of any accident loss or damage there shall be any other indemnity or insurance subsisting whether effected by the insured or by any other person the corporation shall not be liable to pay or contribute more than a rateable proportion of any sums payable in respect of such accident loss or damage."

While L. was driving G.'s car with G.'s consent it had a collision and L. had to pay damages. G., as trustee for L., claimed against the M. company, and L. on his own behalf claimed against the G. company.

Held, that in each policy the provision as to rateable contribution qualified the preceding clause and each company was liable to pay the claimants half the amount claimed.

This special case, stated by an arbitrator under section 7 of the Arbitration Act, 1889, raised a question of the liability of insurance companies under motor-car policies.

Mr. Blanco White and Mr. Handcock appeared for the claimants; Mr. Montgomery, K.C., and Mr. Wallington for the Motor Union Insurance Company; and Mr. Le Quesne, K.C., and Mr. Hilbery for the General Accident, &c., Assurance Corporation.

The claimant Gale, as trustee for the claimant Loyst, sought against the Motor Union Insurance Company, under a policy dated September 30, 1924, issued by that company to Gale, an indemnity in respect of monetary compensation which Loyst had been compelled to pay in the circumstances hereafter stated.

Loyst claimed on his own behalf against the General Accident, &c., Assurance Corporation, under a policy dated November 3, 1924, issued by them to him, an indemnity in respect of the said monetary compensation.

The claims were referred to the arbitration of Mr. Craig Henderson, K.C., and he stated his award in the form of the following special case.

1. By a policy of insurance dated September 30, 1924, the Motor Union Insurance Company insured the claimant Gale from August 14, 1924, to August 13, 1925, in respect of his A.B.C. two-seater motor-car.

The said Motor Union policy contained, *inter alia,* the following provisions:—

"Section A. The company shall indemnify the insured or (subject to provisions of condition 6) any relation or friend driving with the insured's consent against the payment of all sums which they shall become legally liable to pay for compensation in respect of accidents caused by any motor vehicle belonging to the insured and described in the above schedule:—(*a*) To any third person . . . (*b*) to any property or animal belonging to a third person. . . .

"Provided always that the due observance and fulfilment of the conditions and qualifications indorsed on this policy shall be a condition precedent to any liability of the company under this policy.

". . . Condition 6.—The extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed and competent driver and not being insured under any other policy.

"Condition 10.—If at the happening of any accident, injury, damage, or loss covered by this policy . . . there shall be subsisting any other insurance or indemnity of any nature whatever covering the same, whether effected by the insured or by any other person . . . then the company shall not be liable to pay or contribute towards any such damage or loss more than a rateable proportion of any sum payable in respect thereof for compensation."

2. By a policy dated November 3, 1924, issued by the General Accident, &c., Assurance Corporation to Loyst, he was insured from October 31, 1924, to October 31, 1925, in respect of his Morris Cowley two-seater motor-car.

The policy contained, *inter alia,* clauses as follows:—

". . . the corporation will, subject to the terms conditions and limitations contained herein and of any indorsement hereon, indemnify the insured . . . in respect of any car described in the schedule against. . . .

"Sec. 2: (1) all sums which the insured shall become legally liable to pay in respect of any claim by any person . . . for . . . accidental bodily injury or damage to property . . . caused by through or in connexion with such car. . . .

"(2) The insured will also be indemnified hereunder while personally driving a car not belonging to him provided . . . that there is no other insurance in respect of such other car whereby the insured may be indemnified."

The conditions indorsed on this policy included the following:—

"(5) If at the time of the occurrence of any accident loss or damage there shall be any other indemnity or insurance subsisting whether effected by the insured or by any other person the corporation shall not be liable to pay or contribute more than a rateable proportion of any sums payable in respect of such accident loss or damage."

At the foot of the conditions was an indorsement:—

"The due observance and fulfilment of the provisions and conditions of this policy . . . shall be a condition precedent to any liability of the corporation to make any payment under this policy."

3. The claimant Gale was a brother-in-law of the claimant Loyst.

4. On April 4, 1925, Loyst was driving the A.B.C. motor-car belonging to Gale, with Gale's consent, and came into collision with a motor cyclist. The cyclist brought an action for damages in Brentford County Court, and, by a judgment given on October 9, 1925, in that Court, he recovered £93 17s. 4d. damages, and costs, which were subsequently ascertained at £60 2s. 11d. Loyst paid these sums to the cyclist and also incurred costs, which he had not yet paid, in defending the action.

5. Loyst claimed under both the insurance policies. The Motor Union Insurance Company repudiated all liability and suggested that the General Accident, &c., Assurance Corporation were liable: that corporation also repudiated liability and suggested that the Motor Union Insurance Company were liable. In the result, Loyst had to defend the county court action at his

own expense. Subsequently, formal claims for arbitration were made by Loyst against the General Accident, &c., Assurance Corporation, and by Gale, as trustee for Loyst, against the Motor Union Insurance Company. By the consent of all parties the claims were referred to Mr. Craig Henderson, K.C.

6. On behalf of the claimants it was contended at the arbitration :—

(1) That Loyst must be covered by one policy or the other, and that each insurer must indemnify him so far as he was not indemnified by the other. (2) That, on a true interpretation of the two policies, having regard to condition 10 of the Motor Union Insurance Company's policy, and condition 5 of the General Accident, &c., Assurance Corporation's policy, the two insurers were liable to pay a full indemnity, each contributing rateably to the insured values of the A.B.C. motor-car, insured by the Motor Union Insurance Company for £120, and the Morris Cowley, insured for £155 by the General Accident, &c., Assurance Corporation.

On behalf of the Motor Union Insurance Company it was contended :—(1) That, *prima facie,* each insurer intended to indemnify the person to whom the policy was issued, and that any provision extending the right of indemnity to any other person must be interpreted strictly ; (2) that Loyst was "insured under another policy," viz., the General Accident, &c., Assurance Corporation's policy, and therefore was not covered by the Motor Union Insurance Company's policy ; and that (3) condition 10 of the company's policy did not apply, and there could be no liability of both companies.

On behalf of the General Accident, &c., Assurance Corporation it was contended :—(1) That the liability of one insurer excluded the liability of the other, and the conditions of the policies as to contribution by the insurers in rateable proportions did not apply ; (2) that motor insurance was primarily an insurance of goods, and the General Accident, &c., Assurance Corporation's policy primarily insured the Morris motor-car and third party risks incidental thereto ; the further cover given by section 2 (2) of the policy provided for another car, but only if there was no other insurance of that other car, and, as the A.B.C. motor-car was insured, the General Accident, &c., Assurance Corporation could not be liable ; and (3) that the words at the end of section 2 (2) of their policy, "whereby the insured may be indemnified," were words descriptive of the type of policy which must be in existence if their policy was not to be operative ; that those words must be construed strictly, and that the words were satisfied in this case because the risk was covered by the general words of section A of the Motor Union Insurance Company's policy, and condition 6 was fulfilled by Loyst and, even if not fulfilled, could be waived and might never be operative.

The arbitrator held :—(*a*) That the liability of one insurer excluded liability of the other, and that the conditions in both policies as to payment of the loss by the two insurers in rateable proportions did not apply ; (*b*) that, on a true construction of the material provisions of each policy, Loyst satisfied the requirements of condition 6 of the Motor Union Insurance Company's policy, and was entitled to be indemnified by that company, but not by the General Accident, &c., Assurance Corporation. He therefore awarded, subject to the opinion of the Court, that the claim of Loyst against the General Accident, &c., Assurance Corporation failed, but that Gale, as trustee for Loyst, was entitled to be indemnified by the Motor Union Insurance Company in respect of all sums which, in consequence of the collision on April 4, 1925, Loyst became legally liable to pay, and also in respect of costs incurred by Loyst in defending the action.

The question for the opinion of the Court was whether the award was correct in law.

Mr. Montgomery, in opening the case, said that it was really a fight between the two insurance companies ; for the claimants, he thought, might certainly recover from one or other, or from both rateably. The case would come under section A of the Motor Union Insurance Company's policy but for condition 6, which provided that the extension of the indemnity to the insured's relative depended on that relative's not being otherwise insured. Loyst was insured in respect of a car of his own by the General Accident, &c., Assurance Corporation's policy, and the material provision there was section 2 (2) (*supra*). In both policies there was a provision for payment of only a rateable proportion. Before the arbitrator the claimants alone relied on that provision, and neither company put it forward.

He would prefer, while not abandoning his contention that the Motor Union Insurance Company was not liable, to rely on the rateable proportion clause. Under that company's policy, construed strictly, the effect of condition 6 was that Loyst could not recover at all, because he was insured elsewhere. The provisions of the General Accident, &c., Assurance Corporation's policy were not so stringent. Section 2 (2), read with condition 5, showed that the intention was not that the claimants should not recover anything, but only that they should not recover more than a proportion of the loss.

The claimants wished to construe the rateability as proportional to the values of the two insured cars, but the insurance companies preferred to reckon by the extent of the risk covered ; if each company had insured the whole risk the contribution of each should be the same. Before the arbitrator the General Accident, &c., Assurance Corporation relied on *Williams v. Baltic Insurance Association of London, Limited* (40 *The Times* L.R., 668 ; [1924] 2 K.B., 282), but that case turned on the question whether there was an insurable interest and did not apply here.

Mr. Le Quesne submitted that the intention of section 2 (2) of the General Accident, &c., Assurance Corporation's policy was only to insure the strange car if it was not insured. The commonsense view, and the intention here, was that the company which insured the car which actually did the damage must be the company to pay, and the General Accident, &c., Assurance Corporation only went so far as to say that they would pay if the car was not insured at all. Here there was another policy in existence under which, in certain circumstances, Loyst might recover, so his clients' policy never attached. It was suggested in "MacGillivray on Insurance," p. 717, that as a matter of strict law in such a case as this the claimant could not recover against either company, but he (Mr. Le Quesne) did not contend that. From the business point of view the Motor Union Insurance Company must be solely liable, because they were the insurers of the car which actually did the damage.

Counsel for the claimants did not address the Court.

Mr. Montgomery was not called on to reply.

Mr. Justice Roche having stated the facts and read the material clauses of the policies, said that he saw nothing to support Mr. Le Quesne's argument that the General Accident, &c., Assurance Corporation's policy was only to apply where the car being driven

was not insured at all. Each policy provided that if the risk was covered by another policy the insurers would not be liable. But each policy went on to provide that, where two policies were in existence, the insurers should pay rateably. Those provisions must be read together, and the effect of them when taken together was not, in his opinion, to deprive the claimants of any right whatever to recover. The provision as to rateable contribution qualified the preceding clause denying liability and showed that the intention was that where there were two policies each insurer must contribute rateably.

As to the proportions in which the contributions should be calculated, he did not think that the suggested contribution of each company according to the value of the particular car which it had insured was satisfactory. The right basis was that each of the respondents should pay the claimants one-half of the amount claimed, and he therefore ordered accordingly.

[Solicitors—Messrs. T. and N. Blanco White; Messrs. A. D. Vandamm and Co.; Messrs. Joynson-Hicks and Co.]

K.B. Div. (Wright, J.) 1926. Nov. 1.

W. FRANCE FENWICK AND CO., LIMITED v. THE KING.*

Ship — Requisition—Cargo—Government order not to discharge—Detention of ship—Ultimate requisition of cargo—Compensation for detention—Emergency Regulations, 1921, regs. 9, 11, 25.

The suppliants were the owners of a steamer which, in March, 1921, was chartered from them to bring a cargo of coal from Sunderland to London. The steamer arrived at Rotherhithe on April 1, but on April 2, before she could begin to discharge, a Customs official gave directions that, by reason of the coal strike, the cargo was not to be discharged. The ship was detained until April 21, when the Government requisitioned the coal. She was then ordered by the Board of Trade to take the coal to Erith, and to discharge it there. The discharge was completed on April 23.

The suppliants claimed damages for detention of the ship and asked for (*a*) a declaration that she was requisitioned by a Government Department, and that they were entitled under reg. 25 of the Emergency Regulations, 1921, to compensation for 21 days' detention, and (*b*) a declaration that they were entitled to compensation at common law.

Held, that the order not to discharge was not a requisition of the ship, and that the suppliants were entitled under the Regulations to compensation for a requisition of the ship for only two days, namely, April 22 and 23, and that a mere negative prohibition did not carry with it any claim to compensation at common law.

This was a petition of right presented by shipowners.

Sir Leslie Scott, K.C., and Sir Robert Aske appeared for the suppliants; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. W. Bowstead for the Crown.

The facts on which the claim arose were the following:—

The suppliants were the owners of a steamer, the Lockwood, which, in March, 1921, was chartered from them to bring a cargo of coal from Sunderland to London for the South Metropolitan Gas Company. The steamer arrived at Rotherhithe on April 1. She was to have discharged there, but as the wharf was occupied by another steamer she had to lie out at a buoy.

On April 2, before she could begin to discharge, a Customs official came on board the Lockwood and said that, by reason of the coal strike, the Government had taken the cargo over. He said that it must not be unloaded, and that steam must be kept up, so that, if necessary, the steamer might take the coal to some other port. The Lockwood's boilers needed cleaning, but the Customs officials would not allow the work to be done. In the result the Lockwood was detained until April 21, when the Government requisitioned the coal. The vessel was then ordered to take the coal to Erith and to discharge it there. Discharge was completed at Erith on the afternoon of April 23.

The suppliants now claimed damages for detention; for the cost of keeping up steam; and for the payment of the crew during the period of detention. They asked for (*a*) a declaration that the Lockwood was requisitioned and taken possession of by a Government Department, and that the suppliants were entitled to compensation under reg. 25 of the Emergency Regulations, 1921; and (*b*) a declaration that the suppliants were entitled to compensation at common law for the interference with their rights.

The sum claimed was £1,225.

The Crown, by their answer, pleaded that they had acted under the Emergency Regulations, and that in the circumstances no compensation was payable.

The material sections of the Regulations referred to were:—

"Statutory Rules and Orders.

"1921. No. 440.

"Emergency Regulations, 1921, dated April 1, 1921.

"9. (1) The Board of Trade or any other Government Department approved by his Majesty . . . may make orders regulating, restricting, or giving directions with respect to . . . the terms and conditions on which the traffic is to be carried on, the ports at which cargo is to be loaded or discharged . . . (including directions requiring ships to proceed to specified ports for the purpose of loading or unloading cargo . . .) and other matters affecting shipping where it appears to the Department necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country. . . .

"(2) The Board of Trade or any other Government Department . . . may . . . by order requisition or require to be placed at the disposal of the Department, in order that they may be used in the manner best suited for the needs of the country, any ships. . . .

"11. (2) Subject to the general directions of the Commissioners of Customs and Excise, the collector or other chief officer of Customs at any port or place in the United Kingdom may prohibit the unloading of any goods . . . from any ship . . . in that port or place. . . .

"13 (1) The Board of Trade may take possession . . . of

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

"(*d*) any stock of coal wheresoever situate and by whomsoever held. . . .

"(2) The Board of Trade may give directions

"(*a*) As to the management and user of any . . . property of which possession may be taken as aforesaid.

"(*b*) As to the . . . transport, storage . . . disposal, and use of any coal. . . .

"25. The compensation payable in respect of any property which is requisitioned or of which possession is taken under these Regulations shall be such as may be determined in default of agreement by a single arbitrator. . . .

Sir Leslie Scott, in opening the case, said that the delay in bringing the petition was due to the fact that it had been hoped that a settlement could be reached. The question at issue was whether what happened in this case was such a putting of the vessel at the disposal of the Government as amounted to a requisition. In fact, the Government used the Lockwood as a coal store for three weeks. Although the Regulations did not, in so many words, state that compensation was to be payable to persons whose property was seized, reg. 25 showed that it was assumed that compensation would be payable. The Crown had consented to the question of liability being decided by the Court.

He submitted that "requisition" was a general word which would cover any taking over. He referred to *The Meandros* (41 *The Times* L.R., 236; [1925] P. 61, at p. 65); *The Broadmayne* (32 *The Times* L.R., 304; [1916] P. 64, at p. 73); *The Sarpen* (32 *The Times* L.R., 575; [1916] P. 306, at p. 317); *China Mutual Steam Navigation Company v. Maclay* (34 *The Times* L.R., 81; [1918] 1 K.B., 33); *Sutherland and Co. v. Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (36 *The Times* L.R., 724); *Bombay and Persia Steam Navigation Company v. Shipping Controller* (7 Ll. L., 226); *Federated Coal and Shipping Company v. The King* (38 *The Times* L.R., 497; [1922] 2 K.B., 42).

With regard to the alternative claim for compensation at common law, he referred to Lord Atkinson's judgment in the *de Keyser Hotel* case (36 *The Times* L.R., 600; [1920] A.C. 508, at p. 542). A common law right to compensation would never be destroyed by a statute unless the statute expressly said so (*Commissioner of Public Works v. Logan*, 19 *The Times* L.R., 545; [1903] A.C., 355). He referred also to the *Cannon Brewery* case (35 *The Times* L.R., 552; [1919] A.C., 744, at p. 752); and *Robinson v. The King* (37 *The Times* L.R., 698; [1921] 3 K.B., 183).

Sir Robert Aske then called evidence in support of the claim.

The Solicitor-General contended that all that had happened was that a Customs officer went on board and forbade the unloading of the cargo. Nothing was said about the ship being kept at the disposition of the Government; the cargo only was dealt with. That direction as to the cargo was lawful under Regulation 11, and did not amount to a requisition or a taking possession of the ship. The cargo was, in fact, requisitioned later—on April 21—but the ship was never requisitioned at all. The mere prevention of unloading would give no right to compensation. After the coal had been requisitioned all that the ship had to do was to discharge at a particular place. The order so to discharge did not amount to a requisition, though it was an interference with the owners' right to use their ship as they liked.

Sir Robert Aske called William Milne, master of the Lockwood in April, 1921, who said that about 5.30 p.m. on April 2 Customs officials in uniform came on board and told him that he must not discharge the cargo; that the ship was requisitioned; that he must keep steam up; and that he must be prepared to go to any other port. The witness asked why, and they told him that there was a strike on. Later, on the same evening, a Customs launch came alongside and gave him the same orders. He then lay at the buoy until April 22. On April 22 he went to Erith, as ordered, and discharged the cargo.

Cross-examined by the Solicitor-General, he said that the Customs officers who gave him his orders in April, 1921, used the word "requisitioned."

The Solicitor-General called evidence for the Crown. A Customs preventive officer, stationed at Blackwall, stated the instructions which the Customs received at the material time. Their orders were to refuse permission to discharge coal cargoes, but they were not told anything about requisitioning vessels. He went to the Lockwood and told the officer not to discharge the coal without permission, but said nothing else to him.

Cross-examined, he said that he did not tell the captain that he must keep steam up.

Other evidence having been called, the Solicitor-General said that he agreed with the suppliants in their proposition that no particular form of words was required to constitute a requisition. The case fell into two periods—first, from April 1 to 21; and, secondly, the two days April 22 and 23. The evidence now given by the suppliants did not agree with the statements in the petition. He submitted that the only thing established was that the order was given that the ship must not be discharged. If anything at all was said about keeping steam up it might have been merely in conversation. The order was "Don't discharge." *Bombay and Persia Steam Navigation Company v. Shipping Controller* (*supra*) was an authority showing that such an order did not amount to a requisition.

Sir Leslie Scott replied. Even if the evidence as to what was said by the Customs officers was accepted in favour of the Crown, the question remained, what was the real effect of what the Government did? He claimed compensation under Regulation 25 because the ship had been put at the disposal of the Crown under Regulation 9. The order not to discharge implied that the ship must stay where it was and await further orders. Meanwhile it was to keep the cargo at the Government's disposal, which constituted a keeping of the ship at the disposal of the Crown within Regulation 9, whatever form of words might have been used. If the claim failed under the Regulations then he relied, alternatively, on the common law.

Mr. Justice Wright, in the course of a written judgment, said:—I find that no Customs officer gave any instructions until April 22, 1921, except that discharge was prohibited. The ship hauled into the jetty in the evening of April 2, 1921, but later was moved and moored at the Charlton Buoys lower down the stream. There she remained until orders were given on April 22, 1921, for her to go to Erith and discharge there. These orders were given by the Government, that is, the Board of Trade, by the Mines Department, which was in charge of these matters. A coal strike was in progress when the ship arrived. The Mines Department was concerned to see that the cargo was delivered where it was specially needed having regard to the general position of coal supplies, namely in Area 14, the discharging place being Erith. Attempts were made by the Mines Department to induce the consignees of the cargo to agree to surrender the coal to the

Board of Trade, but they refused, and at length, on April 21, 1921, the Board of Trade sent a letter to the consignees requisitioning the cargo under their emergency powers. The Customs gave permission to discharge at Erith. The vessel was ordered to go and discharge there on April 22, 1921. This was done, and discharge was completed on April 23, 1921. The vessel while remaining at the Buoys had kept under banked fires.

On these facts the suppliants claim to be entitled to be paid for 21 days' detention—namely, from April 2, 1921, to April 23, 1921, either under reg. 25 of the Emergency Regulations, 1921, or at common law. These Emergency Regulations (Statutory Rules and Orders, 1921, No. 440) were issued on April 1, 1921, by reason of the then existing coal strike, and were made under authority of the Emergency Powers Act, 1920. It is not contended that they were in any way invalid. Under them the Board of Trade was empowered, where it appeared necessary by reason of the existing emergency, to take possession of various stores, road transport, coal mines, coal, and other things and places specified; but the Regulations also dealt with matters connected with shipping, in particular by regs. 9, 11, and 25, which I will take as read.

The dispute, so far as concerns the Regulations, turns on those paragraphs. The suppliants' original contentions were based on the allegations set out in paragraphs 4 and 5 of the petition, but I indicated that I was not likely to find these paragraphs proved, and Sir Leslie Scott, in a strenuous argument, contended that I should hold that the orders to discharge given on April 22, 1921, constituted a requisition and requirement within reg. 9 (2), giving a claim to compensation *pro tanto* under reg. 25; and that, equally, the earlier period when the ship was lying under banked fires waiting permission to unload came under reg. 9 (2). I did not gather that he relied specifically on reg. 9 (1). He contended that while the ship was waiting at the Buoys she was, in substance, being kept by the Board of Trade at their disposal; the Board had determined to take the cargo, and intended to keep the ship with the cargo on board at their disposal, so that at any moment at their convenience they could order her to go and discharge where they desired, and, meantime, the ship was a floating warehouse for the cargo, potentially, if not actually, belonging to the Government, a floating warehouse kept with main steam and full crew ready at any moment when the Board of Trade ordered it to go and discharge. Whatever words the Customs officer used he meant, it was contended, and the Board of Trade meant, and was understood to mean, that the ship was being ordered to keep the coal on board for the benefit of the Board of Trade, to stay where it was, awaiting further instructions, and to be ready to act on such instructions whenever received. In this sense, it was contended by Sir Leslie Scott, the ship was during that latter period required to be placed, and was placed, at the disposal of the Board of Trade. On the other hand the Solicitor-General for the Crown contended, though I think he did not press the point, as regards the days April 22 and 23, 1921, that the vessel merely acted on directions to discharge, given under reg. 9 (1), and was never requisitioned under reg. 9 (2) so as to give a claim under reg. 25. He contended as regards the period up to April 22, 1921, that nothing was done by the Customs or the Board of Trade except to give purely negative orders—namely, that the cargo was not to be discharged, which orders were justified by reg. 11 (2) even if the ship must wait where she was, because she could not leave without getting from the Customs an endorsement on the transire or the pass, which was all she would have needed by way of clearance, being a coastwise vessel. That circumstance, however convenient to the Board of Trade, resulted from collateral matters and not from any order given under the Regulations.

A number of cases were cited and I shall refer to them later. I think it better first to state the conclusion at which I have arrived on the construction of these Regulations.

Reg. 25 provides for compensation in respect of property the possession of which is taken under the Regulations, that is, under various regulations such as 13 (1) (*d*) "coal," which do not concern this question, and also in respect of property requisitioned. The word "requisition" seems to be elsewhere used only in reg. 9 (2), where it is coupled with the words "require to be placed" at the disposal of the Department. These latter words are, I think, inserted either by way of definition or amplification of the word "requisitioned" as used in reg. 25, where also some of the provisions with regard to road vehicles, &c., may be included. "Requisitioned" so used in reg. 25 means, in my judgment, some effective and positive dominion or control constituted by a definite order given under the Regulations. Thus the order to proceed to Erith and discharge constituted such a requisition. The vessel no doubt remained in the possession of the suppliants by their master and crew, but she was required to be placed, and was placed, at the disposal of the Department; she was performing the service which the Department ordered.

The position is, in my judgment, different whilst she was merely prohibited from unloading under reg. 11 (2). She was then not performing any service on the orders of the Government. There was no act which the owners were required to do or service to render. In effect, to attempt to unload the ship whilst under the prohibition, the validity of which is not questioned, would simply be to do an unlawful act, and it cannot have been intended that compensation would be paid to subjects for abstaining to do unlawful acts.

It is immaterial, in my opinion, that the ship waited where she was and was, in fact, available to discharge whenever and wherever the Department required her. That was merely a collateral consequence. Indeed, the Government might never have needed the coal or taken possession of it or given any orders to the ship; the strike might have suddenly ended and the emergency passed; or the coal might have been purchased by a voluntary arrangement from the consignees and voluntary arrangements made as to unloading. Whether there was a requisition depends, in my judgment, on the nature and quality of the order given and not on collateral considerations.

It was not, I think, contended by Sir Leslie Scott that the order not to unload was a direction within reg. 9 (1). I do not think it was, nor do I think any direction under reg. 9 (1) could in itself amount to a requisition. So to amount the direction must, I think, also come within reg. 9 (2) and amount to a requirement that the vessel be placed at the disposal of the Government.

On the Regulations I hold that the suppliants are entitled to compensation for the two days, April 22 and 23, 1921, but for no other days claimed.

I think this conclusion is also in accordance with the cases cited.

The word "requisition" appears from the Oxford dictionary to have been adopted from the French,

and as early as 1837 was used by Carlyle as meaning "to require anything to be furnished for military purposes." It came, however, into official prominence during the Great War, and, in particular, was employed in the Proclamation by the Admiralty dated August 3, 1914, in connexion with the requisition and taking up of British vessels. It was employed in several of the Defence of the Realm Regulations, especially reg. 39 BBB, and in the Indemnity Act, 1920, section 2 (1). The nature of the requisition of vessels under the Admiralty Proclamation was explained by Lord Justice Pickford in the case of *The Broadmayne* (32 *The Times* L.R., 304 ; [1916] P., 64) and in the case of *The Sarpen* (32 *The Times* L.R., 575 ; [1916] P., 306). The same great Judge, when Master of the Rolls, again discussed the meaning of the word in the case of *Bombay and Persia Steam Navigation Company v. Shipping Controller* (7 Ll. L., 226). He was dealing with that word as used either in the Admiralty Proclamation or the Defence of the Realm Regulations or the Indemnity Act of 1920—it does not appear which—and he there said that the word at any rate does contemplate employment of some sort by the Government for Government purposes. He obviously would regard as a requisition a case where the Government, having taken possession of a cargo, kept it in the ship at their disposal, but he held that in the contest before him a mere direction to the ship to proceed to a particular port, the order being assumed to be lawful, did not constitute a requisition.

The case of *Federated Coal and Shipping Company v. The King* (38 *The Times* L.R., 497 ; [1922] 2 K.B., 42) mainly turned on the circumstance that if there had been a requisition it was a requisition from the owners, whereas the suppliants there were merely time charterers, but Mr. Justice Bailhache seems to assume that if a ship were ordered to lie in a port at the Government's disposal, such order being lawful, that would be a case not of requisition but of mere direction. The point, however, was not material, and, whilst it may be that a mere direction would be different from a requisition, a direction that the ship should be at the disposal of the Government would, I think, be a requisition as that term is used in reg. 9 (2) of the Emergency Regulations, 1921, or in reg. 39 BBB of the Defence of the Realm Regulations. That regulation was discussed by the Court of Appeal in the case of *Sutherland and Company v. Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (36 *The Times* L.R., 724). The steamer in that case had been directed to proceed to an Australian port and there load a cargo of grain for the United Kingdom for the British Government. That was held to constitute a requisition within the meaning of the charterparty, which provided for a suspension of the charter period during the requisition. The ship was so directed under reg. 39 BBB, which is in practically identical terms with reg. 9 of the Emergency Regulations, 1921. The members of the Court of Appeal did indeed abstain from giving any formal definition of the word "requisition," but I think their judgments support the conclusion that a direction to proceed to a place and load or discharge a cargo for the Government amounts to a requisition in the sense of the Regulations. I cannot find it suggested, still less decided, in any case that a mere direction by the Government for a ship to go to a place, or *a fortiori* a mere negative direction, such as not to unload without permission, can constitute a requisition or a requirement that a vessel should be placed at the Government's disposal within such a Regulation as the present.

I do not need to consider at any length the claim based on the common law right to compensation for interference with a subject's property. In the cases cited in argument the matter has been discussed by high judicial authority, and I do not think it necessary to express any opinion of my own, but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. But I think the rule can only apply (if it does apply) to a case where property is actually taken possession of or used by the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot claim at common law compensation merely because he obeys a lawful order of the State. Hence, I think, there is no right at common law which the suppliants in this case can claim in respect of the period up to April 22, 1921 ; and as regards the two days April 22 and 23, 1921, the suppliants cannot be at common law in a better position than under reg. 25 of the Emergency Regulations, which indeed, in my opinion, has superseded any common law right, if such otherwise existed.

I am only asked to deal with the question of liability, and the result, therefore, is that I declare that the suppliants are entitled to recover £100 in respect of the two days April 22 and 23, 1921, but are not entitled to recover in respect of any further or other period.

[Solicitors—Messrs. Botterell and Roche ; the Solicitor to the Board of Trade.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1926.
Nov. 10.

HARMS (INCORPORATED) AND OTHERS v. EMBASSY CLUB, LIMITED, AND OTHERS.*

Copyright — Infringement — Musical work — Performance in public—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), ss. 1, 2.

The question whether the performance of a musical work was a performance in public, so as to constitute an infringement of copyright, is a question of fact, and, in determining that question, the quantum of damage likely to accrue and the number and class of persons having a right to be present at the performance are factors to be noted.

Decision of Eve, J. (42 *The Times* L.R., 729 ; [1926] Ch. 870), affirmed.

This was an appeal by the defendants from a decision of Mr. Justice Eve (42 *The Times* L.R., 729 ; [1926] Ch. 870), holding that the performance by an orchestra of certain American dance music at a London dance club was a performance in public and therefore an infringement of the plaintiffs' copyright therein, and granting an injunction to restrain such performance.

The first plaintiffs were the American owners of the copyright of a musical play entitled *Tip-Toes*, and the second plaintiffs, Messrs. Chappell and Co.,

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

were the musical publishers in England of the play. The defendants, Martan's Club, Limited, were the owners of the Embassy Club, a social and dance club in Old Bond-street.

The plaintiffs complained that the defendants had authorized the performance by their orchestra at the club on March 4, 1926, of an excerpt from *Tip-Toes* entitled *That Certain Feeling*. They claimed that this performance was an infringement of their copyright and brought an action for an injunction to restrain the defendants from performing the same in public at the Embassy Club, or elsewhere, without their consent, and for damages. The defendants admitted that the performance had taken place, but contended that it was not "in public."

The total number of members of the Embassy Club was 1,800, and on the night in question 130 members of the club had dined there, and some 50 guests were present during the performance of the music, when dancing took place. Members were entitled to introduce any number of guests on payment of 10s. for each guest introduced after 9 p.m. The play *Tip-Toes* had been produced in America, but had not at that date been produced in England, though a few copies of the music had been published simultaneously with the American publication.

Mr. Justice Eve held, applying the decision in *Duck v. Bates* (13 Q.B.D., 843), that on the facts proved, and having regard in particular to the large membership of the Embassy Club and the right of members to introduce visitors, the performance at the club was a "performance in public." He made a declaration to that effect, with liberty to apply for an injunction if the necessity arose.

The defendants appealed.

Mr. Vaisey, K.C., and Mr. Winterbotham appeared for the appellants; Mr. Gover, K.C., and the Hon. S. O. Henn Collins for the respondents.

Counsel for the respondents were not called upon.

The Master of the Rolls, in giving judgment, said that by section 1 (1) of the Copyright Act, 1911, copyright subsisted in every original literary, dramatic, musical, and artistic work, subject to certain conditions, throughout the parts of his Majesty's Dominions to which the Act extended. By subsection 2 of section 1 copyright meant the sole right to produce or reproduce or perform the work or any substantial part thereof in public. By section 2 (1):—

"Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright. . . ."

His Lordship, having stated shortly the facts as found by Mr. Justice Eve, proceeded:—It was obvious that the words "in public" were not easy to define, and they were commonly used with regard to a number of activities in which people shared. Certain cases had been referred to by counsel for the appellant, particularly *Wall v. Taylor* (11 Q.B.D., 102) and *Duck v. Bates* (13 Q.B.D., 843).

It was quite true that the terms of the earlier Copyright Acts which were considered in these cases were quite different from those of the present Act. Dramatic copyright was first protected by the Act of 1833 (3 and 4 Will. III., c. 15), and by section 1 of the Act of 1842 (5 and 6 Vict., c. 45) the privileges in copyright given in the earlier Act were extended to musical compositions. The effect of these statutes was to give the author of a dramatic piece with music the right to prevent the performance of it in any place of dramatic entertainment without his consent. The words of the present statute were different, but it was necessary to consider the nature of the right given to the owner of a musical composition. Lord Esher, M.R., in *Duck v. Bates* (13 Q.B.D., at p. 845), said:—

"I agree that what was intended to be protected was the value of the author's invention, that is the key to the construction of the Act: he does not want sentimental protection: he has power himself to represent his drama, and to confer upon others the right to represent it. That power gives a value to his production. If an author performs his drama, and if it is performed also by another, the author will be injured."

The Copyright Act, 1911, gave protection to the author of a musical or dramatic work. It was true that the protection amounted to a monopoly, but no prejudice was to be attached to the use of that word.

The two cases referred to led to a discussion of the meaning of the phrase "place of dramatic performance," and the view of the Court was in each case that that meaning must to a certain extent be a question of fact. A similar view was taken by Chief Justice Tindal in the earlier case of *Planché v. Braham* (4 Bing. N.C., 17). In *Wall v. Taylor* (11 Q.B.D., 102) Lord Esher said that what was a representation or performance at a place of dramatic entertainment must to some extent be a question of fact. In *Duck v. Bates* (*supra*) Lord Justice Bowen at p. 850 said:—

"Then the question of fact will arise, whether the place has not been so appropriated on any particular occasion: profit is a very important element: the question of numbers also is very important: these are matters to be taken into consideration."

And further on:—

"There is a broad distinction between the present case and a performance to which the public at large or any portion of the public are invited; but the question must be to a certain extent a question of fact."

These authorities were ample foundation to support what Mr. Justice Eve had decided—namely, that what was a performance "in public" was largely a question of fact.

Starting with the question what was the measure of protection afforded to the author, one must next consider whether the true view was that there had been a "performance in public" at the club. In that connexion one must consider whether there was such a representation as would injure the author's right to money. As the Master of the Rolls said in *Duck v. Bates* (*supra*, at p. 847), there must be present a sufficient part of the public who would also go to a performance licensed by the author as a commercial transaction, otherwise the place where the drama was represented would not be a place of dramatic entertainment.

One must consider also whether the performance could be described as "domestic or private," and also the place where the performance was given. These were sufficient tests to be applied. Here the club was evidently a high-class club open to any persons who were able to pay a substantial entrance fee and the annual subscription, and care was taken by means of the rule for annual re-election of members to exclude any persons who might be undesirable.

To revert to what took place at the club on March 4, could it be denied that the 50 guests present were members of the public of a class able and willing to pay for the entertainment provided? On the facts one could not answer in the negative the

question : Was the owner of the musical copyright in the piece performed injured ? He thought that Mr. Justice Eve had come to a right conclusion on the facts, and on these facts he himself would have come to the same conclusion.

If it were possible to evade the provisions of the Copyright Act, 1911, by such performances as the present a very serious inroad would be made upon an author's property. Though it might be difficult to say whether in the present case an actual loss had been suffered by the author, on the facts there was clearly an infringement of his copyright. The appeal failed and would be dismissed.

Lord Justice Sargant, who said that the case for the plaintiffs was very much stronger than it was in *Duck v. Bates* (13 Q.B.D., 843), which was a borderline case where the plaintiff only just failed to succeed, and where a dissenting judgment was given, delivered judgment to the same effect, and Lord Justice Lawrence concurred.

[Solicitors—Messrs. Whitelock and Storr ; Messrs. Pollock and Co.]

K.B. Div. (Rowlatt, J.) 1926. Nov. 4.

MARIE CELESTE SAMARITAN SOCIETY OF THE LONDON HOSPITAL v. COMMISSIONERS OF INLAND REVENUE.*

Revenue — Income-tax — Charity—Bequest of residue—Payment of income by executors before ascertainment of residue—Claim of repayment of income-tax—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*).

A testator devised his residuary estate on trust for the appellants, who were a society established for charitable purposes only and were entitled to exemption from income-tax on their income from investments. Pending the completion of the administration the executors paid to the trustees for the appellant society certain sums on account of income. The appellants claimed repayment of income-tax, but the Inland Revenue Commissioners refused repayment so far as related to income received by the executors before the date when the residue was ascertained.

Held, that as the income when it was received was the income only of the executors and the money paid to the charity was only a sum equal to the income payable to the charity as a matter of equitable book-keeping in due course of administration, the appellants were not entitled to the repayment claimed.

The Marie Céleste Samaritan Society of the London Hospital, by way of case stated, appealed against the refusal of the Special Commissioners of Income Tax to exempt from income-tax sums paid to them under the will of the late Mr. James Hora during the administration of the estate of which the Society was the residuary legatee.

The Special Commissioners on March 15, 1926, heard the claim of the Marie Céleste Samaritan Society of the London Hospital (the appellants) for exemption from income-tax under section 37 (1) (*b*) of the Income Tax Act, 1918 (which provided for the exemption from income-tax of certain income of charities) in respect of certain sums received by them from the residuary estate of the late James Hora.

The late James Hora, the testator, died on August 31, 1917. By his will he (*inter alia*) gave his wife an annuity for her life of £1,000 and directed his trustees to set apart and invest such a sum of money as would when invested produce that annuity. After making certain other bequests he devised and bequeathed the residue of his estate to his trustees upon trust to sell and convert the same into money and out of the proceeds to pay (*inter alia*) his funeral and testamentary expenses and the legacies bequeathed by the said will, to set apart the sum directed to be set apart to answer the annuity to his wife, and to stand possessed of the said moneys "upon trust for the Governors of the London Hospital, Whitechapel-road . . . to be held by the said Governors upon trust to invest the same from time to time, to vary the investments thereof, and to stand possessed of the same moneys and the investments thereof, with power upon trust that the income thereof shall be applied towards and for the objects and purposes of the Samaritan Society of the said hospital, now and since the year 1899 called the Marie Céleste Samaritan Society, London Hospital, having been so named in perpetuity by reason of my endowment of the Society in the said year with the interest and dividends amounting to £250 by the year of various securities of the face value of £5,000 but of the marketable value of £6,000 or thereabouts."

The trustees were given full powers to settle all questions which might arise in the management and administration of the estate or any trust property held under the will, and all questions as to the construction of the will, or of any of the clauses thereof, and all other questions whatsoever which might arise in relation to the estate or any trust property, in such manner as they should in their discretion think fit. The testator expressed his desire that so far as possible the residue of his estate should be transferred in the state of investment in which it should be after making the payments and purchases directed by his will, and declared that such transfer should be made by his trustees as soon as reasonably might be, having regard to the due administration of his estate.

The appellants were a society for assisting needy patients of the London Hospital to obtain convalescent home or other treatment after leaving the hospital. The society was independent of the London Hospital, but its work was auxiliary to that of the hospital. It was admitted by the Commissioners of Inland Revenue that the society was established for charitable purposes only, and was entitled to exemption from income-tax in respect of its income from investments.

On the death of the testator, the executors and trustees appointed by the said will took over and administered his estate, and by August 31, 1919 (the date to which the residuary account hereinafter mentioned was made up), had paid or satisfied the legacies bequeathed by the said will and had paid all the debts due at the death of the testator. The executors also out of the general surplus income of the testator's estate paid (*inter alia*) the annuity to the testator's widow until the investments were made to provide the annuity. Long before August 31, 1919, and indeed at the date of the death it had

* Reported by G. G. Beagley, Esq., Barrister-at-Law.

been certain that the estate was much larger than the amount necessary to pay expenses, debts, and legacies.

During the period of administration of the estate large amounts of income were received by the executors, and after paying all income charges thereout there was a substantial surplus on the executors' income account. Pending the completion of the administration the following sums were, at the request of the Samaritan Society, paid on account out of the surplus income to the Governors of London Hospital as trustees for the society :—£5,000 in December, 1918 ; £1,500 in November, 1919 ; and £3,000 in January, 1920. These payments were shown in the executors' accounts as made on account of income.

In May, 1920, the executors lodged with the estate duty office a corrective affidavit for estate duty on additional assets found to belong to the testator of which the executors had not been previously aware. On this corrective affidavit additional excise duty amounting to £12 16s. 1d. was paid. At the same time the executors also lodged with the estate duty office a residuary account for legacy duty on the residue of the estate, made up as at August 31, 1919—two years after the testator's death.

In the said residuary account debts due from the estate amounting to £1,600 were shown to be outstanding. This sum was made up chiefly of solicitors' and accountants' charges incurred in the course of administration. As no sum of the investments had been specifically set aside by the executors before the date to which the residuary account was made up, in this account a deduction was made of the sum necessary to produce the annuity to the widow.

Between July and October, 1920, certain investments forming part of the testator's estate were sold to meet the legacy duty on the residue, and also to purchase £20,360 National War Bonds to be held by the trustees to produce the annuity to the widow.

The investments forming the residue of the testator's estate were transferred to the Governors between July, 1920, and May, 1921.

The appellants claimed repayment of income-tax in respect of these three payments of £5,000, £1,500, and £3,000, but this claim had been refused by the Commissioners of Inland Revenue so far as it related to income from the trust estate received by the executors up to August 31, 1919, the date of delivery of the residuary account, and the date before which the Commissioners of Inland Revenue contended that the residue had not been ascertained. The appellants being aggrieved by this partial refusal of their claim, applied to have their claim for the period to August 31, 1919, heard and determined.

It was contended on behalf of the appellants :—

(1) That they were entitled to receive only the income of the residue and not the capital, and that any payments made to the society were payments of income.

(2) That this case was distinguishable from that which formed the subject of the decision of the Courts in *Dr. Barnardo's Homes v. Special Commissioners of Income Tax* (37 *The Times* L.R., 540 ; [1921] 2 A.C., 1), inasmuch as in that case the charity was entitled to the residue of the estate absolutely.

(3) That the claim of the appellants should be allowed for the whole period from the date of the testator's death.

It was contended on behalf of the Commissioners of Inland Revenue :—

(1) That the residue of the estate was not ascertained earlier than August 31, 1919.

(2) That until the residue of the estate had been ascertained the income was the income of the executors and not that of the appellants or the Governors. The case of *Dr. Barnardo's Homes v. Special Commissioners of Income Tax* (*supra*) was quoted in support.

(3) That the claim for repayment of income-tax in respect of the income received up to August 31, 1919, had been properly refused.

The Special Commissioners were of opinion that the income received up to August 31, 1919, was not the income of the appellants or of the Governors, but of the executors, and that no claim for repayment of income-tax was admissible in respect of this income under section 37 (1) (*b*) of the Income Tax Act, 1918. They accordingly refused the claim.

The question for the decision of the Court was whether the appellants were entitled to claim repayment of income-tax under section 37 (1) (*b*) of the Income Tax Act, 1918, in respect of the income of the estate which was received up to August 31, 1919.

Mr. F. H. Maugham, K.C., and Mr. Roland Burrows appeared for the appellants ; the Attorney-General (Sir Douglas Hogg, K.C.), and Mr. R. P. Hills appeared for the respondents.

Mr. Justice Rowlatt, in dismissing the appeal, with costs, said that the appeal failed upon a point which might be narrow, but was sufficient—namely, that the income of the assets of this estate, being, he would assume, assets producing income within the category subject to section 37 (1) (*b*), that income at the time when it was received, and at the time when the tax was deducted and fell into the said category, was the income only of the executors, and that the money paid to the charity was, in the words of Lord Cave, in the *Barnardo* case (37 *The Times* L.R., 540 ; [1921] 2 A.C., 1), only "a sum equal to the income" which was payable to the charity as a matter of equitable book-keeping in the due course of administration. That was enough to dispose of the appeal, because it meant that this sum could not be described in the terms of the section.

The Attorney-General had also taken a broader and larger point, by contending that there being an undefined gift of income the effect was a gift of the residue *simpliciter*, and on that ground that the case was governed by the decision in the *Barnardo* case (*supra*). Upon that point his Lordship offered no opinion, and decided the case upon the first-mentioned point.

[Solicitors—Messrs. Hanbury, Whitting, and Ingle; the Solicitor of Inland Revenue.]

K.B. Div. (Wright, J.) — 1926. Nov. 4.

LOWTHER v. HARRIS.*

Conversion — Mercantile agent—Possession as such—Consent of owner—Wrongful sale by agent—Title of purchaser—Estoppel—Factors Act, 1889 (52 and 53 Vict., c. 45), ss. 1, 2.

The plaintiff was the owner of certain tapestries, known as the Aubusson tapestry and the Leopard tapestry, and he gave to one P., a dealer in antiques, a limited authority to obtain and submit offers from possible purchasers. P. falsely represented to the plaintiff that he could obtain £525 for the Aubusson tapestry, and the plaintiff allowed him to take it away for

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

delivery to a purchaser, who in fact did not exist. P. then sold the Aubusson tapestry to the defendant for £250. Subsequently P., who never had authority to sell the Leopard tapestry, stole it from the plaintiff and sold it to the defendant.

In an action for conversion the defendant contended that P. had been in possession of the tapestries as a mercantile agent within the meaning of the Factors Act, 1889, and that as he had bought them from P. in good faith he had acquired the property in them. He also contended that the plaintiff had held out P. as a person with authority to sell and was therefore estopped from saying that P. had no such authority in fact.

Held, that although P.'s authority was limited, and although he was not acting for any principal other than the plaintiff, yet these facts did not prevent him from being a mercantile agent, and, in the circumstances he was a mercantile agent in possession of the Aubusson tapestry with the consent of the plaintiff, and therefore as to that tapestry the defence under the Factors Act, 1889, was established, but, as to the Leopard tapestry, that as P. was never in possession of it with the plaintiff's consent, the defence under the Act failed, and, as the plaintiff had never represented to the defendant that P. had authority to sell it, there was no estoppel, and therefore the plaintiff was entitled to recover the value of the Leopard tapestry alone.

The plaintiff in this case, Colonel Claude Lowther, the owner of Hurstmonceaux Castle, Sussex, claimed damages from the defendant, Mr. Lionel Harris, for the alleged conversion of certain tapestries or, alternatively, claimed the return of the articles in question and damages for their detention.

Mr. Stuart Bevan, K.C., and Mr. F. van den Berg appeared for the plaintiff; Mr. Greaves-Lord, K.C., and Mr. L. W. J. Costello appeared for the defendant.

The plaintiff, by his statement of claim, alleged that he was the owner of certain tapestries, known as the Leopard tapestry and the Aubusson tapestry, and that the defendant had wrongfully obtained and converted them.

By his defence the defendant put in a general denial, and said that before the alleged detention and conversion of the tapestries one Barton Prior, an antique dealer, was in possession of them as a mercantile agent under the Factors Acts, and that Barton Prior, acting on behalf, and with the consent, of the plaintiff, in August, 1923, sold to him the Aubusson tapestry for £250; and that in January, 1924, he sold to him the Leopard tapestry for £200. He said that both sales took place in the ordinary course of business and that he purchased the tapestries in good faith and without notice of any defect in the title of Barton Prior. He therefore contended that the sales were valid, and that the property in the goods had passed to him.

He further pleaded that by putting Barton Prior in possession of the tapestries and authorizing him to sell them, the plaintiff had held out Barton Prior as his agent for sale and was now estopped from denying that the sales were valid.

Mr. Bevan, in opening the case, said that the defendant was a fine art dealer carrying on business as the Spanish Art Gallery. There were four pieces of tapestry, the subject of this action, three known as the Aubusson, which the plaintiff had bought in 1919 from Mr. Leonard Partridge for £900, and one known as the Leopard, which the plaintiff had bought in 1919 at Christie's for a price which, with commission, amounted to £771. After these tapestries were sold to the defendant he almost at once resold them at a large profit.

The circumstances out of which the matter arose were the following:—In 1922 the plaintiff had a house in Westminster. He had a large quantity of china and furniture. His mother died, and owing to her death he became possessed of a further large quantity. Not needing so much, the plaintiff arranged with an art dealer named Barton Prior, with whom the plaintiff had had other dealings, that he should sell the articles out of the house of the plaintiff's mother on a commission of 10 per cent.

The plaintiff and Prior then discussed further business. The plaintiff had been a member of a company trading in old furniture, and as that company had been wound up the plaintiff had come into possession of a further quantity of furniture. In order to store it he took another house at Palace-street, Westminster, and into that house he put all the furniture which he wished to get rid of. He arranged with Barton Prior that Prior should bring any likely customers to see the furniture. Prior had only authority to obtain and submit offers; he had no authority to sell, and he was forbidden to remove any article from the premises. Afterwards, as the plaintiff was often away, it was arranged that in small transactions offers of less than £100 could be approved by the plaintiff's secretary in the plaintiff's absence. For some time things went well. In the autumn of 1923 Prior told the plaintiff that an offer of £525 had been made by one Woodall for the Aubusson tapestry. The plaintiff thought the offer was too small, but as Prior represented that if it was accepted it would probably lead to other transactions, the plaintiff finally agreed to the sale. In August, 1924, the plaintiff's secretary became uneasy about Barton Prior. A cheque had been dishonoured, and the plaintiff called for an explanation. It was then discovered that Prior had removed the Leopard tapestry without permission, and the supposed purchaser of the Aubusson tapestry was fictitious.

With regard to the law, Mr. Bevan referred to the Factors Act, 1889, and submitted that Barton Prior was not a mercantile agent within the meaning of section 1 of the Act because he had no authority to sell. His only authority was to obtain and submit offers. The Leopard tapestry was never in possession of Barton Prior; it was always in the possession of the plaintiff. Prior had only possession of the Aubusson tapestry for a particular purpose—namely, for delivery to Woodall, a supposed purchaser, who, in fact, did not exist. Barton Prior had been prosecuted at the Old Bailey and had been convicted of fraud, being sentenced to 18 months' imprisonment.

Colonel Lowther, called by Mr. Bevan, gave evidence in support of the opening statement. When he took the house in Palace-street he filled it with articles which he wished to sell. The value of the articles would be about £18,000 to £20,000. The price to be asked for each article was put down in a book. Prior was to get offers, but was not to let anything go out of the house without witness's written permission. He allowed Prior to live on the top floor of the house.

Cross-examined by Mr. GREAVES-LORD, he said that he had had dealings with the Spanish Art Gallery for about 30 years and had never heard anything against them. Personally, he had always found them behave very well. The house in Palace-street was taken in the name of his secretary. Cheques for goods sold by Prior were not paid direct to the witness, but it was not true that the whole business was run by Prior.

Mr. Urwin, secretary to Colonel Lowther, gave evidence as to the manner in which sales of Colonel Lowther's articles were effected.

Cross-examined, he said that when Prior sold anything the cheques were almost always made payable to Prior. Sales were sometimes made by Colonel Lowther under the style of the Buckingham Art Gallery, but he was not registered by that title under the Registration of Business Names Act, 1916. So far as the outside public was concerned it might appear that the business was that of Prior alone, but that was not their intention. If a customer offered the price which Colonel Lowther had fixed for any particular article, Prior could make a sale which would bind Colonel Lowther, but the customer could not have delivery without paying cash unless Colonel Lowther agreed to give credit. Prior had a telephone put into the house at Palace-street on his own account and in his own name. He (the witness) knew about it, but did not interfere.

Police evidence was then given relating to Prior's dealings with the tapestries, and expert evidence was given as to their value.

Mr. GREAVES-LORD called Morris Harris, son of the defendant, who said that he had been associated with his father in the business for about seven years. In 1923 a man named William Prior called on them with a van containing articles which he wished to sell. Before buying he (the witness) made inquiries about Prior, and on getting a satisfactory reference he bought some small things. About July, 1923, Prior saw him again and offered the Aubusson tapestry for sale. He recognized the tapestry and remarked that he thought it belonged to Colonel Lowther. The answer was given that it did and that Colonel Lowther was anxious to sell it. Prior said that the offer of £250 which was made could not be accepted, and he then took the tapestry away.

In August he brought it back and said that the offer could now be accepted. He (the witness) telegraphed to his father, who was in Switzerland at the time, and on receiving his reply paid £250 and got a receipt. That receipt was signed "Barton Prior." Later on he sold the tapestry, with other articles, to a New York dealer, a Mr. Simons, who was then in London. The price for which he sold it was £350.

In January, 1924, the same man brought the Leopard tapestry and offered it for sale. His (the witness's) father was then present and offered £200 for it. Prior accepted the price and Mr. Harris, senior, paid with a cheque for £200. Subsequently, in March, 1924, they sold the Leopard tapestry with other tapestries to Cardinal and Harford. In October, 1924, a detective called on him (the witness) and made inquiries.

In January, 1925, the detective called on him again with Mr. Urwin, and in the result he gave evidence on the prosecution of Barton Prior at the Old Bailey. From first to last he had no idea that there was anything wrong with that transaction.

Lionel Harris, the defendant in the action, called by Mr. GREAVES-LORD, said that he had carried on business for nearly 40 years—in Conduit-street for 30 years. There was nothing unusual in a man's calling with a van and trying to sell him things. Small dealers selling on commission constantly did so.

Cross-examined by Mr. BEVAN.—He recognized the Aubusson tapestry as a thing which had belonged to Colonel Lowther. If that had been the first time that Prior had offered things to him he might have inquired of Colonel Lowther what Prior's authority was. In fact, he remembered very little of what he said to Prior, who stated that he was trying to sell the tapestry for Colonel Lowther. That gave him confidence, and he thought that Prior was doing a job on commission.

Mr. GREAVES-LORD then addressed the Court on the law. Dealing with the estoppel point first, he said that if one put goods in the hands of a commission agent for sale and the agent sold them, one could not subsequently repudiate his authority.

He referred to *Cole v. North Western Bank* (L.R. 10 C.P., 354); *Turner v. Sampson* (27 *The Times* L.R., 200); *Weiner v. Harris* (26 *The Times* L.R., 96; [1910] 1 K.B., 285); *Oppenheimer v. Attenborough* (24 *The Times* L.R., 115; [1908] 1 K.B., 221); *Hastings, Limited v. Pearson* (9 *The Times* L.R., 18; [1893] 1 Q.B., 62); *Heyman v. Flewker* (13 C.B., N.S., 519). Barton Prior was clearly a mercantile agent within the meaning of the Act; he was employed to sell on commission; the goods were kept in a house in which he was allowed to exercise dominion; and he had power to do everything to make effective contracts of sale. Possession of goods under the Act did not mean exclusive possession. As to the presumption of consent, he referred to *Moody v. Pall Mall Deposit and Forwarding Company* (33 *The Times* L.R., 306); *Folkes v. King* (39 *The Times* L.R., 77; [1923] 1 K.B., 282); and *Lake v. Simmons* (42 *The Times* L.R., 425; [1926] 2 K.B., 51).

Further, with reference to the estoppel point, there was nothing to indicate to the public that Colonel Lowther was carrying on business at all. He was not registered under the Registration of Business Names Act, 1916; he did not deal directly with the customers; and his name did not appear on the receipts or other documents. Cheques were paid to Barton Prior, and receipts were given in his own name. To allow receipts to be given by an agent was clearly a holding out of the agent as a person authorized to sell.

Mr. BEVAN contended that the point under the Factors Act, 1889, was the more difficult point. With regard to both the sales he submitted that the case was not within the Act at all. Barton Prior was not a mercantile agent, and was not in possession with the consent of the true owner. A mercantile agent was a person who carried on business away from his principal; but here Prior's duties were purely domestic and, like those of a shopman, could only be carried on on the premises of his principal. A mercantile agent was not a servant (*Lamb v. Attenborough*, 31 L.J. Q.B., 41).

On the question of possession, the Leopard tapestry was never in Prior's possession. The possession of the other tapestry was obtained by fraud; it was a case of larceny by a trick, and there was no real possession by Prior.

As to estoppel, the defendant never knew that the Leopard tapestry belonged to the plaintiff, and Prior was dealt with as a principal.

The plaintiff put forward no suggestion of bad faith by the defendant.

Mr. Justice Wright delivered the following considered judgment.—This is an action brought by the plaintiff, Colonel Claude Lowther, to recover damages from the defendant, Lionel Harris, carrying on business as an art dealer under the name of the Spanish Art Gallery. The claim is pleaded in the alternative as for detinue or conversion, but the plaintiff's counsel elected to proceed as for conversion. The subject-matter consisted of two pieces of tapestry, one consisting of three panels, described as the Aubusson tapestry, and the other a single piece, described as the Leopard tapestry (also as a hunting scene). The defendant relied on the Factors Act, 1889, or, in the alternative, on estoppel at common law. The circumstances in regard to the two pieces were in some respects different.

Colonel Lowther early in 1923 had a large quantity of valuable furniture and antiques for disposal. He had as secretary a Mr. Urwin. In March, 1923, he went into an antique shop in Ebury-street where one Barton Prior dealt in antiques in a small way, principally glass and china. The plaintiff made some purchases, and after some conversations came to an arrangement with Barton Prior that Prior should act as his agent for the disposal of the furniture and antiques. Among the articles so to be dealt with were the Aubusson tapestry, which had been bought in 1919 for £900, and the Leopard tapestry, which about the same time had cost £771. The plaintiff took a house, 10, Palace-street, a few minutes' distant from Prior's shops in Ebury-street, and there the plaintiff's furniture and antiques were stored. Mr. Urwin was the lessee, but this was in his capacity as agent for the plaintiff, and he had an office on the first floor. Prior was allowed to live in a flat on the top floor and to use as a sitting room a room on the floor below. He retained his business in Ebury-street, where he had two shops at Nos. 5 and 9, and his business was registered under the Registration of Business Names Act, 1916, as "Period." Towards the end of 1923 he also had a telephone address at 10, Palace-street, under the name "Period," with an extension to Ebury-street, but that was a private telephone of his own. Customers used to come to his shops in Ebury-street and he used to bring them round to see the furniture on view as for sale at 10, Palace-street, and in most, if not all, cases customers were not told that the furniture was the property of the plaintiff, or that Prior was merely selling on the plaintiff's behalf. He was left to make out invoices for goods sold as for "Period," 5 and 9, Ebury-street, and he collected the price by cheques made out to himself; he accounted to the plaintiff by paying cash, at least during the time material to this case. As between the plaintiff and Prior, the plaintiff's authority was strictly limited. The books were kept by Mr. Urwin, who was in the office at 10, Palace-street, during business hours. Prior had no authority to complete a sale or make a delivery without first getting the sanction of the plaintiff, whom he used to see about four times a week, or, if the articles were of less value than £100, the sanction of Mr. Urwin. Prior had no authority to remove any goods from 10, Palace-street, without such sanction. Trouble began about the middle of 1924, or a little earlier in that year, between Prior and the plaintiff, who complained that money for goods sold was not coming in properly. Alterations in procedure were discussed, and in August, 1924, heads of agreement for the protection of the plaintiff as against Prior were signed. A little later, in October, 1924, it was discovered that various articles of value had been disposed of by Prior. He was arrested and was tried and convicted of larceny at the Old Bailey. As a result of what was discovered by the plaintiff, this action was brought in respect of two of the articles which Prior had dishonestly made away with.

I find the following facts with reference to the Aubusson tapestry. Prior falsely pretended to the plaintiff about August, 1923, that he was able to sell this tapestry to one Corbel Woodall for £525; the plaintiff, after protesting that the price was too small, agreed to the sale on the representation that Woodall was a valuable customer. After this consent, given in the presence of Mr. Urwin, the latter permitted Prior to remove the tapestry in order to make delivery and complete the sale as authorized by the plaintiff. This happened in August, 1923. I think the entry in the plaintiff's book as of December, 1923, was direct bad bookkeeping. In fact, Prior had not sold the tapestry to Woodall at all, and his story was a mere fiction in order to enable him to get possession of the tapestry, as he did, with the intention of disposing of it in fraud of the plaintiff. Having thus got the tapestry, he sent it in a van or cart by means of his brother, William Prior, who was merely acting on his instructions, to the defendant's place of business and offered it for sale. The tapestry had actually been offered to the defendant about a month before in the same way for £300. The defendant had had some small dealings with Prior a little previously, and offered £250 for the tapestry. The defendant and his son recognized the tapestry as having been offered by the plaintiff at Christie's in the preceding March, and on inquiry were told by William Prior that it was being sold on behalf of the plaintiff. They knew nothing of Barton Prior's general connexion with the plaintiff or of the premises at 10, Palace-street. They dealt with Prior as a commission agent carrying on business under the name of "Period," at 5 and 9, Ebury-street, and when the price was agreed at £250 they gave their cheque for that sum to Barton Prior, obtaining a receipt signed B. Prior on paper headed "Period, 5 and 9, Ebury-street," and took the tapestry. A few days later they sold it to Simons, of New York, for £350, which I find to be its true value at that time. In January, 1924, the same man, W. Prior, came again with the other piece of tapestry, the Leopard tapestry, on a van and offered it for sale. The defendant bought it for £200, paid a cheque in favour of B. Prior, and took a receipt headed "Period, 5 and 9, Ebury-street," and signed by William Prior for Barton Prior. The defendant did not know or question whether Prior was selling for himself or for a principal, nor had he any knowledge that the tapestry was the property of the plaintiff. In fact, Prior had simply stolen the tapestry from 10, Palace-street, without the knowledge or consent of the plaintiff or Mr. Urwin, who thought that it was still lying folded upon a shelf. It was not till October, 1924, that the theft was discovered along with the other frauds. The defendant sold the tapestry to Cardinal and Harford almost at once for £300, less commission. I place its value at that date at £270. No suggestion is made that the defendant acted otherwise than in good faith. I find that it was in the usual course of business in fine art dealings for a dealer, whether acting for himself or as agent for a principal, to bring for sale to other dealers articles which, if sufficiently bulky, would be carried in a van or motor-car.

Unless the defendant has a defence under the Factors Act, 1889, or on the ground of common law estoppel, it is clear that he is liable in damages for

conversion, which damages, if recoverable by the plaintiff, I fix at £350 in the case of the Aubusson tapestry, and at £270 in the case of the Leopard tapestry. The circumstances relating to the two pieces of tapestry are different and require separate consideration. I shall first deal with the Aubusson tapestry, and shall first consider the defence based on the Factors Act, 1889, in order to ascertain if the conditions of the Act are fulfilled. The first question is whether Prior was a mercantile agent—that is, an agent doing a business in buying or selling, or both, having in the customary course of his business as such authority to sell goods. Various objections have been raised. It was contended that Prior was a mere servant or shopman, and had no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman (*Cole v. North Western Bank*, L.R. 10 C.P., 354, at p. 372 ; *Lamb v. Attenborough*, 1 B. and S., 831 ; *Heyman v. Flewker*, 13 C.B. N.S., 519). I think this is still law under the present Act. In my opinion B. Prior, who had his own shops, and who gave receipts and took cheques in his own registered business name and earned commissions, was not a mere servant but an agent, even though his discretionary authority was limited. It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman v. Flewker* (*supra*), and I think the same is the law under the present Act. In *Weiner v. Harris* (26 *The Times* L.R., 96 ; [1910] 1 K.B., 285) it appears that the agent was not acting for any other principal than the plaintiff, and this was so also in *Hastings, Limited v. Pearson* (9 *The Times* L.R., 18 ; [1893] 1 Q.B., 62), in respect of which case the Court of Appeal, in *Weiner v. Harris* (*supra*), held that the agent was a mercantile agent. It is also clear that pictures, as objects of purchase and sale, constitute those who deal in them on commission mercantile agents within the Factors Acts (see under the old Act *Heyman v. Flewker* (*supra*) and under the present Act *Turner v. Sampson*, 27 *The Times* L.R., 200).

The next question is whether Prior was in possession of the Aubusson tapestry, and, if so, with the consent of the plaintiff, and, if he had such possession, whether it was in his capacity as mercantile agent. I add the last consideration because I think that, just as such a condition was imported in the old Factors Acts (see *Cole v. North Western Bank* (*supra*) and cases there cited), the same condition must be satisfied under the Factors Act of 1889. Mr. Greaves-Lord contended that the tapestry, while lying at 10, Palace-street, was in the possession of Prior, relying on the facts that Prior had the use for residence of the top floor and the sitting room below, and further that he had disposing control over the goods in the house. As to Prior's residence in the house, I hold that the furniture in it, including the tapestry, was in the possession of the plaintiff, because Mr. Urwin, who was the lessee and occupier of the house, and who was in attendance during business hours, was merely a servant of the plaintiff, so that his possession was the plaintiff's possession. I adopt the language of Pollock and Wright on Possession, page 38 : "It will hardly be denied that a man is in possession in fact, as well as possession in law, of his own goods in the house which he occupies whether he be in the room at a given moment, or even in the house or not." The plaintiff did all in his power to exclude any unauthorized dealing with the goods by Prior while they were in the house. As to Prior's use of the top floor and sitting room, I think Prior was merely in the position of a licensee, and perhaps caretaker, but never in possession of the plaintiff's goods in 10, Palace-street. Mr. Greaves-Lord also contended that Prior had possession of the goods because he was in a position to dispose of them by a sale enforceable by specific performance. Assuming that he was able to do so, though I find that he was forbidden to sell without specific authority, possession would not thereby be established, any more than if the goods had been in an independent warehouse. But I do hold that Prior became in possession of the Aubusson tapestry when he was allowed to take it away in the van after the plaintiff had sanctioned a sale to Woodall. It is true that no such sale had in fact been made or was intended to be made, and that the possession was obtained by the fraud of Prior. Possession, however, was in fact obtained by Prior, and obtained by him in his capacity as mercantile agent. Mr. Bevan contended that Prior obtained the tapestry under colour of an actually completed sale, and merely for purpose of delivery and as a sort of carrier between vendor and vendee. I think that is erroneous. Prior's functions as a mercantile agent were not completed even if a bargain had been concluded, but extended to the delivery of the goods, the collecting of the price, and the giving of a receipt and a subsequent accounting to the plaintiff. Delivery of possession to Prior was a necessary step to enable him to complete his office. The same point was raised under the old Acts in *Baines v. Swainson* (4 B. and S., 270) and in *Vickers v. Hertz* (L.R. 2 H.L. Sc., 113), referred to in *Cole v. North Western Bank* (*supra*, at page 374), in which case it was held that possession given to the agent in similar circumstances was possession given to him in his capacity as a mercantile agent. I think that is still the law. But it must further be determined if the possession was obtained with the consent of the plaintiff. It is not necessary here to rely on the presumption expressed in section 2 (4) of the Factors Act, 1889, because I hold that the plaintiff did consent to the possession. It is true that the consent was obtained by fraud, and that in any event the plaintiff's sanction to Prior's selling was limited to a selling at a definite price and to a definite purchaser, and, accordingly, Mr. Bevan relied on certain observations of Mr. Justice Wills in *Biggs v. Evans* (10 *The Times* L.R., 59 ; [1894] 1 Q.B., 88), stated to be to the effect that there was no intrusting for sale within the old Factors Acts because the principal gave only a partial or limited authority to sell. If that were the effect of that judgment, it would seem inconsistent with the principles laid down in the cases relating to the old Factors Acts and would clearly be contrary to the language and purpose of the Factors Act, 1889, and to the cases decided under it. But it is said that there was no consent in law because Prior obtained the tapestry in circumstances which rendered him guilty of larceny by a trick. I do not think he was guilty of that offence. When Prior obtained possession of the tapestry, the plaintiff intended not merely to part with possession but also to confer a power to pass the property ; it is clear that in such a case the misappropriation is either larceny by a bailee or obtaining goods by false pretences on the principles explained in *Whitehorn Bros. v. Davison* ([1911] 1 K.B., 463) and *Folkes v. King* (39 *The Times* L.R., 77 ; [1923] 1 K.B., 282). But a fraud of that character, such as not to amount to larceny by a trick, does not vitiate the consent

of the owner to the agent's possession. Whether even larceny by a trick can, consistently with the policy and purpose of the Factors Act, 1889, which was passed to protect innocent purchasers for value, be held to vitiate consent in fact given and intended by the principal, remains the subject of two conflicting decisions of the Court of Appeal—namely, *Oppenheimer v. Frazer* (23 *The Times* L.R., 410; [1907] 2 K.B., 50) and *Folkes v. King* (*supra*). I do not, on my view of the facts, consider that the particular question arises in this case.

I accordingly hold that Prior obtained possession of the Aubusson tapestry in his capacity as a mercantile agent and with the consent of the plaintiff; having such possession, he made (as I have found above), in the ordinary course of business of a mercantile agent, a sale to the defendant, who, it is not contested, acted in good faith and with no notice of Prior's want of authority. I hold that the defendant establishes his defence as regards the Aubusson tapestry under the Factors Act, 1889. This conclusion renders it unnecessary to discuss the plea based on estoppel at common law. I merely observe that on the facts established the defendant had no notice of the actual relations between the plaintiff and Prior, or how as between them business was conducted, and knew nothing except that the tapestry belonged to the plaintiff, and that Prior, whom the defendant regarded as a commission dealer, stated that he was selling it on behalf of the plaintiff.

I now deal with the Leopard tapestry, which raises different considerations. In my judgment, the defendant here fails in his defence under the Factors Act, 1889, because Prior never had possession of the tapestry with the consent of the plaintiff, and hence the conditions of the Factors Act, 1889, were never fulfilled. I have held that, while the tapestry was at 10, Palace-street, it was not in the possession of Prior but of the plaintiff. The plaintiff never in fact parted with that possession. Prior simply stole the tapestry in January, 1924. It was not till October, 1924, that the plaintiff, or Mr. Urwin, discovered that it had been taken, and it was that discovery which led to Prior's arrest the same night. Similar reasons show, in my opinion, that no estoppel at common law can be established. The defendant, in purchasing the Leopard tapestry, did not know or consider whether he was buying from Prior as an agent or as a principal, or whether the tapestry belonged to Prior or not, and, if not, to whom it did belong. Such considerations, which would be immaterial under the Factors Act, 1889, are vital in regard to a plea of estoppel. Such a plea involves a representation, express or implied, by words or conduct, by the principal, becoming in ordinary course known to and being relied on by the purchaser, that whereas the goods belong to the principal they are being sold on his behalf and by his authority. But the defendant, far from knowing of or acting on any such representation on the part of the plaintiff, did not even know or consider that the tapestry belonged to the plaintiff. Nor did the plaintiff by his conduct do anything to represent, expressly or impliedly, to the defendant that Prior was authorized to sell on his behalf; such a contention might in some cases be put forward where a principal has entrusted for sale, even though under limitations, an article to a person who carries on a general business as a commission agent. But the plaintiff never so entrusted, or entrusted at all, the Leopard tapestry to Prior, who in fact simply took it dishonestly by stealth. It may be that the theft was facilitated because Prior had free access to 10, Palace-street, but that fact is, in my opinion, immaterial.

The plaintiff is therefore entitled to recover in respect of the Leopard tapestry, the damages being £270.

[Solicitors—Messrs. Windybank, Samuell, and Lawrence; Messrs. Powell, Rogers, and Merrick.]

K.B. Div. (Wright, J.) 1926. Nov. 5.

BANK OF LIVERPOOL AND MARTINS, LIMITED v. HOLLAND.*

Assignment—Chose in action—Debt—Amount recoverable expressed to be less than debt—Whether absolute assignment of the whole—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 136.

The defendant owed £285 to one W., who owed money to the plaintiff bank, and W. assigned to the bank the debt owed to him by the defendant. The assignment, which was in writing, provided that "the amount recoverable under these presents shall not at any time exceed the sum of £150." Due notice of the assignment was given to the defendant. In an action upon the assignment,

Held, that the assignment was not an assignment of part only of the debt, but an absolute assignment of the whole debt with a proviso that if the bank recovered more than £150 they must hold the balance as trustees for the assignor, and it was therefore a good legal assignment, and that even if it was an assignment of part only of the debt it would still be a good equitable assignment, and the plaintiffs were entitled to recover.

The plaintiffs in this case claimed as assignees a sum of money due under an agreement made between the defendant and one Wilkinson.

Mr. van den Berg appeared for the plaintiffs; Mr. C. P. Harvey (Mr. W. T. Monckton with him) for the defendant.

By an agreement in writing made on November 5, 1925, Wilkinson sold his business to the defendant Holland. It was agreed that £65 should be paid at once, and that completion should take place on or before November 23, 1925. Completion did not take place by that date, but Holland paid sums on account from time to time, and at the date material to this case he had paid in all £365, leaving £285 still owing. Wilkinson had an overdraft with the plaintiff bank, and by way of security and to avoid legal proceedings by the bank to enforce payment of the overdraft he gave the bank an assignment of the £285 then due to him from Holland. The bank now sued upon the assignment.

The material parts of the document were as follow:—

"This assignment is made the twenty fourth day of June one thousand nine hundred and twenty six between William Robert Wilkinson of . . . (hereinafter called the mortgagor) of the one part and the Bank of Liverpool and Martins, Limited . . . (hereinafter called the bank) of the other part. Whereas the mortgagor recently sold his business . . . to Henry

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

Holland of . . . and there is now owing to the mortgagor by the said Henry Holland the sum of two hundred and eighty five pounds in respect of such sale and Whereas the mortgagor is indebted to the bank in a sum of £100 or thereabouts and the bank have requested payment thereof and the mortgagor has agreed to give such security therefor as hereinafter appearing Now This Deed Witnesseth that in consideration of . . . the forbearance of the bank to take immediately proceedings for the recovery of the said amount due by the mortgagor to the bank the mortgagor as beneficial owner doth hereby assign unto the bank All That the debt or sum of £285 due as aforesaid by the said Henry Holland to the mortgagor . . . to hold the same unto the bank absolutely . . . And it is hereby agreed and declared that the amount recoverable under these presents shall not at any time exceed the sum of one hundred and fifty pounds. . . ."

The proceedings began by a claim under Order XIV., and the defendant obtained leave to defend on the grounds (i.) that there was a pre-existing oral agreement between Wilkinson and the defendant, and that the written agreement of November 5, 1925, did not express the real intention of the parties ; and (ii.) that the assignment in any case was not an absolute assignment within section 136 of the Law of Property Act, 1925 (which has taken the place of section 25 (6) of the Supreme Court of Judicature Act, 1873).

Due notice of the assignment had been given to the defendant.

Mr. VAN DEN BERG submitted that the assignment was good as a legal assignment, but, if it was not, then at least it was a good equitable assignment. He referred to *Brandt's Sons and Co. v. Dunlop Rubber Company* (21 *The Times* L.R., 710 ; [1905] A.C., 454) ; *Hughes v. Pump House Hotel Company* (18 *The Times* L.R., 654 ; [1902] 2 K.B., 190) ; *In re Steel Wing Company* ([1921] 1 Ch., 349).

If the assignment was only good as an equitable and not as a legal assignment, it might be necessary to join Wilkinson as a co-plaintiff, and he had the consent of Wilkinson if that was required.

Mr. HARVEY said that the real agreement between Wilkinson and the defendant was that the balance of the purchase money for the business was only to become payable as and when the defendant should receive money that was coming to him under the will of a relative who had died in Canada. He tendered evidence to that effect, but his LORDSHIP ruled that, as it purported to vary the written document, it was inadmissible unless the defendant applied for leave to rectify the document. Mr. Harvey did not apply for rectification. He referred to *Durham Brothers v. Robertson* ([1898] 1 Q.B., 765).

MR. JUSTICE WRIGHT stated the facts and said that he had to determine whether the assignment was a good legal assignment. Without the last paragraph (set out above) of the assignment the case would have been covered by *Hughes v. Pump House Hotel Company* (18 *The Times* L.R., 654 ; [1902] 2 K.B., 190). It was essential that an assignment must transfer the whole debt so that the debtor could know once for all whom he had to pay, and should not be liable to different actions and different executions by assignees of different parts of his debt. The question here was really what was the effect of the word "recoverable" in the proviso that the amount recoverable should not exceed £150. Mr. Harvey contended that its effect was to reduce the assignment to one of part only of the debt, and that therefore the assignment was bad. As to that, he would hold, following *In re Steel Wing Company* ([1921] 1 Ch., 349), that even if it was an assignment of only part of the debt it would still be a good equitable assignment. But was it an assignment of only part of the debt ? In his view it was not an assignment of part of the debt, but was an absolute assignment to the bank of the whole debt, with a proviso that if the bank should recover more than £150 from the debtor they must hold the balance in excess of £150 as trustees for Wilkinson. The fact that a creditor remained trustee of part of the debt did not make the assignment any the less absolute. *Comfort v. Betts* (7 *The Times* L.R., 475 ; [1891] 1 Q.B., 737). The assignment, therefore, was a good legal assignment, and there must be judgment for the plaintiffs.

[Solicitors—Messrs. Kinch and Richardson, for Mr. J. H. S. Aitken, Nelson ; Messrs. H. Backhouse and Son, Blackburn.]

K.B. Div. (Finlay, J.) 1926. Oct. 28.

LAUBACH v. COOPTIMISTS' ENTERTAINMENT SYNDICATE, LIMITED, AND ANOTHER.*

Master and Servant—Negligence—Doctrine of common employment—Accident to servant—No finding of negligence by employers—Finding of negligence by another servant of employers—Supply of appliances.

The plaintiff, a member of the orchestra at a theatre, sued his employers for damages for injuries suffered by him by reason of a club supplied by the employers to a performer slipping from the performer's hand during a performance and striking the plaintiff. The jury (*inter alia*) found (1) that the employers were not guilty of negligence in supplying the club, (2) that the employers' stage-manager was guilty of negligence, and (3) that the employers were not negligent in employing the stage-manager.

Held, on these findings, that the fact of the stage-manager's negligence being in respect of the supply of appliances did not in the circumstances exclude the application of the doctrine of common employment, and the defendant employers were not liable to the plaintiff.

This was a further argument on the findings of the jury after a trial before Mr. Justice Finlay and a common jury.

The action was brought by the plaintiff, Mr. Sydney Laubach, who was a professional 'cellist and a member of the orchestra at His Majesty's Theatre, against the Cooptimists' Entertainment Syndicate, Limited, and Miss Betty Chester, to recover damages for an injury which he said he had suffered on October 21, 1925, owing to a club, used by Miss Chester during a performance at His Majesty's Theatre, slipping from her hand and striking him.

It appeared that the second defendant, Miss Betty Chester, had previously complained to the stage-

* Reported by S. SEUFFERT, Esq., Barrister-at-Law.

manager, Mr. Brightman, about the weight of the club.

After the hearing, the jury answered the questions which had been left to them as follows :—

(1) Was the defendant syndicate negligent in supplying the club ?—No.

(2) Was Mr. Brightman guilty of negligence ?—Yes.

(3) Was the defendant syndicate guilty of negligence in appointing Mr. Brightman to do the work that he was employed to do ?—No.

(4) Was Miss Betty Chester guilty of negligence ?—Yes.

(5) What damages, if any ?—£30.

Mr. J. B. Melville appeared for the plaintiff ; Mr. Doughty, K.C., and Mr. Ronald Ross for the first defendants, the Cooptimists' Entertainment Syndicate, Limited ; and Mr. H. M. Giveen for the second defendant, Miss Betty Chester.

Mr. Doughty, for the defendant syndicate, submitted that on the answers of the jury the defendant syndicate was entitled to judgment.

Mr. Melville, for the plaintiff, contended that if Mr. Brightman was guilty of negligence, it was negligence in respect of the supply of appliances, and that such negligence was the negligence of his employers, the defendant syndicate. He referred to *Toronto Power Company v. Paskwan* ([1915] A.C., 734), and contended that that decision was not put on the ground of a breach of statutory duty.

Mr. Justice Finlay.—The jury have found that there was no negligence on the part of the defendant syndicate either in appointing Mr. Brightman or in supplying the apparatus. The only negligence was the negligence of Mr. Brightman. You say that, if any employee is negligent in respect of the supply of plant or anything of that sort, his employers become *ipso facto* responsible.

Mr. Melville.—Yes ; the employers cannot escape liability by saying that they have appointed some one else to supply the plant. In the event of the employers' not personally superintending and directing the work, it is their duty to select a proper and competent person to do so, and to furnish him with adequate materials and resources for the work. The Cooptimists' Entertainment Syndicate is liable for the negligence of Mr. Brightman in this case. Counsel referred to *Wilson v. Merry* (L.R., 1 H.L. Sc., 326) ; *Williams v. Birmingham Battery and Metal Company* (15 *The Times* L.R., 468 ; [1899] 2 Q.B., 338).

Mr. Giveen, for the second defendant, Miss Chester, supported Mr. Melville's argument, and said that, though there was a class of cases where a breach of a statutory duty had been held not to be excused by the doctrine of common employment, the *Toronto Power Company* case (*supra*) did not turn on the question of the statute, and if the law was as stated in that case there was a primary duty on the master to provide proper appliances and plant, and he could not get rid of that primary duty by delegating it to some one else. The employer was under a duty to provide proper material, and the finding of the jury in this case must mean that the person to whom that duty was delegated failed to fulfil that duty, and that the plant provided was not fit.

Mr. Justice Finlay.—What do you say, Mr. Doughty, about *Toronto Power Company v. Paskwan* (*supra*), with regard to laying down the principle that the master has to provide proper plant and can delegate that duty if he likes, but that he delegates it at the risk of the failure of his delegate to fulfil the duty, with the result that the master is responsible ?

Mr. Doughty said that the questions as framed and left to the jury raised the same point as that raised in the *Toronto Power Company* case (*supra*), which dealt with *Wilson v. Merry* (*supra*), and he then referred to *Cribb v. Kynoch, Limited* (23 *The Times* L.R., 550 ; [1907] 2 K.B., 548), *Young v. Hofmann Manufacturing Company, Limited* (23 *The Times* L.R., 671 ; [1907] 2 K.B., 646), and *Henson v. Lancashire and Yorkshire Railway Company* (20 W.R., 297). According to the judgment in the *Toronto Power Company* case (*supra*) there were cases where an employer who had knowledge of a want of machinery could not delegate the duty of supplying machinery to some one else, but it was always a question of fact for the jury whether he could or could not delegate. Counsel contended that it was a question of fact for the jury in this case to say whether it was a reasonable thing to have left this matter to the employee.

Mr. Justice Finlay.—I have come to the conclusion that on these findings in this particular case it is my duty to enter judgment in favour of the defendants, the Cooptimists' Entertainment Syndicate, Limited. Although the amount involved is very small, no doubt the question raised is one of some importance, and I desire to say, without attempting any review of the authorities, why I am entering judgment in the way that I do. The jury have found that the defendant syndicate was not guilty of any negligence in supplying these clubs, and they have also found that Mr. Brightman, the defendant syndicate's stage-manager, was guilty of negligence, and that the defendant syndicate was not guilty of negligence in employing Mr. Brightman to do the work that he was doing. Upon that it is said by Mr. Doughty that in view of the decision in *Wilson v. Merry* (L.R., 1 H.L. Sc., 326) he is entitled to judgment. It is said by Mr. Melville that that is not so, and that the later authorities, particularly the *Toronto Power Company* case ([1915] A.C., 734), go to show that where the matter is a matter of supplying plant, then the master cannot relieve himself of responsibility merely by delegating it to a person who is incompetent for the task. My impression is that it is to some extent a question of degree. I think there may be cases, as, for instance, in the fitting up of a mine or a great factory, where it would be correct to arrive at the same conclusion as in the *Toronto Power* case (*supra*). But it is necessary to consider what this case is. This is a case of the ordinary running of a theatre. It is merely the case of the supplying of the articles which have led to an unfortunate accident, and it seems to me that it would be doing violence to common sense to say that there is a rule of law which requires that one should say that an employer not guilty of any negligence himself is nevertheless to be held liable because he was bound to supply plant. I do not think that there is a rule established to the extent which Mr. Melville suggests. In my opinion the substance of the view of the jury was that Mr. Brightman was negligent and that no one else was negligent, even in his appointment. I am of opinion that the truth of the matter is that there was negligence by Mr. Brightman, who was an employee of the syndicate. I think, therefore, that the syndicate is entitled to judgment. There will be judgment for the plaintiff against Miss Betty Chester with costs, and there will be judgment for the syndicate with costs against the plaintiff.

Mr. Melville asked that the costs payable by the plaintiff to the defendant syndicate should be

added to the costs payable by Miss Betty Chester to the plaintiff.

After some discussion, Mr. Justice Finlay refused to make any special order with regard to the costs.

In the result judgment was entered for the plaintiff against Miss Betty Chester for £30, with such costs as that amount carried (namely, costs on the County Court scale), and judgment was entered for the defendant syndicate against the plaintiff, with costs.

[Solicitors—Messrs. Bulcraig and Davis ; Messrs. Kenneth, Brown, Baker, Baker ; Mr. O. L. Richardson.]

K.B. Div. (Roche, J.) } 1926. Nov. 8.

RICHARDSON v. MONCRIEFFE.*

Gaming—Chemin-de-fer—Losses—Payment by cheque to croupier or banker—Action on cheque.

The plaintiff and other players of chemin-de-fer took it in turn to be croupier or banker. The defendant, who was one of the players, bought counters to stake, and at the end of the game, having lost £500, he gave a cheque for that amount to the plaintiff in payment of what he had lost to the plaintiff and/or other persons. In an action on the cheque,

Held, that a payment to a winner at gaming, or to a person who accepted payment for winners, in the form of a cheque, was void and unenforceable, and the action failed.

This was an action in which Mr. Henry Thomas Richardson, a commission agent, of 90, Charing Cross-road, W.C., claimed £500 from Mr. J. A. Moncrieffe, who was stated to have been an officer in the Guards, and whose address appeared on the writ as "care of" a firm of wine-merchants in St. Martin's-place, W.C.2, as drawer of a cheque for that sum payable to the plaintiff, the cheque having been dishonoured on presentation. Alternatively, the plaintiff claimed damages for alleged breach of a contract by the defendant to pay into his bank sufficient money to meet the cheque in consideration of the plaintiff's postponing presentation of it.

The defendant pleaded that there was no consideration for the cheque, and that it was drawn for a void or illegal consideration. He said that the plaintiff carried on the business of a betting house, and that the cheque was given to the plaintiff on December 23, 1925, for losses at chemin-de-fer, which the plaintiff conducted or at which he acted as croupier.

It was stated that the plaintiff had cashed the cheque for the defendant at the conclusion of the game.

Mr. Cope Morgan and Mr. G. O. Slade appeared for the plaintiff ; Mr. Hawke, K.C., and Mr. Harold Simmons for the defendant.

In the absence of the plaintiff, who was stated to be abroad, the case for the plaintiff consisted of the cheque and the affidavit sworn by the defendant under Order XIV.

After hearing argument, Mr. Justice Roche held that there was no case to go to the jury. The plaintiff had contended that the parties had entered into a new agreement with fresh consideration, and had relied on *Hyams v. Stuart King* (24 *The Times* L.R., 675 ; [1908] 2 K.B., 696). The only evidence on that point was that when the defendant handed the plaintiff the cheque he asked him to hold it over, and the plaintiff agreed to do so, and that a few days later it was agreed that the cheque should not be presented until January 10, 1926. The plaintiff had not adduced any evidence of a new bargain fit to go to the jury.

The next point taken by the defendant was that the case fell within the Betting Act, 1853, and the Gaming Houses Act, 1854. *Jenks v. Turpin* (13 Q.B.D., 505) and *Fairtlough v. Whitmore* (11 *The Times* L.R., 288) showed the nature of the game of chemin-de-fer, and appeared to establish that where that game was played in a club the club came within the Acts. The materials before him, however, were not adequate to show that no other conclusion would be open to a jury than to find that the place where the game had been played in the present case was a gaming house and that the transactions which had terminated in the transference of the cheque were bad on that account. He would not stop the case on that point alone.

It had also been said that the transactions were void under the Gaming Acts of 1835 and 1845. The plaintiff and other players took it in turn to be croupier or banker at the game during which the defendant bought counters to stake. At the end of the game the defendant's losses amounted to £500 ; he owed that sum for counters to somebody. As payment of those losses to the plaintiff and other persons—or only to other persons—and not as repayment of any loan, the plaintiff accepted the cheque. A payment made to a winner, or person who accepted payment for a winner or winners, in the form of a cheque was void and unenforceable in these Courts.

There was, therefore, no case to go to the jury, and judgment must be entered for the defendant.

[Solicitors—Mr. Lewis Stroud ; Messrs. Stewart-Moore and Twyford.]

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

House of Lords. (Viscount Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Carson.) } 1926. Nov. 8.

SCOTT v. LONDON AND NORTH-EASTERN RAILWAY COMPANY.*

Master and Servant—Compensation for injury by accident—Dependants—Illegitimate children of wife of workman—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 2.

The House held that where a workman had been killed by accident, leaving a widow who was entitled to compensation, her two illegitimate children by another man, born some time before her marriage and partly maintained under an order upon the father, were not dependants of the deceased workman within the meaning of s. 2 of the Workmen's Compensation Act, 1923, so as also to be entitled to compensation.

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

Decision of the Court of Appeal (42 *The Times* L.R., 292 ; [1926] 2 K.B., 204) affirmed.

The HOUSE without calling on counsel for the respondents, dismissed this appeal from an order of the Court of Appeal (42 *The Times* L.R., 292 ; [1926] 2 K.B., 204) affirming an award of the County Court Judge of Lincolnshire made under the Workmen's Compensation Acts, 1906 to 1923.

The appellant, Alice Scott, claimed compensation for herself and her two children, by reason of the death of her husband, who was killed on June 5, 1925, by an accident arising out of and in the course of his employment with the respondents.

The appellant was married to her husband in July, 1923. There was no issue of the marriage, but, at the date of her marriage, the appellant was the mother of twin illegitimate children by another man, who was alive, and against whom she had obtained a maintenance order of 4s. per week in respect of each child. The deceased workman used to pay the appellant out of his earnings 23s. per week, and out of that sum she paid the household expenses and also bought clothes and boots for the twin children. Those children lived with her sister, to whom she sent the 8s. per week regularly. When the 8s. due from the putative father was in arrear the appellant provided that amount out of the moneys given her by her husband.

The respondents admitted the widow's claim and paid £300 into Court. On behalf of the children she claimed an extra sum under section 2 of the Workmen's Compensation Act, 1923.

The County Court Judge held that the children were not in law entitled, as dependants, to compensation under the Acts, but found that they were, in fact, partially dependent upon the deceased workman's earnings. The Court of Appeal (the Master of the Rolls, Lord Justice Scrutton, and Lord Justice Sargant) affirmed his award.

Mr. Montgomery, K.C., Mr. William Shakespeare, and Mr. Cluer appeared for the appellant ; Mr. Greaves-Lord, K.C., and Mr. Cope Morgan for the respondents.

VISCOUNT DUNEDIN, in the course of his judgment, said that the case raised what he could not help calling a perfectly preposterous claim. A woman had two illegitimate children. The father was known, and he had been ordered to make a weekly payment for their sustenance. The woman married another man and, after her marriage, the children no longer resided with her. As she was their mother, and had ties of natural affection towards them, she used to give them presents of boots and clothing from time to time ; and, if their real father was a little unpunctual in his payments, she used to see that the money was forthcoming.

The husband died as the result of an accident arising out of and in the course of his employment, and she, as his widow, became entitled to compensation, which the employers paid. But the present claim was made on behalf of her two illegitimate children, who did not come under either the category of being dependants or that of being members of the family. In these circumstances he thought that the judgment of the Court of Appeal was right, and that the appeal should be dismissed, with costs.

LORD ATKINSON, in concurring, said that it was a hopeless appeal.

The other noble and learned Lords concurred.

[Solicitors—Messrs. Pattinson and Brewer ; Sir R. F. Dunnell.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.) } 1926. Oct. 15.

OUTERBRIDGE v. OUTERBRIDGE.*

Husband and Wife—Maintenance order—Discharge on ground of adultery—Arrears accrued before discharge—Recovery—Order "under this Act"—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 6—Affiliation Orders Act, 1914 (4 and 5 Geo. V., c. 6), s. 2.

Where a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, has been discharged on the ground of the wife's adultery, she may nevertheless enforce payment of arrears accrued due down to the date of discharge and obtain an order for the attachment of her husband's income. Such an order is not an order "under this Act" within s. 6 of the Summary Jurisdiction (Married Women) Act, 1895.

This was a case stated by justices for the county of Surrey.

An application was made by the respondent against Richard H. Outerbridge, the appellant, for his committal for non-compliance with an order for maintenance made under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, on April 15, 1915, by which the appellant was ordered to pay the respondent £2 a week until the order should be varied or discharged. A summons for the arrears up to February 14, 1924, which had been adjourned from that date, was heard on January 21, 1926, when the following facts were found :—

(*a*) That the order of April 15, 1915, was, in accordance with section 7 of the above statute, discharged by the justices on February 14, 1924, as from that date, on the grounds of the respondent's adultery with one Frost.

(*b*) That there was on February 14, 1924, the sum of £390 unpaid under the order, and that the same sum was still unpaid on January 21, 1926.

The justices ordered the appellant to pay the arrears to the respondent by instalments of £2 a week, and under section 2 of the Affiliation Orders Act, 1914, and section 9 of the Summary Jurisdiction (Married Women) Act, 1895, ordered the attachment of the appellant's income from the Public Trustee for the payment of the said instalments. The grounds for making this order were as follows :—That the order of April 15, 1915, was only discharged as from February 14, 1924 ; and that there was £390 still due to the respondent as arrears up to February 14, 1924, under that order.

It was contended for the appellant that this order was erroneous in law and in excess of jurisdiction by reason of the facts, that the order of April 15, 1915, having been discharged by the justices as from February 14, 1924, was no longer in force and that no further order for payment of money thereunder could be made ; that no further order for payment could be made because by section 6 of the Summary Jurisdiction (Married Women) Act, 1895, no order could be made thereunder on the application of a married woman after proof of her adultery ; that the justices were *functi officio*, and had no power to make

* Reported by J. W. HALL, Esq., Barrister-at-Law.

another order for payment of arrears against the appellant; that this order of January 21, 1926, was erroneous in law and in excess of jurisdiction as divorce proceedings between the parties were pending at the date of the application for and the making of the order; that the order was erroneous in law and in excess of jurisdiction because it was made in respect of arrears alleged to be due subsequently to the commencement of the adulterous cohabitation with Frost; and that the order was erroneous in law and in excess of jurisdiction inasmuch as no documentary or other evidence was adduced of any settlements or investments made in favour of the appellant.

It was contended for the respondent that the order was rightly made; that section 6 of the Act of 1895 did not apply to an order for payment of arrears due under an order before discharge; and that divorce proceedings between the parties were no bar to the making of the order.

The appellant applied to the justices to state this case.

The question upon which the opinion of the Court was desired was whether the justices upon the above statement of facts came to a correct decision in point of law or were acting within their jurisdiction in making the order, and if not, what should be done in the premises.

By the Summary Jurisdiction (Married Women) Act, 1895, section 6: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery. . . ."

By section 9: "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced, under an order of affiliation.

Mr. Wellesley Orr appeared for the appellant; Mr. J. Douglas Young appeared for the respondent.

The Lord Chief Justice.—This is a case stated by justices, and the question arises on an application by the respondent, Mrs. Outerbridge, against the present appellant for his committal for non-compliance with an order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895. The history of the case is, for the sake of clearness, a little important.

The order for maintenance was made in April, 1915, and the appellant was ordered to pay the respondent £2 a week till the order was discharged. The payments fell into arrear, and the respondent took out a summons for those arrears returnable on February 14, 1924. But that summons was not dealt with on February 14, 1924. In the meantime a summons had been taken out by the appellant for the discharge of the order on the ground of the respondent's adultery, and on February 14, 1924, the order was discharged on the ground of adultery, and the wife's summons for arrears was adjourned. Nothing further was done on it till in 1926 it was reinstated, and the justices made an order for the payment of the arrears to the date of the discharge of the order, and for the attachment of the appellant's income. They state as the ground for making the order that the maintenance order was only discharged on February 14, 1924, and at that time there was £390 due to the respondent under that order.

The chief ground of appeal as appears from the case and from the arguments before us on behalf of the appellant was that the justices were *functi officio*, and had no power to make an order against the appellant, *scilicet* because the maintenance order had been discharged. The effect of the argument is that, if a woman who has obtained an order for maintenance is going to commit adultery, she must be diligent to collect her arrears first. The basis of the contention is to be found in the Summary Jurisdiction (Married Women) Act, 1895. Sections 4 and 5 having dealt with the granting of orders, section 6 provides as follows: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery. . . ."

The argument made was this: This order which the justices made in the present case was an order "under this Act" and there was no power to make it. The answer was that the original order was undoubtedly made "under this Act," but that a distinction must be drawn between that order and the order for enforcement of arrears, which was made under the powers conferred by the Affiliation Orders Act, 1914. In other words, for the enforcement of the payment of such sums nowadays it is not necessary to obtain an order under the Summary Jurisdiction (Married Women) Act, 1895; what is needed is an order similar to that sought by persons seeking to enforce affiliation orders. The question has been dealt with in *Ruther v. Ruther* ([1903] 2 K.B., 270), where Lord Alverstone said, at page 274: "The Act of 1895 provided a new and amended procedure for making orders for the maintenance of wives, and by section 9 it is enacted that the payment of any sum of money directed to be paid by an order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. The procedure for enforcing payment is therefore regulated by section 4 of the Bastardy Laws Amendment Act, 1872, which empowers magistrates where an order for payment has not been obeyed and no sufficient distress can be had to commit the defendant to prison for any term not exceeding three months." And Mr. Justice Wills said, at page 275: "Orders for payment made under the Act of 1895 are by section 9 to be enforced in the same way as affiliation orders; and on looking at section 4 of the Bastardy Laws Amendment Act, 1872, one sees what the procedure is. Therefore an order of committal for non-payment is not an order made under the Act of 1895." That decision seems to depend precisely on the contrast sought to be made in this case, and the learned Judge went on: "As to the main question, it is clear that there is no power to order committal for non-payment of the weekly sum after adultery on the part of the wife has been proved. I do not mean to say that the respondent was not entitled to recover arrears in respect of the period between the date when the adultery was committed and the date when the order ought to have been discharged." Mr. Justice Channell agreed. In those circumstances, the decisions being what they are, it seems clear that it was open to the justices to make the order which they made in this case about the arrears which had accrued before the discharge of the order.

I have come to the conclusion, not without hesitation, that the justices were right.

Mr. Justice Avory.—In this case I have entertained, and still entertain, considerable doubt whether an order made under the Act of 1895 which has been discharged can afterwards be enforced, and also I entertain some doubt whether this order is not an order under the Act of 1895. If it were, then section 6 would prohibit the justices from making the order on proof that the wife had committed adultery. But it has apparently been decided that an order for payment of arrears is not to be treated as an order under the Act of 1895. It is a very fine distinction, but

just intelligible. It has been held in *Ruther v. Ruther* ([1903] 2 K.B., 270), certainly by implication, if not in express terms, that on an application for arrears the wife is entitled to receive them up to the date of proof of adultery and not merely to the date at which adultery was committed. I have already in another case expressed a view which did not find favour with the majority of the Court and need not repeat it.

In these circumstances I do not dissent from the judgment of my Lord, with which I understand my brother Salter agrees.

Mr. Justice Salter.—I agree that the justices had jurisdiction to make an order for payment of arrears due under this order, which had been discharged, but not annulled *ab initio*. The jurisdiction to make this order was derived partly from section 9 of the Summary Jurisdiction (Married Women) Act, 1895, and partly from the Bastardy Acts. In a sense, no doubt it was made "under this Act," but I think not in the sense required. I think we could not hold otherwise without differing from *Ruther v. Ruther* ([1903] 2 K.B., 270). I agree that the justices could order payment of arrears down to the date of proof of the adultery.

[Solicitors—Mr. C. T. Lewis; Messrs. Cardew Smith and Ross.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926.
Oct. 19.

LEYTON U.D.C. v. WILKINSON.*

Justices — Appeal — Recognizance—Appeal by corporation — Recognizance of clerk — Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 3.

Where, on a case stated by justices, the appellants are a corporation, a recognizance entered into by their clerk, which does not show that it was entered into on their behalf and that it is their property which is made liable, does not satisfy the requirements of s. 3 of the Summary Jurisdiction Act, 1857.

When this case, stated by justices for the Becontree Petty Sessional Division of Essex on a question arising under the Public Health Acts, came on for hearing a preliminary objection was taken on behalf of the respondent. The questions raised were whether a corporation was bound to enter into a recognizance to prosecute an appeal, and, if so, whether the recognizance in this case was sufficient.

The Summary Jurisdiction Act, 1857, after providing in section 2 for the making of an application for a case to be stated, enacts in section 3 :—

"The appellant, at the time of making such application and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance before such justice or justices or any one or more of them, or any other justice exercising the same jurisdiction . . . conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court, and pay such costs as may be awarded by the same. . . ."

Sir James O'Connor, K.C., and Mr. G. W. H. Jones appeared for the respondent; Mr. Montgomery, K.C., and Mr. William Allen for the Leyton U.D.C. (now the Leyton Corporation).

Sir James O'Connor said that there was a certain amount of authority that a corporation, which could not appear in person, was not required to enter into a recognizance, but he submitted that they should do so by attorney.

Mr. Montgomery.—I have not come prepared to argue that point, because a recognizance was entered into by the Town Clerk, or rather the Clerk to the Urban District Council.

Sir James O'Connor said that that recognizance was a personal recognizance entered into by the clerk in his own name; it did not purport to bind the council, nor did it appear that the clerk was authorized to enter into it on their behalf. It was in this form :—

"Be it remembered that on the 26th day of May, 1926, John Atkinson, of Town Hall, Leyton, Clerk to the Leyton Urban District Council, personally came before me, one of his Majesty's Justices of the Peace for the said County, and acknowledged himself to owe our Sovereign Lord the King the sum following —namely, the sum of £100 to be levied on his several goods and chattels, lands, and tenements if he the said principal fail in the condition hereon indorsed."

The conditions indorsed were those required, but the person bound was not right. He referred to *Rex v. Inhabitants of Abergele* (5 Ad. and E., 795), where Lord Denman ordered some one to be bound on behalf of the inhabitants; *Southern Counties Deposit Bank v. Boaler* (11 *The Times* L.R., 568).

Mr. Montgomery, for the council, said that the authority to the clerk to apply for a case stated duly appeared on the council's minutes. It was not necessary that it should also be on the face of the recognizance in which Mr. Atkinson was described as clerk to the council. He referred to *Cortis v. Kent Waterworks Company* (7 B. and C., 314), and *Reg. v. Manchester Corporation* (7 E. and B., 453).

The Lord Chief Justice, in giving judgment, said that he thought that the preliminary objection succeeded. The procedure described in section 3 of the Summary Jurisdiction Act, 1857, was made by the statute a condition precedent, and it was to be remembered that the words were "shall *in every instance* enter into a recognizance." In the present case the objection was taken that the Leyton U.D.C. had not in fact entered into any recognizance at all. The question whether a corporation was bound to enter into a recognizance had not been fully argued, but he thought that the burden was on those who contended that a corporation was excused to establish that proposition, in support of which no authority had been cited.

In the case of *Cortis v. Kent Waterworks Company* (7 B. and C., 314), which had been cited, Mr. Justice Bayley said, at page 330 :—

"It is said, however, in this case, that it must be collected from the appeal clause of this Act that corporations were not intended to be included, inasmuch as the person or persons appealing against a rate are required to enter into a recognizance, and that a corporation cannot do so. If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognizance. I am aware that there is a dictum to show that they cannot do so; but as they may appoint an attorney for a variety of purposes, I am not satisfied that they may not do so for the purpose of entering into a recognizance."

* Reported by J. W. Hall, Esq., Barrister-at-Law.

That observation was made as long ago as 1827, and notwithstanding the lapse of time no authority had been produced in support of the proposition that a corporation was excused ; on the other hand, there had been cases in which corporations had entered into recognizances.

The second point was that the recognizance did not satisfy the requirements of the section. It was entered into not by or on behalf of the Leyton U.D.C., but by a man named John Atkinson, who was indeed described as the clerk to the council but nowhere spoke on behalf of the council. On the contrary, he used language referring to himself and "his" appeal.

The Court had been told that that was a stock form. There was a form, and a good deal of it was in print, but words had been written in, and it was open to those concerned to choose words more suited to their purpose. The words were, "to be levied on his goods and chattels." Suppose that the sheriff levied execution on the goods and chattels of Mr. Atkinson, it could hardly be urged in face of this recognizance that he had a right of action against the sheriff. Nor, in face of this recognizance, could the sheriff have levied against the U.D.C.

It was not such a recognizance as was required by the statute. It would have been easy by the use of suitable words to make it clear that it was entered into on behalf of the U.D.C., that it was their goods and chattels which were made liable, and that it was their appeal which was to be prosecuted.

The preliminary objection must therefore be upheld.

Mr. Justice Avory and Mr. Justice Salter delivered judgment to the same effect.

[Solicitors—Messrs. Sharpe, Pritchard, and Co., for Mr. John Atkinson, Clerk to the Leyton U.D.C. ; Messrs. Appleton and Co.]

K.B. Div.
(Lord Hewart, C.J., Salter and Talbot, JJ.)
1926. Oct. 21.

WEBSTER AND OTHERS v. MINISTER OF HEALTH.*

Pensions — Qualification—"Resident"—Meaning of expression—Widows' Orphans' and Old Age Contributory Pensions Act, 1925 (15 and 16 Geo. V., c. 70), s. 23 (1).

Consideration of the meaning of "resident" in s. 23 (1) of the Widows' Orphans' and Old Age Contributory Pensions Act, 1925.

This was the first case stated by special referees under the Widows' Orphans' and Old Age Contributory Pensions Act, 1925, and raised the question whether any, and, if so, which, of six applicants for widows' pensions had been resident (or, in the last case, whether the husband had been resident) in Great Britain within the meaning of section 23 (1) of the Act, which provides :—

"Subject as may be otherwise prescribed, a right to a pension shall not arise in respect of the insurance of any person, unless that person had—(*a*) so far as relates to widows' pensions and orphans' pensions at the date of his death . . . been resident in Great Britain for a period of two years immediately prior to that date . . . Provided that (i.) in the case of a widow's or orphan's pension arising at the commencement of this Act the foregoing provisions of this section shall not apply, but a right to such a pension shall not arise unless the widow or child to or in respect of whom the pension would, apart from this section, have been payable has been resident in Great Britain for a period of two years immediately prior to the commencement of this Act. . . ."

The cases were :—

(1) Mrs. Webster, whose husband died in 1924, and who lived with her father in Ardwick till May 12, 1925, renting two rooms from him, the furniture in which was her own. On that date she went to look for employment in Australia, arranging that the furniture should be left for 12 months, and that if she had not then returned it should be sold on her behalf by her father. She found the prospects of work in Australia unsatisfactory and returned in October, 1925, and remained in Great Britain till after January 4, 1926, the date of the commencement of the Act.

(2) Mrs. Noteyoung, whose husband died in 1917. She was employed by the Navy, Army, and Air Force Institutes as a cook, and in May, 1923, was sent to Cologne, then occupied by the British Army. She remained there (except for short periods of absence owing to health) till November, 1925, when she finally returned to England. During her absence her child remained with her mother in England, where the applicant had two furnished rooms. The child was supported by the applicant, who asked for a transfer to England, but was asked to stay in Cologne.

(3) Mrs. Allport, whose husband died in 1923, and who left Great Britain on medical advice for Canada on June 24, 1924, and returned on June 14, 1925. She had previously lived with a sister in England, and went for a complete change, with her child, to visit another sister in Canada. She stated that she had no intention of remaining in Canada and refused offers of employment there.

(4) Mrs. Whittaker, whose husband died in 1922, and who went with her children to the United States, on the ground of health, from June to November, 1925.

(5) Mrs. Giacopazzi, whose husband died in 1925, and who went to the United States with her husband and child in August, 1924, to visit her sister and see if her husband could get employment. Some of the husband's furniture was sold to a stranger and some was sold to his father, who stored it against the possibility of a return if he could not find suitable work. The husband fell ill in America and died a few days after his return to Great Britain on January 30, 1925. The applicant then went to live where the furniture had been kept.

(6) Mrs. Thomas. In this case the husband did not die till a few days after the Act came into operation, and therefore his residence was the material question. He accepted employment in the Congo Free State in May, 1923, leaving his wife and child living in Great Britain, where he rented for them half the house of her parents. His health broke down and he returned home on December 21, 1924, and was ill till April, 1925. He got work till December, 1925, when he again fell ill and died on January 7, 1926.

Mr. F. B. Merriman, K.C., and the Hon. E. Duke appeared for the applicants, whose cases were brought under the Poor Persons Rules ; the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. Harold Murphy for the Minister of Health.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

The Lord Chief Justice said that the Court did not think that this consultative case required them to hazard a definition of "resident," but they were impressed by the contrast between that term and "absent" in section 22. The contrast was not between "absence" and "presence," but between "absence" and "residence," which need not imply actual physical presence.

In each of these cases the condition of residence was satisfied. To adopt the words of Lord Campbell in *Reg. v. Inhabitants of Stapleton* (22 L. J. M. C., 102), "I should be very glad if we could lay down some general rule applicable to all cases, defining what is a residence under this statute, but . . . I have as yet heard none suggested."

The Court was grateful to Mr. Merriman and Mr. Duke, who had found the time, to the exclusion of other matters, to give their attention to the cases of these poor persons.

[Solicitors—Messrs. Field, Roscoe, and Co.; the Solicitor to the Minister of Health.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P., and Bateson, J.) 1926. Oct. 13.

DIGGINS v. DIGGINS.*

Husband and wife — Maintenance — Deed of separation — Order for maintenance — Jurisdiction of justices—Wife not deprived of right to resort to justices for maintenance by deed — Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 4—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51), s. 1 (1).

A wife's right to claim and obtain an order for maintenance from a bench of justices under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, is not necessarily barred by a deed of separation which makes an allowance for her maintenance, but it must depend on the terms of the deed whether she is or is not deprived of that right.

This was an appeal from an order made by the justices for the borough of Sudbury, Suffolk. The parties were married on August 17, 1917. The wife alleged acts of cruelty against her husband, and left him on September 22, 1925. On December 1 of that year they executed a deed of separation, by which the husband covenanted to pay 30s. a week towards the maintenance of the wife and one of her five children, who were aged from eight years to ten months. The deed provided that if the wife at any time molested her husband directly or indirectly, or if the wife took proceedings for restitution of conjugal rights or for otherwise compelling him to live with her, he should be free to discontinue the weekly payments. The deed also provided for its own avoidance if the parties became reconciled and returned to cohabitation, or if the marriage were dissolved, or if the parties were judicially separated. The wife was to have the custody of the eldest child, a girl, and the husband that of the other four.

After two weeks the payments ceased, the husband alleging that his wife had molested him. On May 17, 1926, the wife took out a summons for maintenance under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, section 1, subsection 1, on the ground that her husband had been guilty of persistent cruelty and had wilfully neglected to provide reasonable maintenance for herself and two of her infant children. When the summons was heard an objection was taken on behalf of the husband that the justices had no jurisdiction, inasmuch as the deed of separation regulated the rights of the parties. The justices overruled the objection, and made an order as follows:—(1) That the wife was no longer bound to cohabit with her husband; (2) that the wife should have the legal custody of the eldest child and the baby while under the age of sixteen; (3) that the husband was to pay 20s. a week maintenance for the wife and 5s. a week for each of these two children while under sixteen.

In their reasons for the decision the justices said that they had disregarded the evidence as to alleged cruelty, but the evidence amply showed that the husband had failed to provide reasonable maintenance. They considered themselves empowered to make the order because of the repeal in the later Act of the following words in the earlier Act:—"And shall by such neglect have caused her to leave and live separately and apart from him." They declined to adjudicate on the deed.

The Summary Jurisdiction (Married Women) Act, 1895, section 4, provided:—"Any married woman . . . whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district . . . in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act. . . ."

By the Summary Jurisdiction (Separation and Maintenance) Act, 1925, section 1 (1), which came into operation on October 1, 1925, it was enacted that such an application by a wife against her husband "may be made notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from him, and accordingly the words 'and shall by such cruelty or neglect have caused her to leave and live separately and apart from him' in section 4 of that Act are hereby repealed."

The husband appealed mainly on the grounds that the justices were wrong—(1) in holding that the appellant had wilfully neglected to provide reasonable maintenance, and (2) in not holding that the respondent wife had committed breaches of the deed, and in consequence any non-compliance by the appellant was justified and the deed was an answer preventing any order from being made.

Mr. C. E. Jones, for the appellant, said that the justices had no jurisdiction to entertain the summons, the wife being limited as to her remedy to suing under the deed of the County Court, where the question of molestation could have been argued. He referred to *Piper v. Piper* ([1902] P., 198), *Roe v. Roe* (32 *The Times* L.R., 490; [1916] P., 163).

The President.—The summons was for desertion in those cases.

Mr. Jones said that *Medway v. Medway* ([1900] P., 141) showed that a summons for neglect to maintain would not lie where the parties were living apart under a deed of separation.

* Reported by William Latey, Esq., Barrister-at-Law.

Mr. Melford Stevenson, for the respondent:—The decision in *Medway v. Medway* (*supra*) has no application since the repeal of the words in section 4 of the 1895 Act by the 1925 Act. That case was decided on the ground that the neglect to maintain did not cause the wife to leave and live separate and apart from the husband. In the present case the wife's statutory rights co-exist side by side with her rights under the deed.

Mr. Justice Bateson.—The deed excludes proceedings for restitution of conjugal rights, but contemplates the possibility of proceedings for judicial separation or dissolution of marriage.

Mr. C. E. Jones, in reply, argued that in the circumstances there was no wilful neglect to provide reasonable maintenance.

Lord Merrivale.—The wife in this case proceeded under section 4 of the Summary Jurisdiction (Married Women) Act of 1895, as amended by the Act of 1925, by way of summons before the justices alleging that her husband had wilfully neglected to provide reasonable maintenance for her. The husband met the wife's allegation of wilful neglect to provide reasonable maintenance by producing a deed into which she had entered in which there were various mutual covenants. One was a covenant by the wife against molestation, and the husband said, "My wife has molested me contrary to the terms of this deed, and I claim to be exempt from any liability under the statute by reason that the deed itself provided maintenance subject to a proviso for discontinuance of it if there were molestation."

It is necessary first of all to see what the Act of Parliament says in its amended form. It is perfectly explicit. It says that, if a husband shall be guilty of wilful neglect to provide reasonable maintenance for his wife, a Court of summary jurisdiction may make an order for maintenance in her favour. As to maintenance, the wife gave evidence of the means of the husband which put out of question any contention that the amount of the order that the justices have made could be impeached. She was entitled also to say: "In the deed upon which my husband relies he has covenanted to pay me 30s. a week for myself and one of the children." So it cannot be said that the sum which is in question is unreasonable; a reasonable maintenance is not less than the sum which the justices have ordered.

The next question is whether the husband has wilfully neglected to provide his wife with reasonable maintenance. He has purposely neglected to do so. The evidence which the justices accepted was that from the second week after the deed was entered into the husband did not pay. The husband said that the wife molested him. Counsel for the appellant relies upon the fact that the justices have said, "We cannot go into that matter." The real question is whether the justices were entitled to go beyond the terms of the Act and to incorporate in the Act the qualification of the wife's right which they should derive by implication from a deed between the parties. The justices thought that they were not so empowered.

The case is clear, apart from the deed. The husband has wilfully neglected to provide reasonable maintenance for the wife. What remains is to ascertain whether the deed excludes the jurisdiction of the justices. It must not be supposed that there is an unlimited right in a wife under the amended statute wherever she has entered into a deed at her own volition to apply to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt that, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek from the justices something different, she will meet with an answer which will prevent the possibility of further question. If she does not meet with it in the first instance, she may meet with it here.

But this is not a case of that kind. The case here is that the parties are in disagreement as to their rights under the deed. There are allegations of molestation. There is some evidence of conduct which might be held to amount to molestation. What we have to determine is whether in such a state of facts, with the statute subsisting, and the parties having entered into a deed about maintenance, the justices are prevented from dealing with the question under the amended Act of Parliament. In my judgment they are not. The deed here does not exclude the wife from going to the justices if reasonable maintenance is not provided. It does not purport to deal with her rights under the 1925 Act. As my brother pointed out, it does provide against resort to the Courts for restitution of conjugal rights, and it does include provisos by which the deed is to be avoided in certain circumstances. It does not deal with the present form of proceeding.

The true effect of the facts as they stand is this, that the Legislature has given the wife, by the amendment in the law embodied in the Act of 1925, a right to resort to a bench of justices for an order for maintenance in case her husband shall wilfully neglect to provide reasonable maintenance for her. This wife has that right, subject only to the proper interpretation of the deed of December, 1925. That deed does not either expressly or by implication deprive her of that right, or effectually limit it. The wife's right, therefore, was intact at the time when she applied to the justices. She established the necessary facts to bring it into operation, and in my judgment the appeal fails.

Mr. Justice Bateson.—I agree. Under the Acts of 1895 and 1925 the wife was entitled to assert her claim to maintenance. It is suggested that the deed is a bar. The deed in terms in the last clause contemplates other proceedings. In an earlier clause it excludes one form of proceeding. It does not exclude these proceedings. I think this appeal should be dismissed.

The appeal was dismissed, with costs.

[Solicitors—Messrs. Doyle, Devonshire, and Co., for Messrs. Jones and Son, Colchester; Messrs. Peacock and Goddard, for Messrs. Steed and Steed, Long Melford.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.) } 1926. Oct. 26.

REX v. GRAIN—EX PARTE WANDSWORTH GUARDIANS.*

Local Government — Gratuity to officer sanctioned by Ministry of Health—Superannuation allowance based on gratuity—Disallowance—Surcharge—Poor Law Amendment Act, 1844 (7 and 8 Vict., c. 101), s. 32—Local Authorities (Expenses) Act, 1887 (50 and 51 Vict., c. 72), s. 3—Poor Law Officers' Superannuation Act, 1896 (59 and 60 Vict., c. 50), ss. 2, 3, 12, 19.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Acting upon a recommendation of the Ministry of Health (made without statutory authority) a board of guardians paid a gratuity to a registrar of births and deaths. That payment, having been sanctioned by the Ministry, could not be disallowed by the district auditor. On the retirement of the registrar the guardians granted him a superannuation allowance based on the average of his remuneration by fees *plus* gratuity in the preceding five years. The district auditor disallowed so much of the allowance as was based on the gratuity, and surcharged it on certain guardians and ex-guardians.

Held, that he had no power to surcharge the amount. Section 32 of the Poor Law Amendment Act, 1844, does not authorize the surcharge of a payment which is illegal unless it was due to the negligence or misconduct of the accounting party.

Held, also by Lord Hewart, C.J., and Avory, J. (Salter, J., dissenting), that the district auditor was wrong in disallowing the payment, as the gratuity formed part of the registrar's "emoluments" within the meaning of s. 19 of the Poor Law Officers' Superannuation Act, 1896.

This was a rule *nisi* for a *certiorari* directed to Mr. H. W. W. Grain, the district auditor of the Wandsworth Union, to bring up and quash a certificate of disallowance and surcharge of a sum of £27 17s. 1d. in the accounts of the Wandsworth Guardians for the half-year ending September 30, 1925.

The question arose out of the payment of gratuities to registrars of births and deaths to meet the increased cost of living. Those gratuities, for which there was no statutory sanction, were authorized and recommended to boards of guardians by circulars of the Local Government Board (now the Ministry of Health), dated May 2, 1918, and May 14, 1920. The circulars pointed out that since registrars were paid by fees and not by salary there was no authority to pay a war bonus, but that great hardship was caused in some cases by the diminution of fees. Boards of guardians were therefore invited to recommend, on lines laid down in the circulars, the payment of gratuities to those officials which the Ministry would be prepared to sanction.

The Wandsworth Board of Guardians, in accordance with those circulars, granted a gratuity to Mr. W. V. Minter, the registrar of births and deaths, and that gratuity was paid for two years, subject to a deduction of 3 per cent. towards superannuation allowance when Mr. Minter should retire. Though there was no statutory sanction for the payments, the district auditor could not disallow them because of the provision of section 3 of the Local Authorities (Expenses) Act, 1887 (50 and 51 Vict., c. 72) :—

"Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board."

On Mr. Minter's retirement a superannuation allowance was granted to him in February, 1922, based on fees *plus* gratuities. The payment of that allowance was not challenged until the half-year ending September 30, 1925, as it was assumed to have been paid on the correct basis. On that occasion, however, a more searching inquiry was made, and the fact that the gratuities were included in arriving at the amount of the basis was disclosed.

The district auditor thereupon disallowed (and surcharged on certain guardians and ex-guardians) the sum of £27 17s. 1d., part of a payment of £137 1s. 10d., in respect of the half-yearly instalment of Mr. Minter's allowance of £274 3s. 8d. That disallowance represented the difference between the amount due on the basis of fees alone and the amount calculated on the basis of fees *plus* gratuity.

The district auditor took the view that, though he was precluded from disallowing the gratuities, the authority of the Ministry did not legalize their payment ; and that they were not "emoluments" of the officer within the meaning of section 3 of the Poor Law Officers' Superannuation Act, 1896 (59 and 60 Vict., c. 50), which enacts that the scale for superannuation allowances to an officer or servant under the Act shall be based upon the average amount of salary or wages and emoluments during the five years ending on the quarter-day preceding the day on which he ceases to hold his office or employment. "Emoluments" are defined in section 19 of the Act as including "all fees, poundage, and other payments made to any officer or servant as such for his own use."

The effect of the disallowance and surcharge, if correct, was to reduce Mr. Minter's allowance from £274 3s. 8d. to £218 9s. 6d. per annum.

The present rule was obtained at the instance of the guardians upon the grounds that the district auditor had no jurisdiction to disallow and surcharge the payment ; that the gratuities were "emoluments" within the meaning of the Poor Law Officers' Superannuation Act, 1896 ; that the sanction of the Ministry of Health legalized the payments of the gratuities ; and that the payment was allowed by the district auditor at several previous audits.

Mr. Montgomery, K.C., and Mr. Croom-Johnson showed cause for the district auditor ; Mr. Wingate-Saul, K.C., and Mr. Crouch supported the rule.

Mr. Montgomery referred to the Births and Deaths Registration Acts of 1836 (6 and 7 Will. IV., c. 86) and 1874 (37 and 38 Vict., c. 88) to show the statutory authority for the remuneration of registrars, and to the Poor Law Amendment Acts of 1834 (4 and 5 Will. IV., c. 76) and 1844 (7 and 8 Vict., c. 101), section 32.

By section 32 of the Poor Law Amendment Act, 1844 : ". . . and every auditor appointed for such a district shall have full powers to examine, audit, allow, or disallow of accounts, and of items therein . . . and such auditor shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable but not brought by him into account against such person, and shall certify on the face of every account audited by him any money . . . found by him to be due from any person . . . and all moneys so certified to be due by such auditor shall be recoverable as so certified from all or any of the persons making or authorizing the illegal payment or otherwise answerable for such moneys. . . ."

The Lord Chief Justice.—Is there any power under that section to surcharge except for negligence or improper conduct ? The wording is different from section 247 of the Public Health Act, 1875, which was in question in the Poplar case, *Roberts v. Hopwood and Others* (41 *The Times* L.R., 436 ; [1925] A.C., 578).

Mr. MONTGOMERY submitted that the power to surcharge arose merely because the payment was illegal, and that in any case the making of the payment in the circumstances amounted to improper conduct. He would not dispute that if the gratuities were legally given they were emoluments. In using the words "improper conduct" he did not suggest any moral stigma.

Mr. WINGATE-SAUL said that, after allowing the payment of this superannuation allowance for three years, the district auditor had gone back and surcharged the guardians and ex-guardians who had voted for it three years previously. The gratuities themselves could not be disallowed, and they had been subject to the pension deduction authorized by the Poor Law Officers' Superannuation Act, 1896. The auditor had then passed the deductions as correct and for six half-yearly audits had passed the payment of the allowance.

The LORD CHIEF JUSTICE.—Has anyone suggested surcharging the district auditor as a person authorizing an illegal payment?—Not yet.

Mr. WINGATE-SAUL said that "misconduct" sufficient to justify surcharge must be something *ejusdem generis* with negligence. It was an abuse of language to use such a term for a mistake of law in construing a difficult section, as to the true interpretation of which their Lordships might have some difficulty after full argument.

He submitted that the word "emoluments" was wide enough to cover any payment in fact made to a registrar for his own use, and that there was no statute preventing boards of guardians from paying a reasonable remuneration to registrars of births and deaths over and above the statutory fees. The Ministry could not be supposed to have been inviting boards of guardians to do something illegal, but was drawing their attention to the propriety of exercising a discretion which they possessed.

Mr. CROOM-JOHNSON, at the invitation of the Court to deal with any specific point, though he had no general right of reply, pointed out that guardians were a purely statutory body, and said that the question was therefore not, "Was there anything to prevent them from making this payment?" but "Was there anything giving them power to make this payment?" They might pay their servants, but registrars were only to be deemed to be their servants for the purpose of the superannuation allowance. This payment was not an "emolument," but a voluntary payment.

The LORD CHIEF JUSTICE.—This is an order *nisi* for a writ of *certiorari* to remove into this Court the certificate of disallowance and surcharge made by a certain district auditor of a certain sum of £27 17s. 1d., that sum having been disallowed by him in the accounts of the Guardians of the Poor of Wandsworth Union for the half-year ending September 30, 1925, and surcharged by the district auditor upon certain guardians of the poor of the Wandsworth Union, and upon certain late members of the board. The grounds upon which the rule was asked and obtained were: First, that the district auditor had no jurisdiction to make the surcharge dated April 12, 1926; secondly, that the gratuities referred to in the district auditor's surcharge were emoluments within the meaning of the Poor Law Officers' Superannuation Act, 1896; thirdly, that the sanction of the Minister of Health legalized the payment of the gratuities; and fourthly, that the superannuation allowance was allowed by the district auditor at a series of half-yearly audits beginning in March, 1922, and ending in March, 1924.

The question arises out of certain gratuities granted by a board of guardians to a registrar of births and deaths for the purpose of meeting, on the one hand, the increased cost of living, and, on the other hand, the decline in the remuneration derived by registrars from the statutory fees. The attention of the Court has been directed to two circulars from the Local Government Board dated respectively May 2, 1918, and May 14, 1920, in which boards of guardians were not merely reminded that they might, but directed that they ought to, make such gratuities in order to meet the difficulties just mentioned. It is said, for example, in the circular dated May 14, 1920, in paragraph 3: "The Minister has stated on several occasions that the grant of a gratuity is within the discretion of the board of guardians, but he feels it his duty to remind the guardians that it is important that the case of registrars of births and deaths should be met, and he hopes that guardians will deal with these cases not less adequately than with officers eligible for war bonus." What happened in the particular case is set out in detail in the various affidavits. I do not take up time by reiterating the various paragraphs; the substance of the matter may be very shortly summarized. After and in consequence of the circulars sent by the Local Government Board, now the Ministry of Health, this particular board of guardians did grant to the registrar of births and deaths referred to in the present case a certain gratuity. Under the statutes relating to his office the registrar was entitled to a series of fees of the nature of capitation fees. The object and the effect of the gratuity paid by the guardians were to supplement the remuneration derived from those statutory sources. The payment of those gratuities was apparent on the face of the accounts of the board of guardians, and at no time, repeated as it was, was it questioned by the district auditor. There was an excellent reason why it should not be questioned. By section 3 of the Local Authorities (Expenses) Act, 1887, it is provided that "Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board." In the present case, whatever else is in dispute, it is common ground that this gratuity was originally suggested, was in its amount approved, and was in this way from time to time sanctioned by the Local Government Board. There came, however, a time when a different question arose, namely: What was the appropriate amount of this poor law officer's superannuation allowance? It is provided by section 12 of the Poor Law Officers' Superannuation Act, 1896, that officers and servants are to contribute to the fund from which the pension is drawn. "Subject"—says section 12—"to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union shall contribute annually for the purposes of this Act a percentage amount of his salary or wages and emoluments according to the scale laid down by this Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the common fund of the union." It is in the present case common ground that in pursuance of that section a certain percentage amount was during the relevant period deducted not only from the fees which this officer was entitled to receive, but also from the gratuity paid to him at the instigation of the Local Government Board. In other words, it is common ground that for the purpose of assessing the amount of his contribution this gratuity was treated as being an

integral part of his emoluments. That, indeed, I think is not surprising, because when we turn to the definition section in the Act of 1896 it appears that the term "Officer" includes: "Every officer in the service of an authority to whom this Act applies," and, "For the purposes of this Act superintendent registrars and registrars of births and deaths and school attendance officers are deemed to be in the service of the guardians of the union in which their districts are situated"; and again by the definition section the term "emoluments" is said to include: "All fees, poundage, and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment." In the present case the guardians, as in the matter of his contribution, so also in the matter of the computation of the amount of his superannuation allowance, treated the gratuity paid to him as being a part of his emoluments. It would have been strange indeed if they had taken any other course. It would have been a little remarkable if they had said: For the purpose of levying your contribution we say that your gratuity is a part of your emoluments, but for the purpose of assessing your allowance we say that it is not. They took no such course; they had one weight and one measure in both cases. I should have thought that this gratuity, being what it is and paid as it was, was a payment made to this officer or servant as such for his own use, and clearly came within the definition of emoluments in section 19 of the Poor Law Officers' Superannuation Act of 1896. It is not seriously denied that it came within that category at the time when it was being paid, and when it was being paid from time to time. What is denied is that it remained in that category when afterwards it was sought to treat it as a factor in the sum upon which the computation for superannuation allowance was to be based.

Now various questions have been stirred in this case which, in my opinion, do not strictly arise. But it is desirable that I should not even seem to pass them over. It is said that in this case there was a duty upon the auditor to surcharge, and that there was a duty upon the auditor to disallow this sum, the sum disallowed being that element in the superannuation allowance which is derived from taking into account as part of the emoluments the gratuity already referred to. Mr. Montgomery, for the purposes of his argument, dealt with, or assumed to deal with, the questions of disallowance and of surcharge as if they were one and the same, as if, to put it in another way, this certificate of disallowance and surcharge were a certificate so described by a combined substantive, there being a hyphen between "disallowance" and "and," and another hyphen between "and" and "surcharge." Mr. Wingate-Saul, on the other hand, dealt with, and no doubt most properly dealt with, each of these matters separately, and I will follow that course. Reference has been made to the various statutes. I need not enumerate them, nor the several orders under them. Sooner or later we come to the Poor Law Amendment Act of 1844, and especially to section 32 of that Act. Now there was a moment in the course of this argument when it appeared to be suggested—in fact, it was in terms stated—that the ground upon which this payment was impugned was two-fold, first, that it was a payment made without lawful authority; secondly, that it was a payment made in circumstances which amounted to improper conduct on the part of the persons making it or authorizing it to be made. In the course of the argument, however, those two clearly became one, and it ought clearly to be understood that at the conclusion of the matter it was most definitely stated and reiterated by Mr. Montgomery that the only sense in which he referred to improper conduct in this context was that he alleged that this was a payment made without lawful authority, and no more. Now when one looks at section 32 of the Poor Law Amendment Act of 1844 there is apparent the clearest possible contrast, as it seems to me, between that section and section 247 of the Public Health Act, 1875, under which some cases have recently arisen. Under section 247 (7) of the Public Health Act, 1875, it is in the clearest possible terms provided that: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law and surcharge the same on the person making or authorizing the making of the illegal payment." There is no opportunity for doubt or controversy as to the meaning of those words; if the payment is illegal it is to be surcharged upon the person making or authorizing it. Then the section goes on to deal with other and more particular matters; the auditor, it says, "shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person. . . ." There is, as I say, a remarkable contrast between that section of the Act of 1875, relating to the matters with which it deals, and section 32 of the Act of 1844. Section 32 of the Act of 1844 begins with no such general words about payments made contrary to law; it begins by saying that the auditor is to have "full powers to examine, audit, allow or disallow of accounts and of items therein relating to moneys assessed," &c., and he "shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable, but not brought by him into account"; then he is to certify, and then he is to report. Side by side with that section it is natural to read, not as indeed concluding the matter, but as throwing light upon it, the General Order for Accounts of the Local Government Board, dated January 14, 1867. By Article 41 of that General Order it is provided that: "In auditing the accounts the auditor shall see that they have been kept and are presented in proper form; that the particular items of receipt and expenditure are stated in sufficient detail; and that the payments are supported by adequate vouchers and authority; and he shall ascertain whether all sums received, or which ought to have been received, are brought into account; and he shall examine whether the expenditure is in all cases such as might lawfully be made; and he shall reduce such payments and charges as are exorbitant, shall surcharge moneys not duly accounted for, or lost by negligence, upon the person who ought to account for the same, or whose negligence or improper conduct has caused the loss." There is a remarkable series of duties explained by the use of a series of different verbs; he is to ascertain, he is to examine, he is in the proper case to reduce, and in a certain very limited class of cases he is to surcharge: "Shall surcharge moneys not duly accounted for or lost by negligence, upon the person who ought to account for the same, or whose negligence or improper conduct has caused the loss."

Now it is a part of the argument against this rule, and in support of the certificate which it is sought

to remove, that any payment made without due authority of law is sufficiently covered by the words "or of any sum for which any such person is accountable, but not brought by him into account." I cannot help thinking, with great respect, that that is a misreading of the statute. What is being dealt with there is accounting; it is being dealt with after what has already been said about deficiency or loss incurred by negligence or misconduct on the part of the person accounting, and, in my opinion, what is there being dealt with is the failure or omission on the part of the accounting person to bring into account some sums which ought to be brought into account. To say that those words are in themselves sufficient to cover any payment made without lawful authority seems to me to have, amongst other things, two effects: one is to render a large part of section 32 of the Poor Law Amendment Act of 1844 surplusage, and another effect is to make surplusage of the clear words with which the Legislature begins section 247 (7) of the Public Health Act of 1875. Where, in other words, was the necessity of providing that an auditor, acting in pursuance of the section, shall disallow every item of account contrary to law and surcharge the same on the person making or authorizing the making of the illegal payments, if the very same thing is covered in the words which shortly afterwards follow, as to any sum which ought to have been but is not brought into the account by the accounting person? I think that that argument fails, and there is in section 32 of the Poor Law Amendment Act, 1844, no power in the district auditor to surcharge a sum merely because it appears to him to have been made without lawful authority, where he is not prepared to say that it represents a deficiency or loss incurred by the negligence or misconduct of the person accounting. So far as surcharge is concerned, it appears to me upon the facts of this case, on the true construction of the words in this statute, that the auditor had not the power to surcharge. If, and so far as, the question of disallowance is a separate question, I think that there is great force in the argument made by Mr. Wingate-Saul that in the circumstances this gratuity became part of the emoluments of this officer. I do not think that when the Local Government Board issued the two circulars to which attention has been directed it was inviting or provoking boards of guardians to make illegal payments. It was, at any rate in terms, inviting boards of guardians to make payments which, it said, were in their discretion, and it purported, at any rate, to be reminding boards of guardians of what it represented to be a duty. The question whether there was indeed, apart from anything which arose in 1918 or 1920, power in the board of guardians to supplement in a proper case the statutory fees of a registrar of births and deaths has not been fully argued. But on the evidence, which is undisputed, I am not prepared to say that the payment of these gratuities was illegal. It is common ground that they could not be questioned by a district auditor at the time when they were made, because of the provisions of the Local Authorities (Expenses) Act, 1887. I am not in the least satisfied that they were illegal payments, and it seems to me to be clear that they became a part of the emoluments of the registrar, and as such entered into the figure upon which not only was his contribution to the superannuation fund to be calculated, but also the amount he was to receive from the superannuation fund was to be calculated. For those reasons, amongst others, in my opinion, this surcharge is wrong, and this disallowance is wrong, and I think that this rule ought to be made absolute.

Mr. Justice Avory.—I agree that the writ should go in this case for the purpose of quashing this disallowance and surcharge. I agree entirely in the judgment delivered by my Lord, and for the purpose of my own judgment I do not propose to make any distinction between the disallowance and the surcharge. The auditor has given us his reasons for the disallowance, and having given the reasons for his disallowance he then surcharges the persons who sanctioned the payment which he has disallowed. Now I think it must be borne in mind, in considering the effect of the Poor Law Officers' Superannuation Act of 1896, that under the original Act of William IV., under which registrars of birth are paid, by section 29 it is the guardians who are the paymasters, and in that sense, therefore, there is a relationship of employer and employed between the guardians and the registrar. It is quite true that under that Act the guardians are only to pay, according to a certain schedule, fees which are fixed by a scale, but, that being the position of the registrar, when we come to the Act of 1896, in fixing the superannuation allowance it is clear that the registrar is to be for the purpose of that Act deemed to be an officer of the guardians, in the service of the guardians. Section 2 of the Act provides that every officer in the service of the guardians shall be entitled, under certain conditions, to a superannuation allowance, and the scale of the allowance is fixed by section 3, and it is perfectly clear that in fixing the superannuation allowance the guardians are to take into account the salary or wages, as the case may be, and the emoluments during the five years ending on the quarter-day preceding the day on which he ceases to hold this office. Therefore, the question would appear to be, at first sight, quite a simple one—namely, What were the wages or the salary and the emoluments that this gentleman was receiving during that period? Looking at the definition of "emoluments," and particularly in view also of the recent decision of the House of Lords in the case of *Salford Guardians v. Dewhurst* (42 *The Times* L.R., 657; [1926] A.C., 619), I cannot doubt that these gratuities, or the gratuity which was annually paid to him since a certain date, was a portion of the emoluments of his office. That being so, the auditor finds that the inclusion of this gratuity was illegal on the ground that, though the sanction of the Minister of Health had been given to the payment of the gratuities, the only effect of that was not to legalize the payments, but merely to prevent disallowance at audit—in other words, he comes to the conclusion that, although by law he could not, at the annual or six-monthly audit, disallow these payments of gratuities, when he has to consider whether the superannuation allowance was a proper one, he may disallow those same gratuities; that is the effect of the finding of the auditor in this case. As my Lord has pointed out, before he can disallow he must justify his disallowance under section 32 of the Poor Law Amendment Act, 1844, and in my view, giving the most liberal construction to this section, I do not think it can be said that these gratuities, which were paid by the guardians, were either moneys that represented a deficiency or loss incurred by the negligence or misconduct of the guardians, nor, in my opinion, did they represent sums for which the guardians were accountable, but not brought by them into account, nor, in my opinion, were these gratuities, within the meaning of this section, moneys which can be described as illegal payments within the meaning of section 32.

For these reasons, shortly, while agreeing entirely

with all other reasons given by my Lord in his judgment, I think that this disallowance and surcharge should be quashed.

Mr. Justice Salter.—I agree that this rule should be made absolute to quash the surcharge. The applicants for the rule, however, have asked for more than that; they have asked for a rule to quash the disallowance. The auditor has dealt with the matters, as I think he was obviously bound to do, quite separately. He has powers to disallow and powers to surcharge which are quite distinct. He has given his reasons, first, for the disallowance, and then his reasons for the surcharge. I think that his reasons for the surcharge are insufficient.

As regards the disallowance, I think that he was right, for the reasons which he gave and, indeed, that if he had failed to disallow this item he would have failed to discharge the duty imposed upon him by law. That duty is imposed, first, by section 32 of the Poor Law Amendment Act, 1844, and then, much more briefly, in Article 41 of the General Order for the accounts of unions, January 14, 1867. No one has disputed the validity of the article, and it will be quite sufficient to refer to that, and the only material words are: "In auditing the accounts the auditor shall disallow and shall strike out such payments as are not authorized by law." It rests, therefore, upon the applicants for this rule to show that the payment now challenged was a payment authorized by law. If they fail to do so, then they fail to succeed as to this part of the matter. No one suggests that the common law authorizes this payment. It is a question, therefore, of statutory authorization, and two statutes, and two statutes only, have been relied upon as authorizing this payment.

Before I deal with the first of them it will be convenient to refer to the Births and Deaths Registration Act, 1836, which by section 7 deals with the appointment and by section 29 with the remuneration of registrars of births and deaths. It is sufficient to say that as it seems to me the result of that statute is that the registrar is not a servant of the guardians; that he is an officer who is to be paid, and to be paid solely, by piecework. He is to do that work partly for the guardians and partly for outside private persons, and he is to be paid by fees which are fixed by the statute; he has no legal right to any other remuneration from the guardians or from members of the public as such.

That being so, the first statute to refer to—although it is not the first in date, it is most convenient to refer to it first—is the Poor Law Officers' Superannuation Act, 1896—the Act that is said to make this payment a payment authorized by law. That is an Act of Parliament the object of which, and the sole object of which, was to provide for pensions for poor law officers and servants and for their contribution to such pensions. It provides by section 2 that every officer and servant in the service or employment of the guardians shall in certain circumstances be entitled to a pension. Section 3 provides for the ascertainment of the amount of the pension; it is a certain proportion according to length of service of his salary or wages and emoluments during a certain period. Then comes the section with which we are mainly concerned, section 19, the definition section: "'Officer' includes every officer in the service of an authority to whom this Act applies whether his whole time is devoted to the duties of his office or not; and for the purposes of this Act superintendent registrars and registrars of births and deaths and school attendance officers are deemed to be in the service of the guardians of the union in which their districts are situated." That, as it seems to me, quite clearly does not establish any relation of master and servant between the registrar of births and deaths and the guardians. It does not impose upon him any duty of obedience or any of the other characteristic duties of a servant, or impose upon the guardians any of the liabilities of employers or any of the rights of employers, and among other things I think it does not give to the guardians any discretion as employers to alter the scale of pay fixed by statute, or the method of pay fixed by statute, for their officers.

Then in the same section, under the heading of emoluments, one finds: "'Emoluments' includes all fees, poundage, and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment." It appears to me that that cannot mean any sums or advantages which he in fact gets hold of, whether with the sanction of the law or without it. It must mean sums paid to him within the law, and the case of *Salford Guardians v. Dewhurst* (42 *The Times* L.R., 657; [1926] A.C., 619) in the House of Lords, which has been referred to, was a case where the gratuity held to be part of the emoluments was a gratuity paid by people who had a right to expend public money in that way on persons who had a right to receive it. Therefore, so far as the Act of 1896 is concerned, it does not appear to me to show at all that this payment is a payment authorized by law, and I think it is directed to altogether different matters.

The only other statute relied upon is the Local Authorities (Expenses) Act of 1887. That is an Act to amend the law relating to expenses of local authorities, and it provides that expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board. This, of course, cannot be relied upon as showing that the Local Government Board have approved, if they have not in fact approved them. I do not want to discuss whether they have approved or not; I do not want to embark upon any speculations of that kind. If they have in fact approved, the section is invoked as showing that this is a payment authorized by law.

The question, therefore, is whether this shows an intention of Parliament that a local authority may, within the law, expend public funds in any manner sanctioned by the public department which controls them. It would require, to my mind, very wide words indeed to bring about so startling a result. It would, I think, be a very dangerous reading, and would open the door to oppression. It seems to me that this statute means no more than I think it says, that Local Government Board auditors are not to disallow that which their Board has sanctioned. It deals with auditing methods. Mr. Wingate-Saul shrank from reading this statute in the wide sense to which I have just referred, and he said that it meant that local authorities might lawfully expend the public money in any manner reasonably sanctioned by the public department. Who is to decide whether the sanction was reasonable; is it to be the auditor or is it to be a Court of law? I do not think that such a reading is possible, and I do not think that this statute in any way makes this payment a payment authorized by law.

The grounds on which the rule is moved are that

the district auditor had no jurisdiction to make the surcharge. I agree that he had none. The second is that the gratuities referred to in the surcharge were emoluments within the meaning of the Act. I do not think that they were. The third is that the sanction of the Minister of Health legalized the payment. If that means that it made the payments payments sanctioned by the law, I do not think that it did. The fourth is that the superannuation allowance was allowed in previous audits. I cannot think that the fact that this auditor had omitted to do his duty before prevents him from doing it now.

For those reasons I have thought it necessary, although the matter may not in this case be of much practical importance, to give my reasons for holding that the district auditor was right in disallowing, though not in surcharging, this sum.

[Solicitors—Messrs. Sharpe, Pritchard and Co.; Messrs. W. W. Young, Sons and Ward.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926. Oct. 28.

POINTING v. WILSON.*

Criminal Law — Assault on prison officer — "Powers, authorities, protection, and privileges of a constable"—Sentence as for assault on constable—Prevention of Crimes Act, 1871 (34 and 35 Vict., c. 112), s. 12—Prison Act, 1898 (61 and 62 Vict., c. 41), s. 10.

Section 10 of the Prison Act, 1898, enacts that "Every prison officer while acting as such shall have all the powers, authorities, protection, and privileges of a constable." A convict who assaults a warder on duty is therefore liable to be sentenced by a Court of summary jurisdiction to six months' hard labour, that being the punishment provided by s. 12 of the Prevention of Crimes Act, 1871, for assaulting a constable when in the execution of his duty.

This was a case stated by Hampshire Quarter Sessions for the opinion of the King's Bench Division upon a point of law which arose upon the hearing of an appeal against a conviction of the appellant by the magistrates of the Petty Sessions holden at Newport, Isle of Wight, within the said county.

The appellant was a convict serving a sentence of penal servitude in Parkhurst prison, Isle of Wight. The respondent was a warder in the said prison and was a prison officer within the meaning of the Prison Act, 1898 (61 and 62 Vict., c. 41).

On June 26, 1926, the appellant was charged before the said Petty Sessions for that he on May 15, 1926, did unlawfully assault the respondent when acting in the execution of his duty as prison officer, contrary to the statute in such case made and provided. The justices, having heard the evidence, convicted the appellant and sentenced him to six months' imprisonment with hard labour, such sentence to take effect from the completion of the sentence of penal servitude.

The appellant duly appealed to the said Quarter Sessions against the said conviction and sentence, and on July 20, 1926, the appeal came on for hearing before Quarter Sessions.

Upon the hearing of the appeal counsel for the appellant contended that the conviction was bad on the face thereof for the reason that for the offence charged against the appellant the justices had no power to impose a sentence of six months' imprisonment. He pointed out that power to impose such a sentence depended upon whether section 10 of the Prison Act, 1898, extended and made applicable to prison officers the statutory provisions which rendered the offence of assaulting a police constable in the execution of his duty an offence triable summarily before justices at Petty Sessions, and he contended that it did not.

He contended that the charge could only have been dealt with as a common assault, the maximum penalty for which, if dealt with on summary proceedings before a Petty Sessional Court, was two months' imprisonment, with or without hard labour. (See section 42 of the Offences against the Person Act, 1861, 24 and 25 Vict., c. 100.)

There were various statutes which rendered the offence of assaulting a police constable in the execution of his duty an offence triable before justices at Petty Sessions, see in reference to county police the County Police Act, 1839 (2 and 3 Vict., c. 93, section 8), which incorporates section 11 of the Special Constables Act, 1831 (1 and 2 William IV., c. 41); in reference to borough police the Municipal Corporations Act, 1882 (45 and 46 Vict., c. 50, section 195). By section 12 of the Prevention of Crimes Act, 1871 (34 and 35 Vict., c. 112), it was provided that where any person is convicted of an assault on any constable when in the execution of his duty such person shall, in the discretion of the Court, be liable to be imprisoned for any term not exceeding six months, with or without hard labour. Section 10 of the Prison Act, 1898, provided that every prison officer while acting as such shall by virtue of his appointment have all the powers, authorities, protection, and privileges of a constable.

After hearing argument Quarter Sessions overruled the above contention of the appellant's counsel, being of opinion that the purpose and effect of the statutory provisions which made it an offence to assault a constable in the execution of his duty were the protection of such constable and that such protection was extended and made applicable to a prison officer by section 10 of the Prison Act, 1898.

Quarter Sessions accordingly proceeded with the hearing of the appeal and in the result dismissed it. On the application of counsel for the appellant they stated this case in reference to his contention as set out above.

The question for the opinion of the King's Bench Division was whether it was within the powers of the Court of Petty Sessions to pass upon the appellant in respect of the offence with which he was charged the sentence of six months' imprisonment, with hard labour.

Mr. W. E. Lloyd appeared for the appellant; Mr. H. G. Garland for the respondent.

Mr. Lloyd, in opening the case, said that it was one in which the Court would have no sympathy for the appellant whatever. There was no authority upon the point raised. The appellant, Pointing, was, in May last, a convict undergoing a sentence of three years' penal servitude for unlawful wounding. On May 15 he was said to have assaulted the respondent, Augustus Wilson, a prison officer. On May 17 he was brought before the Governor. He referred the

* Reported by J. W. Hall, Esq., Barrister-at-Law.

matter to the visiting justices, who recommended that he should be flogged. That sentence could not be carried out as the appellant suffered from a weak heart.

On June 18 a summons was taken out against the appellant, and on June 26 he was sentenced by a Court of summary jurisdiction to six months' imprisonment, with hard labour, to follow his sentence of penal servitude, in spite of his contention that the justices had no jurisdiction as it was only his good fortune and not his fault that he had not already been flogged.

Pointing appealed to Quarter Sessions, which dismissed his appeal, but stated a case upon the additional point which had been taken on his behalf —namely, whether a person who assaulted a warder was liable to the same penalty on summary conviction as for assaulting a constable, *i.e.*, six months' imprisonment, instead of the two months' imprisonment which was the maximum for an assault on an ordinary individual. By section 10 of the Prison Act, 1898, prison officers were to have "all the powers, authorities, protection, and privileges of a constable." The question was whether the section imposing the heavier penalty for assaulting the constable was a "protection" of the constable within the meaning of that expression. He referred to Archbold's Criminal Pleading ; Stone's Justices' Manual ; and Halsbury's Laws of England, vol. IX., p. 576, and submitted that "protection" referred to the immunity conferred upon police officers for acts done in the execution of their duty. The prison officer was more efficiently protected by the various punishments, culminating in flogging, which might be awarded by the Governor or the visiting justices.

Mr. GARLAND was not called upon.

The LORD CHIEF JUSTICE said that it was a perfectly clear case. The question was whether it was within the power of the Petty Sessional Court to pass on the appellant the sentence of six months' imprisonment, with hard labour. The Quarter Sessions, to which he appealed, were of opinion that it was, and he thought the Quarter Sessions were right. It was not disputed that if the appellant, or, indeed, anybody, assaulted a constable when in the execution of his duty he would be liable to six months' imprisonment, with hard labour. The argument was that that provision relating to punishment did not apply to a prison officer acting in the due discharge of his duty. But section 10 of the Prison Act, 1898, conferred on prison officers, acting as such, all the powers, authorities, and protection of police constables.

The argument for the appellant seemed to depend on two errors. First, it seemed to ignore the whole of that section except the word "protection" ; and, secondly, to put a very narrow limit on the meaning of protection. It involved the desperate proposition that the public was not protected by the fact that there was a punishment for assault.

He thought that the section clearly put prison officers on the same footing with constables so far as the measure of punishment for assaults upon them was concerned. The appellant's proposition was unarguable and the appeal failed.

MR. JUSTICE AVORY and MR. JUSTICE SALTER concurred.

[Solicitors—Messrs. Speechly, Mumford, and Craig, for Messrs. Lamport, Bassitt, and Hiscock, Newport, Isle of Wight ; the Director of Public Prosecutions.]

K.B. Div. (Rowlatt, J.) } 1926. Nov. 9.

DAPHNE v. SHAW.*

Revenue — Income-tax — Schedule D—Deductions—Machinery and plant—Wear and tear — Obsolescence — Solicitor's law-books — Whether included in "plant"—Finance Act, 1925 (15 and 16 Geo. V., c. 36), s. 16.

The word "plant" in s. 16 of the Finance Act, 1925, which extends to professions the allowance granted to traders under Schedule D of the Income Tax Act, 1918, for the wear and tear and obsolescence of machinery and plant, does not include a solicitor's books which he consults for professional purposes.

This was a case stated by the General Commissioners of Income Tax for the division of Finsbury.

The appellant, Mr. Frank Daphne, appealed to the General Commissioners against an assessment made upon him, under Schedule D of the Income Tax Acts for the year ending April 5, 1926, in respect of the profits of his profession as a solicitor.

In support of his appeal the appellant submitted accounts for the three years ending July 31, 1924. From the average for the three years the appellant claimed to deduct £8 as an allowance for—(*a*) wear and tear of part of his law library during the year ; and (*b*) obsolescence of certain books forming part of that library.

It was contended by the appellant : (1) that, under section 16 of the Finance Act, 1925, which extended to professions, employments, vocations, and offices the allowance granted to traders by the Income Tax Act, 1918 (Schedule D, cases 1 and 2, rules 6 and 7), in respect of the wear and tear of machinery and plant, and in respect of expenses incurred in replacing obsolete machinery and plant, he was entitled to prefer a claim for wear and tear of his law library during the year, that being his machinery or plant for the purposes of his profession ; and, further, that he was entitled to claim for certain legal books which had become obsolete in consequence of new legislation ; (2) that the £8 claimed by him was, in the circumstances, a reasonable sum, and should be allowed.

The inspector of taxes contended that the appellant was not entitled to the deduction claimed. *Earl of Derby v. Aylmer* (31 *The Times* L.R., 528 ; [1915] 3 K.B., 374) was referred to.

It was agreed that if the General Commissioners decided in favour of the appellant £8 should be deducted.

The General Commissioners held that the books in the law library of the appellant were neither machinery nor plant, and that he was not entitled to relief for either wear and tear or obsolescence in respect thereof.

Mr. Daphne appeared in person ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

His LORDSHIP, in giving judgment, said that he was unable to say that the books of a solicitor, or of a barrister, or of a Judge, which were used in the sense of being consulted, were plant. It was impossible to deny the suggestion which one naturally

* Reported by G. G. BEAGLEY, Esq., Barrister-at-Law.

conjured up when the word "plant" was added to the word "machinery." Though section 16 of the Finance Act, 1925, had extended the provisions of Schedule D, that extension did not involve an extension of the sense in which the word "plant" was used. Undoubtedly there were many professions or avocations where plant and machinery were used which would be covered by the use of the words as ordinarily understood. He was sure 99 out of every 100 persons would exclude from plant and machinery the books of reference on their shelves. Undoubtedly the books which were used in the professions did entail a great expense, but he had to administer the law as he found it, and must, therefore, dismiss the appeal, with costs.

[Solicitor—The Solicitor of Inland Revenue.]

House of Lords.
(Viscount Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Carson.)
1926. Nov. 4.

GLICKSMAN v. LANCASHIRE AND GENERAL ASSURANCE COMPANY, LIMITED.*

Insurance (Burglary)—Misrepresentation—Concealment—Materiality—Evidence.

The appellant and his partner made to the respondent insurance company through the company's agent a proposal for insurance against burglary. One of the questions on the proposal form was, "Has any company declined to accept or refused to renew your burglary insurance?" The plaintiff and his partner answered jointly, "Yorkshire accept, but proposers refused on account of fire proposal," meaning that the Yorkshire company were willing to grant a burglary policy but refused to do so unless at the same time the assured took out a policy against fire. In fact the appellant had, before the commencement of the partnership, been refused by the Sun Company. The respondents issued the policy, and it contained a condition that any misrepresentation, suppression, concealment, or untrue averment in the answers to the questions on the proposal form should render the policy absolutely void. The partnership having been dissolved during the currency of the policy, the latter was continued for the benefit of the appellant alone. Subsequently the appellant made a claim on the policy. The respondents refused to pay on the grounds (*inter alia*) that the policy was avoided by misrepresentation in the answer to the question on the proposal form and by concealment of a material fact, and in an arbitration the arbitrator decided in favour of the respondents on both grounds but stated a case.

Held, that there were grounds for supporting the finding of the arbitrator that the refusal of the appellant by the Sun Company was a material fact which ought to have been disclosed, and the award of the arbitrator must be affirmed.

Decision of the Court of Appeal (41 *The Times* L.R., 566; [1925] 2 K.B., 593) affirmed.

This was an appeal from a decision of the Court of Appeal (41 *The Times* L.R., 566; [1925] 2 K.B., 593) reversing a decision of Mr. Justice Roche (41 *The Times* L.R., 434) on a claim made under a burglary insurance policy.

The questions raised by the appeal were whether, in an insurance proposal form signed by partners, it was a misrepresentation to reply to the question, "Has any company declined to accept or refused to renew your burglary insurance?" without disclosing the fact that one of the partners alone had previously had a proposal refused; and whether that non-disclosure amounted to a concealment of a material fact vitiating the policy.

In 1916 the appellant started business in partnership with his cousin, Philip Glicksman, as a ladies' tailor at 4, Albert-square, Commercial-road, and the appellant resided on the premises. In 1918 Philip Glicksman retired from the firm, and from 1918 to 1922 the appellant carried on the business alone and on the same premises. On June 19, 1919, the appellant made a written proposal signed by him to the Sun Insurance Office for the insurance of his stock-in-trade against loss or damage by burglary and housebreaking, and this proposal was declined.

Some time in 1922 the appellant took into partnership one H. Roman, and on November 9, 1922, he and H. Roman, who were then carrying on business on the said premises, made a proposal in writing to the respondents on their printed proposal form for insurance, against burglary and housebreaking, on their stock and utensils in trade on the premises in the sum of £1,800. The proposal form contained, in addition, a number of questions to be answered by the proposers, of which the following, with the answers thereto, were material:—

"7. Have you previously been insured against burglary? If so give name of company.

"Answer: No.

"8. Has any company declined to accept or refused to renew your burglary insurance, or increased your premium, or required special terms or additional precautions to be taken? If so state name of company and dates.

"Answer: Yorkshire accept, but proposers refused on account of fire proposal. . . ."

That proposal was accepted by the respondents and a policy was accordingly issued. It contained a proviso

"that the statements made by the assured in the aforesaid proposal and declaration are true in all respects, and that if either this policy or any renewal thereof be obtained through any misrepresentation, suppression, concealment or untrue averment whatsoever by or on behalf of the assured . . . then this policy and any renewal thereof and all claims thereunder shall be absolutely void . . . ."

The appellant was unable to read or to write except that he could sign his name. On December 15, 1922, the partnership between him and H. Roman was dissolved, and the appellant took over the business and stock-in-trade and continued to carry on the business on his own account, and to reside on the premises with his family. A memorandum dated December 19, 1922, was indorsed on the policy to the effect that the interest therein was thenceforth vested in the appellant alone.

During the period covered by the policy—namely, on the night of February 25, 1923—burglars broke

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

into the premises and stole and carried away part of the stock-in-trade therein, to the value of £1,656 6s. 3d. On March 10, 1923, the appellant made a claim on the respondents for that amount, for which the respondents repudiated liability, and the matter was referred to arbitration. The respondents' defence in its original form was a general denial, but during the reference the arbitrator allowed the respondents to amend their points of defence by pleading the following additional defence :—

"It was warranted by the policy that the statements made by the applicant in his proposal in writing dated November 9, 1922, were true in all respects and that if the policy should be obtained through any misrepresentation, suppression, concealment, or untrue averment by or on behalf of the applicant the policy and all claims thereunder shall be absolutely void. In the said proposal the applicant in answer to the question 'Has any company declined to accept or refused to renew your burglary insurance ?' stated 'Yorkshire accept, but proposers refused on account of fire proposal.' In fact in a written proposal dated June 19, 1919, the applicant had offered his burglary insurance to the Sun Insurance Office and the said Sun Insurance Office had declined the said insurance by letter to the applicant dated June 20, 1919."

The arbitrator stated his award in the form of a special case. He found that the appellant had suffered loss within the meaning of the policy for the full amount of his claim, viz., £1,656 6s. 3d. ; that the answer to the eighth question was untrue ; and that, subject to the opinion of the Court, the respondents were under no liability to the appellant.

By a supplemental award made pursuant to the directions of the Court, the arbitrator declared that the respondents were also entitled to avoid the policy by reason of the concealment or non-disclosure of the material fact that the Sun Insurance Office had previously declined the appellant's proposal as stated in the special case.

Mr. Justice Roche held that the answer to question 8 was not untrue or inaccurate so as to avoid the policy, and that, upon the point of concealment, there was no evidence that the refusal of the Sun Insurance Office had not been communicated to Cohen, the agent of the respondents. He therefore gave judgment for the appellant.

The Court of Appeal (Lord Justice Bankes, Lord Justice Scrutton, and Lord Justice Sargant) reversed that decision, holding that there was sufficient ground to support the arbitrator's finding that the refusal of the former proposal made by the appellant was a material fact which ought to have been disclosed, and that there was sufficient evidence of concealment of that fact. Lord Justice Scrutton and Lord Justice Sargant further held that there was evidence to support the finding that the answer to question 8 was untrue, Lord Justice Bankes expressing no opinion on that point.

Mr. Croom-Johnson and Mr. Claud Mullins appeared for the appellant ; Mr. Rayner Goddard, K.C., and Mr. H. C. Dickens for the respondents.

Viscount Dunedin.—My Lords : One Sapsy Glicksman, a small ladies' tailor, insured against burglary his stock in trade. A burglary happened and a large portion of his stock in trade was taken away, but upon his applying to the insurance company for the insurance money he was met by the allegation that there had been no burglary and no stock in trade. They went to arbitration, and here is what the learned arbitrator said :—"On the hearing of the reference during the opening of the case for the claimant, counsel for the respondents stated to me that the only point he intended to raise was that there had been no burglary as alleged by the claimant and that the goods for which the claim was made were not upon the said premises at the date of such alleged burglary and had not been removed or stolen by burglars as alleged." That was a very serious accusation. It was an accusation which, if it was true, would have put the man in the dock. I remember myself giving somebody three years' penal servitude for exactly the same sort of thing. Here is what the arbitrator said about it :—"I find that the goods in respect of which the claim was made were upon the said premises at such date and were stolen and removed by burglars as alleged by the claimant, and that the claimant thereby suffered loss and damage to the amount of £1,656 6s. 3d." But, in the course of the examination of the claimant, in answer to some more or less casual questions, it seems that he said that he had been turned down by another office, and thereupon the insurance company remembered that he had, like other people, signed a paper when he made application for insurance, and accordingly they asked leave and got leave to put in an amended point of defence. The amended point of defence was :—"It was warranted by the policy that the statements made by the applicant in his proposal in writing dated November 9, 1922, were true in all respects, and that if the policy should be obtained through any misrepresentation, suppression, concealment, or untrue averment"—it should be absolutely void. Then it was said that he had, as a matter of fact, in answer to a question, "Has any company declined to accept or refused to renew your burglary insurance ?" said, "Yorkshire accept, but proposers refused on account of fire proposal" ; whereas, in fact, in a written proposal dated June 19, 1919, the applicant had offered his burglary insurance to the Sun Insurance Office and the said Sun Insurance Office had declined it. It was not quite plain sailing even then, because when the proposal came to be looked at it was found that at the time when the proposal was made he was in partnership. The word "you" in English is either singular or plural, and when you come to the answers to the questions there is, what I may call, a somewhat inextricable confusion between the singular and the plural. Of course, literally speaking, if the word "you" is used in the plural, as naturally it should have been because two people were applying, then it was quite true that there had not been any refusal of an insurance ; but it was not true if you take it in the singular. The arbitrator came to the conclusion that it voided the policy and an appeal was taken on a stated case to Mr. Justice Roche. Mr. Justice Roche came to an opposite conclusion—I do not altogether wonder when one thinks of the scene : On the one hand Mr. Cohen, agent for the insurance company, keen, as he was quite entitled and bound to be, to get business for the insurance company, and, on the other hand, this wretched little ladies' tailor of whom the arbitrator tells us that he could neither read nor write and could only sign his name, and whose natural and best language was Yiddish and not English—surely an *impar congressus*. Mr. Justice Roche held that there was no proof of concealment ; and he held upon the other question that the answer was really made in the plural.

My Lords, for the reasons that I shall presently state, I am unable to agree with Mr. Justice Roche, but at least I am left with this impression, that those—shall I call them attractive ?—qualities which we are

prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew.

Then I come to the law. It has often been stated, but perhaps it is just as well to state it again. A contract of insurance is denominated a contract *uberrimae fidei*. It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but quite apart from that, and alongside of that, there is the duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk. Now, as I have said, upon this proposal two questions arose. First, the question arose upon what I call the plural and the singular. One of the learned Judges in the Court of Appeal has said that he would like further to consider this. Mr. Justice Roche decided it in the sense that the question was really put in the plural and that therefore there was no untrue answer. There were certain cases quoted to us which go to the same view. Two of the learned Judges in the Court of Appeal took the other view. My Lords, I do not think it necessary that we should come to a conclusion on which of these views is right, and I therefore do not propose myself to express any opinion upon them because I think the ground of judgment is quite clear on the other point. It is narrow enough, because when you come to the law as to materiality and concealment, of course there are certain circumstances which are so obviously material that it will not be taken from any man to say that he did not know it. If you are insuring a ship on a time policy and that ship had been badly knocked about three weeks before, of course you could not be heard to say that you did not think that was a material circumstance. But here the whole point really comes to turn upon this—and this is the ground of the judgment of the learned Judges in the Court of Appeal—that, never minding the singular or the plural, the fact that a question of this sort was put showed that the insurance company thought it was material whether a proposal had been refused or not, and that that was brought to the knowledge of the claimant. My Lords, under the circumstances I have considerable doubts, but then I am not entitled to take any view of my own on that, because that is a fact and the arbitrator has found it as a fact and I cannot get beyond the arbitrator's finding. I think that the reasoning of the learned Judges in the Court of Appeal is impeccable. It was brought to the knowledge of the claimant that it was a material fact and he certainly did not disclose it and, therefore, the policy is void.

Therefore, my Lords, with unfeigned regret, I move your Lordships that this appeal be dismissed with such costs as there are in a case *in forma pauperis*.

Lord Atkinson.—My Lords: I concur. I wish to say one word in reference to the observations of Lord Justice Scrutton. I think it is a lamentable thing that insurance companies will abstain from shaping the questions that they put to intending insurers on such occasions in clear and unambiguous language. For instance, in this particular case, all that it was necessary to say was, "Did you two or either of you make an application to the Sun Insurance Company for a policy against burglary?" This whole case and all the expense would have been prevented had that simple method been adopted.

Lord Shaw of Dunfermline.—My Lords: I agree with both the judgments just delivered.

Lord Wrenbury.—My Lords: It is with the very greatest reluctance that I concur in the motion which is proposed from the Woolsack. I think it a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay upon a ground which no one says was material. Here, upon purely technical grounds, they, having in point of fact not been deceived in any material particular, choose to avail themselves of what seems to me the contemptible defence that, although they have taken the premiums, they are protected from paying.

Lord Carson.—My Lords: Without committing myself to the strictures passed upon the respondent company I concur in the conclusion arrived at that the appeal should be dismissed with costs as proposed.

[Solicitors—Mr. F. J. Rutledge; Messrs. Coward, Chance, and Co.]

K.B. Div. (Rowlatt, J.) } 1926. Nov. 12.

BIRKENHEAD SCHOOL, LIMITED v. DRING.*

Revenue—Income-tax—Public school—Claim of allowance—Absence of elements of permanence—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. A, No. VI., r. 1 (*c*).

The appellants, a limited company, owned and carried on a high-class secondary school managed by Governors who were partly elected by the shareholders and partly nominated by the Crown. By the company's articles no profit was to be divided amongst members. Practically the whole of the receipts of the company arose from fees paid for pupils. The appellants claimed under Schedule A, No. VI., rule 1 (*c*), of the Income Tax Act, 1918, an allowance on the ground that the school was a public school.

Held, that the elements of permanence connoted by the word "foundation" were part of the essence of a public school, and as these elements were absent the appellants were not entitled to the allowance claimed.

This was a case stated by the Commissioners for the General Purposes of the Income Tax Acts.

The appellants, the Birkenhead School, Limited, a limited company formed under the Companies Acts, appealed against assessments to income-tax under Schedule A of the Income Tax Acts for the year ending April 5, 1922. The amount of the assessments was not in dispute, but the company claimed to be entitled to relief under Schedule A, No. VI., Rule 1 (*c*) of the Income Tax Act, 1918, in respect of the school buildings, offices, and premises belonging to the company.

The rule provides as follows:—

"The following further allowances shall be made under this schedule:— . . . (*c*) The amount of the

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

tax charged on any . . . public school . . . in respect of the public buildings, offices, and premises belonging thereto, and so far as not occupied by any individual . . . master thereof whose total annual income . . . amounts to £150 or more, or by a person paying rent for the same."

The company owned and carried on at Birkenhead the Birkenhead School, which, with the preparatory school attached, was a high-class secondary school of about 450 boys, of whom about 40 were boarders in the school house. It was managed by a governing body consisting of not less than three and not more than 15 governors, who were elected by the shareholders of the company in accordance with the articles of association, together with three special governors nominated by the Crown. The governors of the school were directors of the company.

By Article 84 of the articles of association it was provided that

"No bonus, dividend, or profit shall be paid, allotted, or divided to or amongst the members, but all surplus revenue, or any part thereof, shall be carried to reserve, or applied towards the reduction of debt, or the increase of the benefits and usefulness of Birkenhead School and Birkenhead Preparatory School in such manner as the governors shall in their absolute discretion think fit."

No bonus or dividend had ever been paid to the shareholders since the incorporation of the company.

The school buildings, playing-fields, and lands were acquired by and were the property of the company. Practically the whole of the receipts of the company arose from fees paid for pupils. Shares in the company were frequently purchased by parents who desired to send their sons to the school, as, in addition to the ordinary school fees, a "nomination" fee of £1 11s. 6d. per term was charged in the case of boys who were sons of persons who were not shareholders in the company, or who were not nominated by a shareholder.

It was contended on behalf of the company that the Birkenhead School was a public school in that it possessed the four necessary elements :—(i) it had a charitable substratum ; (ii) it was managed by a public body—namely, a body of governors without remuneration and including Government nominees : (iii) no private person had any interest in the school ; and (iv) it had as its object the benefiting of a large class of the community ; and therefore the company was entitled to an allowance on the amount of the tax charged, as being an amount charged on a public school in respect of the premises belonging thereto.

It was contended, *inter alia*, on behalf of the Crown that the school did not fulfil the tests for establishing that it was a public school, and that no allowance could be granted under Schedule A, No. VI., Rule 1 (*c*).

The General Commissioners were of opinion that the school had a charitable substratum and that it was for the benefit of a large class ; but that it was not managed by a public body, and that the profits and other benefits did become payable to or receivable by private persons, and further, that the school had not a perpetual foundation. They held that the company was not entitled to exemption either as a public school or as a charity.

Mr. Cyril King appeared for the appellants ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt, in giving judgment, said that the foundation of the Birkenhead School was not of a permanent character. It continued to exist because it offered, so far as the boys and their parents were concerned, the advantages of a public school, but the continuance of its existence was dependent on the corporate will of the members of the company. It was true that the members of the company had hitherto received no dividend, but the company was something more than the mere machinery for collecting subscriptions to found a school. The case was really one of a company which was running a school without paying dividends, but which was liable to be wound up at any time. The elements of permanence connoted by the word "foundation" were part of the essence of a public school, and those elements were here absent. He was of opinion, therefore, that the finding of the General Commissioners was right and that the appeal must be dismissed.

[Solicitors—Messrs. Rawle, Johnstone, and Co., for Messrs. Laces and Co., Liverpool ; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1926.
Nov. 4.

TATE AND LYLE, LIMITED v. LONDON AND NORTH EASTERN RAILWAY COMPANY AND LONDON MIDLAND AND SCOTTISH RAILWAY COMPANY.*

Railways — Rates — Transitional period till appointed day—Power to reduce rates and then raise them within maximum—Railways Act, 1921 (11 and 12 Geo. V., c. 55), s. 60.

Under s. 60 of the Railways Act, 1921, which applies to the transitional period between August 15, 1921, and the day to be appointed by the Railway Rates Tribunal for the coming into force of the new rates to be approved by the Tribunal, the rates in existence on August 15, 1921, are maximum rates, and the railway companies are entitled to reduce them, and to raise them again without applying to the Tribunal, if by so doing they do not exceed the maximum.

Decision of Astbury, J. (42 *The Times* L.R., 725), affirmed.

This was an appeal from a judgment of Mr. Justice Astbury (42 *The Times* L.R., 725) which raised a question of outstanding interest to the trading community and to all persons interested in railways.

The action was brought by the plaintiffs, on behalf of themselves and other traders, as a test case to question the right of the defendant companies and other railway companies to charge certain rates. The amount involved by the decision was said to be about £25,000,000, although the action itself was in respect of a small sum. The facts, as found by Mr. Justice Astbury, were shortly as follows :—

The action was brought by agreement in respect of certain consignments of sugar handed by the plaintiffs to the defendant companies. The companies, by their counter-claims, sought payment of the difference between the amount of the minimum reduced charges and of the new charges made by the companies after June 29, 1926, under notices given by them on June 12, 1926.

In September, 1920, the base rates previously charged were raised by the Minister of Transport by

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

100 per cent., together with a flat rate of a shilling per ton. That order affected not only the normal base rates, but also the "exceptional rates" which the companies charged to certain traders for carriage over certain distances, according to the particular mode of conveyance or the volume of traffic carried. Those exceptional rates formed about 80 per cent. of the rates charged, and amounted in number to about 80,000,000. By the Railways Act, 1921, the existing railway companies were amalgamated into four groups, and a new Court was formed called the Railway Rates Tribunal, which, as regards questions of rates, took the place of the Railway and Canal Commission. The control of the Minister of Transport over the railways was to cease on August 15, 1921, and the companies were to prepare a new classification of merchandise and new schedules of rates (to be called standard charges), which were to be approved by the Tribunal.

Those new standard charges were to come into force on a day to be fixed by the Tribunal called the "appointed day," but the preparation of the classification and schedules had proved a much longer task than was expected, and the "appointed day" had not yet been fixed. The Act contained stringent provisions as to existing exceptional rates, which were either to be agreed between the companies and the traders or fixed by the Tribunal, and provisions were made as to new exceptional rates.

Section 60, upon which this appeal really turned, contained the transitory provisions until the appointed day, under which the existing rates were to be continued as in force on August 15, 1921.

The material parts of section 60 were as follows:—

"A . . . railway company which is liable to have applied to it a schedule of standard charges shall, notwithstanding anything contained in any special or general Act or in any agreement, be entitled till the appointed day to make such charges . . . as were in force as respects the railway on the fifteenth day of August, 1921, or, where no such charges were in force on that date, then such reasonable charges as shall, in case of difference, be determined by the Rates Tribunal:

"Provided that at any time after the said fifteenth day of August, and before the appointed day,

(i.) Any representative body of traders may apply to the Rates Tribunal to reduce the aforesaid charges or any of them . . ."

Sub-clause (ii.) gave a similar right to a single trader, and (iii.) a right to a railway company to apply for an increase.

Under that section the Federation of British Industries, a representative body of traders, in May, 1922, applied to the Rates Tribunal to reduce the rates, and an arrangement was made with the companies whereby the rates were reduced from 100 per cent. to 75 per cent. above the old base rates, and the flat rate per ton was reduced from 1s. to 6d. In May, 1923, the companies voluntarily reduced the rates to 60 per cent. above the base rates. In July, 1923, on a further application by the Federation of British Industries, an arrangement was made by which the rates were reduced to 50 per cent. above the base rates. On neither of those applications was any order made by the Tribunal, except that by consent the applications were dismissed.

One question which arose in the present action was whether the arrangement made in July, 1923, constituted a binding legal agreement that the rates then fixed should continue until the appointed day unless varied by the Tribunal, as the plaintiffs contended, or whether, as the companies contended, they were at liberty at any time to raise those rates provided that they did not exceed the rates in force on August 15, 1921.

On June 12, 1926, all the railway companies gave notice that as from June 29 the exceptional rates charged under the arrangement would be increased to the level of 60 per cent. above the base rates. To this the traders objected, and by arrangement this action was brought as a test case. The plaintiffs contended that, apart from the question of the nature of the arrangement made in July, 1923, the companies had no power under section 60 of the Act of 1921 to raise any rate which had been reduced unless they had the consent of the Railway Rates Tribunal. The companies contended that the rates mentioned in the section were only maximum rates, and that they were entitled to raise any rate that had been reduced, without application to the Tribunal, provided that it did not exceed the maximum.

A further special question arose between the plaintiffs and the defendant companies. Before July, 1923, the companies had charged the plaintiffs for the conveyance of sugar from Silvertown to Leicester the same exceptional rate in whatever manner the goods were conveyed; but after that date they agreed to carry sugar, if sent in consignments of five tons or more on a truck, at a slightly lower rate, *i.e.*, 22s. 6d. per ton instead of 22s. 8d. The plaintiffs claimed that that was a new exceptional rate which, under section 37 of the Act of 1921, could only be varied by the Railway Rates Tribunal. The defendant companies contended that there was a rate in existence on August 15, 1921, for the conveyance of sugar in five-ton trucks which was the same as in the case of other modes of conveyance, and that the reduced rate was only a favour granted and that they were entitled to raise it like any other rate.

Mr. Justice Astbury found for the defendants on both points. On the main question he thought that the companies were entitled to reduce their rates, and, having reduced them, to raise them again without applying to the Tribunal, provided that they did not exceed the maximum in force in August, 1921.

The plaintiffs appealed.

Mr. W. A. Greene, K.C., and the Hon. Stafford Cripps appeared for the appellants; Sir John Simon, K.C., and Mr. Bruce Thomas for the respondents.

The Master of the Rolls, in the course of his considered judgment, said that the question really turned on the construction of section 60 of the Act of 1921. Agreeing, as he did, with the judgment of Mr. Justice Astbury, it would have been hardly necessary to do more than express his concurrence but for the fact that the case had been fully argued afresh in the Court of Appeal.

Section 1 of the Railway and Canal Traffic Act, 1894, cast upon the railways the onus of proving that any increase of rates made after December 31, 1892, was reasonable. By the Ministry of Transport Act, 1919, any rates or charges directed by the Minister of Transport were to be "deemed to be reasonable" while the Minister controlled the railways. Under that Act orders were made for increases of the rates charged, up to 100 per cent., and those were the rates which were legally in force when the Railways Act, 1921, became operative on August 19, 1921. The companies then took over control. The rates charged were "deemed to be reasonable" under the Act of 1919, and, the first section of the Act of 1894 being expressly repealed by section 86 of the Act of 1921, the companies were relieved from

the burden of establishing that their charges were reasonable. It mattered not whether they were originally standard rates or exceptional rates; they might be the rates of 1913, *plus* 100 per cent., *plus* a flat rate. However arrived at, they were the rates enforceable and enforced.

The purpose of the Railways Act, 1921, was to fix standard rates, but until the ambitious schemes to that end were realized section 60 provided transitory provisions. (His Lordship read the material parts of the section.) The railways meanwhile were "entitled" to make the charges in force on August 15, 1921, and the right was expressed to be "notwithstanding anything contained in any special or general Act, or in any agreement." By those words all restrictions or hampering engagements were simply swept away, and the end was reached by a short cut.

In his opinion it was significant that in the section the word "charges" was used; it was not right to read it as a synonym for "rates." The inclusive term "charges" seemed to be used advisedly. The charges in force in August, 1921, were maxima. The railways were "entitled" to charge them, and their discretion to do so was not fettered. There was no express limitation of the railway companies' power to vary them. If some limitation were to be introduced to cut down the simple words "shall be entitled till the appointed day to make such charges," it must be derived *aliunde*—from some Act of Parliament, or agreement, or from the history of the past, all of which was swept away by the words beginning "notwithstanding."

The appellants argued that the main part of section 60 was to be interpreted by a consideration of the proviso—

"Provided that at any time after the said fifteenth day of August, and before the appointed day,

"(i.) any representative body of traders may apply to the Rates Tribunal to reduce the aforesaid charges . . ."

and they said that a special meaning must be given to "aforesaid charges." He agreed with Mr. Justice Astbury that "aforesaid charges" must mean the charges in force in August, 1921. He could not read them as charges which the railways had in fact been making within their powers, and which they could not subsequently alter or vary. It might be, however, that if the Railway Rates Tribunal acceded to an application under the proviso, by railway company or trader, to increase or decrease charges, that substituted rate would become one which the company were "entitled" to charge, and so would become an "aforesaid charge."

As to the five-ton rate, he thought, on the facts, that it was a misnomer to describe that as a separate and new rate, and thus a charge which was not in force on August 15, 1921. The correct view seemed to be that that was a charge in force for transit of sugar, and that the four-ton rate was modified to the advantage of the trader upon certain conditions being fulfilled by him. Finally, as to the alleged agreements with traders by which the railways were said to be estopped from taking the action complained of, he could not find on the facts that there were any such binding agreements. The appeal must therefore be dismissed.

Lord Justice Sargant said that the judgment of Mr. Justice Astbury as to the facts had been accepted as substantially accurate by the appellants and by the respondents, and it was unnecessary to re-state them. It seemed to him (Lord Justice Sargant) reasonably clear that the words of section 60 of the Railways Act, 1921, entitling the companies to make such charges as were in force on August 15, 1921, when taken in their ordinary meaning, did not simply authorize the rigid continuance of the precise charges so in force, but gave the companies a discretion to make charges up to, but not exceeding, the charges of August, 1921. The words of the section "shall be entitled to make such charges" seemed to give a power, but not in any way to prescribe the exercise of that power to the full extent. The donee, as in the case of a power to charge jointures or portions in settlements of real estate, was at liberty to charge the maximum sum mentioned, or any such lesser sum as he might think fit. If authority were wanted for that, it might be found in *Julius v. Bishop of Oxford* (5 App. Cas., 214), and it was not immaterial to notice that the very phrase "shall be entitled to" was used in section 24 (10) of the Railway and Canal Traffic Act, 1888, at a time when it was clear that the charges then authorized were maximum charges. Sir John Simon, too, was quite correct when he argued that there were in the antecedent railway legislation two quite distinct and contrasted conceptions, namely, first the charges which railway companies were entitled to make at their discretion within certain limits, and, secondly, the charges which they from time to time decided to make within those limits, and rendered eligible by entry in their rate books after the giving of sufficient previous notice.

If that were then the effect of the first part of section 60, was there anything in the rest of the section to prevent the charge now proposed, 60 per cent. in excess of basic rates, being legal, merely because there had been an intermediate charge of only 50 per cent. excess? There did not seem to be anything. Proviso (i) dealt only with a reduction by the Rates Tribunal. Proviso (ii) was immaterial. Proviso (iii) dealt with the discretionary power of the Rates Tribunal to authorize increased charges. He (the Lord Justice) could not accept the alternative suggestion of the appellants that in that proviso the phrase "the aforesaid charges" meant the charges actually being made from time to time by the companies. Much stress had been laid by the appellants upon the alleged improbability that the Legislature would have intended to get rid during the interval before the appointed day of the beneficial restrictions imposed on the raising of existing rates by the Act of 1894. Whether these restrictions were altogether beneficial to traders might be doubted, for they must have tended to discourage valuable experimental deductions, but at all events that particular aspect of the matter did not seem to help the appellants, for, by section 86 of the Act of 1921, while section 14 of the Regulation of Railways Act, 1873, was repealed only as from the appointed day, section 1 of the Act of 1894 was repealed forthwith, and therefore during the interval the companies appeared to have been deliberately restored to the position of relative freedom which they occupied before 1894. Upon the first point, therefore, it appeared that the appeal must fail.

Upon the second point, there did not seem to be much substance in the arguments of the appellants. It was true that on August 15, 1921, the railways had not made any differentiation between sugar in lots of four tons and upwards and a smaller sub-class of this class which was ultimately created and consisted of sugar in lots of five tons in a truck. But, all the same, the total class did exist, and each individual consignment in the class, whether four tons or more, or five tons or more in a truck, was subject to a charge at the four ton rate, and was in fact so

charged. There was therefore a charge in force on August 15, 1921, on the whole of the original class, and the railways had done no more than lower the original exceptional rate as regards that sub-class.

As regards the allegation that there had been a binding agreement as to rates made between the companies and the Federation of British Industries, it seemed to him (Lord Justice Sargant) that any bargain made related only to a present reduction of rates, and it was never intended that the reduction should last until the appointed day, or until a new order of the Rates Tribunal.

Lastly, there was no substance in the contention that the reductions in rates which had been made, from an additional 100 per cent. to 75 per cent., and from 60 per cent. to 50 per cent., should be regarded as having been made by orders of the Railway Rates Tribunal. The appeal failed.

LORD JUSTICE LAWRENCE said that it was to be observed that the expression used in section 60 was "shall be *entitled* to charge" and not "shall charge," and there was in the context nothing which demanded that the section should be construed otherwise than according to its natural meaning. It was said that the construction which Mr. Justice Astbury had placed on the section had the effect of reversing the policy pursued by the Legislature ever since the passing of the Act of 1894, a result which ought not to be imputed to the Legislature; but the weight which might be attributed to that argument was discounted by the fact that section 60 contained only transitory provisions, and that section 1 of the Act of 1894 was expressly repealed. After all, the Court could only endeavour to ascertain the policy of the Legislature by construing the language employed to express it.

Upon the further points taken, his Lordship agreed with the judgments delivered by the other members of the Court.

[Solicitors—For the appellants, Messrs. Neish, Howell, and Haldane; for the London and North-Eastern Railway Company, Sir Francis Dunnell; for the London Midland and Scottish Railway Company, Mr. H. L. Thornhill.]

K.B. Div. (Rowlatt, J.) } 1926. Nov. 16.

INLAND REVENUE COMMISSIONERS v. TRUSTEES OF THE ROBERTS MARINE MANSIONS.*

Revenue — Income-tax — Charity — Boarding-house at reduced charges—Claim to exemption —Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*).

By a declaration of trust "a home or place of residence" was founded and endowed, "where persons requiring temporary rest and change of air for the benefit of their health may obtain the same." About half the income of the home came from payments by visitors, who included convalescents, persons needing rest and change, and holiday applicants. On a claim by the trustees for exemption from income-tax on the ground that the trust was established for charitable purposes only,

Held, that as the object of the trust was in reality to establish a seaside boarding-house at reduced charges and there was nothing to show an intention either to relieve poverty or to exclude persons in good health, the trustees were not entitled to the exemption claimed.

This was a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The Crown appealed against the decision of the Special Commissioners, who had held that the respondents, the Trustees of the Roberts Marine Mansions, were entitled to exemption from income-tax for the two years ending April 5, 1925, on the ground that the trust was established for charitable purposes only.

The material words of the trust, which was established by Sir John Reynolds Roberts, draper, by a declaration of trust dated July 14, 1903, were as follow:—

"Whereas it is desired to found a home or place of residence where members of the drapery and allied trades and others requiring temporary rest and change of air for the benefit of their health may obtain the same . . . it is hereby agreed and declared . . . that . . . the trustees shall stand and be seised of [the Marine Hotel, Bexhill-on-Sea, Sussex] and any other property which may be conveyed to them . . . upon trust that the trustees do and shall permit such premises to be occupied and used as a home or homes or place or places of residence (primarily) for members of the drapery and allied trades and (secondarily) for members of other trades and professions where persons requiring temporary rest and change of air for the benefit of their health may obtain the same."

The home was supported by the income from investments, including the original endowment; by subscriptions and donations (mainly from firms in the drapery and allied trades); and by payments by visitors. The payments by visitors formed about one-half of the income of the home.

Letters of recommendation were issued to subscribers and donors to the institution, the number of such letters issued to each subscriber or donor depending on the amount of his contribution. Visitors to the home were admitted either with or without letters of recommendation, but only about 10 per cent. came without a letter. A visitor coming without one had to have a letter of introduction.

There were three categories of visitors to the home:—

(1) Convalescents from illness, who had to furnish a medical certificate; (2) persons resting, *i.e.,* persons in need of rest and change of air for the benefit of their health; and (3) holiday applicants.

It was contended on behalf of the trustees, *inter alia*:—(1) that the trust was for the benefit of an important section of the community; (2) that the trust was for the relief of poverty; (3) that the trust was for the benefit of the health of the beneficiaries; and (4) that the trust was established for charitable purposes only and the income of the trust had been applied to charitable purposes only.

It was contended on behalf of the Crown, *inter alia*:—(1) that, as the benefits of the trust were not confined to poor persons the trust was not one for the relief of poverty; (2) that as the benefits of the trust were primarily confined to members of the drapery and allied trades the trust was not one for the benefit of the community as a whole; (3) that, even if the trust could be regarded as a trust for the benefit of the health of the beneficiaries, such a trust was not necessarily a charitable trust; (4) that, as

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

the trustees had power to admit, and did, in fact, admit, purely holiday applicants irrespectively of considerations of health, the trust was not one exclusively for the benefit of the health of the beneficiaries; and (5) that the trustees were not a body of persons or trust established for charitable purposes only, and their income was not, by virtue of the declaration of trust, applicable to charitable purposes only.

The Special Commissioners held that the trust was one for charitable purposes only and that the claim for exemption succeeded.

The Crown appealed.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the Crown; Mr. Raymond Needham for the respondents.

Mr. Justice Rowlatt, in giving judgment, said that on the face of the deed which established the trust there was nothing to show that there was any intention of helping to relieve poverty. The relief of poverty was not confined to the relief of abject poverty, and no doubt that particular home would be of great advantage to persons who were not too affluent. Moreover, it was true that, in carrying out the trust, the trustees gave first choice to persons who were convalescent and required a change of air, and preference to persons who had letters of recommendation; but it was to be observed that, quite outside that class, holiday visitors were received at the home. In effect, a very benevolent donor had provided a house with a certain endowment, which was an assisted seaside boarding-house, for persons in a particular trade and for others. The Special Commissioners had decided that the words, "where persons requiring temporary rest and change of air for the benefit of their health may obtain the same," ought to be construed as providing for the relief of sickness. There was, however, no breach of trust on the part of the trustees if they admitted to the home persons who were perfectly well. The words merely meant persons who had deserved a holiday, and required one for the retention of their health. The object of the trust deed was, in reality, to establish a seaside home where persons, especially those in certain trades, could be admitted at reduced charges. In cases where the law had recognized a valid charitable trust the relief of poverty had appeared prominently in the intention of the donor, but the present case failed to satisfy the requirements of the law in regard to charities. The appeal would be allowed, with costs.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Ashurst, Morris, Crisp, and Co.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926. Oct. 27.

REX v. NORFOLK JUSTICES—EX PARTE PORTER.*

Rating—Sewer rate—Non-payment—Distress—Costs—Distress (Costs) Act, 1817 (57 Geo. III., c. 93), s. 1—Distress (Costs) Act, 1827 (7 and 8 Geo. IV., c. 17)—Sewers Act, 1833 (3 and 4 Will. IV., c. 22), s. 55.

The power given to Commissioners of Sewers by s. 55 of the Sewers Act, 1833, to levy the costs of a distress is limited in the cases of distress for sums under £20 by the provisions of the Distress (Costs) Acts, 1817 and 1827.

This was a rule *nisi* for an order in the nature of a *mandamus* to justices of the Grimshoe Division of the County of Norfolk to hear and determine according to law a complaint preferred by Joseph Porter, the applicant, against Thomas Frank Harrington, bailiff to the Ouse Drainage Board, for that he, having levied a distress on Mr. Porter's goods for a sum of less than £20, in respect of rates levied by the board, unlawfully charged and retained out of the produce of such goods costs and charges exceeding those prescribed by the Distress (Costs) Acts, 1817 and 1827, and Mr. Porter claimed treble the amount under those Acts.

The detailed facts are not material to the only question at issue in the Divisional Court. The applicant was one of many ratepayers in the district of the Ouse Drainage Board who refused to pay the rates levied by the board. There was organized opposition both to the rates and to the sales of distresses, with the result that the board found it necessary to conduct the sales in Cambridge under police protection. In the present case the amount distrained for was £4 16s. 11d. A horse was distrained, the applicant refused to pay, and the bailiff accordingly had to arrange for its carriage by rail to Cambridge. Expenses were incurred both for the bailiff's lodging and for the stabling and carriage of the horse. At the auction no one but the applicant attended, and he refused to bid. The horse was eventually sold for £10, which was less than the amount of the rates and the expenses actually incurred, and no overplus was returned to Mr. Porter, who preferred this complaint, alleging that the amount of costs which could lawfully be taken was limited to the sums named in the Distress (Costs) Acts, 1817 and 1827. It was contended for the board that the justices had no jurisdiction to hear the complaint, as section 55 of the Sewers Act, 1833, and section 7 of the Sewers Act, 1849, contained no limitation of the amount of costs which might be levied, and that the matter was one within the exclusive jurisdiction of the Court of Sewers, and the applicant's only remedy was by appeal to Quarter Sessions under section 47 of the Land Drainage Act, 1861. The justices accepted this view, and declined to hear Mr. Porter's complaint.

Mr. Montgomery, K.C., and Mr. Gerald Howard showed cause; Mr. Pritt supported the rule.

The Lord Chief Justice.—This is a rule *nisi* for an order in the nature of a *mandamus* to justices to proceed to hear and determine, pursuant to the statutes in that behalf, a complaint preferred by one Porter against one Harrington for taking more costs of levying a distress than are permitted under the Distress (Costs) Acts, 1817 and 1827. The ground upon which the rule was obtained was that the justices had jurisdiction to hear that complaint and that they had not heard it.

The question, and it is by no means without interest, turns on the construction of certain old statutes. It appears, upon the rather meagre affidavits before us, that as soon as the matter was mentioned to the justices objection was taken that the complaint was manifestly based on the Distress (Costs) Acts, which no longer had any application to a sewers rate. The justices, it seems, forthwith accepted that contention, and refrained from exploring the merits of Mr. Porter's complaint, because they

* Reported by J. W. Hall, Esq., Barrister-at-Law.

were satisfied that the statutes on which he relied had ceased to apply.

It is contended that the justices were right because the effect of the Sewers Act, 1833, and the Sewers Act, 1849, is entirely to get rid of the Distress (Costs) Acts, 1817 and 1827, so far as sewers rates are concerned.

Attention has been directed to the case of *Coster v. Headland* (22 *The Times* L.R., 441 ; [1906] A.C., 286), and it seems to me that the reasoning in that case, though it specially referred to a poor rate, has no less application to the present matter. It may well appear on a superficial view that there are clauses in the Sewers Acts inconsistent with the Acts of 1817 and 1827. The same argument was used with no less force in *Coster v. Headland* (*supra*), where Lord Loreburn said, at page 288 : "We have under consideration 'charges' for 'taking, keeping, and selling distress.' An Act of 1827, which says in terms that charges for distress shall, in cases not exceeding £20, be according to a particular schedule, is still upon the statute book. Here is a charge for distress in a case under £20, and that charge is beyond the schedule rate. That seems to me necessarily to conclude our decision, unless there is some special reason showing that the Act is inapplicable." Lord Loreburn proceeded to examine the question whether the statutes there in question were incompatible, and came to the conclusion that the statutes said to be incompatible ought to be read together. "Even if a new standard is set up by the Act of 1849, is it incompatible with the special limitation being still preserved under the Act of 1827 as to distresses not exceeding the sum of £20 ? I think it is not incompatible, and that it makes no difference whether the one Act precedes or follows the other. I read them both together. One of them says that the charges are to be reasonable, the other says that the charges in cases not exceeding £20 are to be according to the schedule." In like manner Lord Macnaghten says : "I think the statute of 1827 is a statute of universal application, and when the statute of 1849 was passed it applied to it, and would only not have applied if it had been specially excluded." I cannot see why that language is more applicable to a distress for poor rate than it is to a distress for sewers rate. Lord Robertson, in the same case, says that the Act of 1827 "lies in wait, as it were, for Acts which may be passed, and imprints upon them a certain limitation." Lord Davey delivered a judgment of marked brevity. He said : "The reasons stated by Lord Justice Stirling seem to me so clearly put that I am quite content to accept what he has said as a judgment of my own." When one turns to the judgment of Lord Justice Stirling (21 *The Times* L.R., 123 ; [1905] 1 K.B., 219, at p. 234) one finds passages singularly applicable to the matter now before us. "But that Act was not repealed. It remained on the statute book ready to come into operation as soon as further provision was made with regard to the expenses of distresses for poor rates, unless the Legislature thought fit to provide otherwise. The Act of 1849 in substance restored the provisions of the repealed Act of 1754, 27 Geo. II., c. 20, and it did not repeal the Act of 1817, nor, in my opinion, the Act of 1827. The provisions of those two Acts must, I think, be taken to amount to a definition by the Legislature of what are to be deemed reasonable charges in respect of the expenses of the distresses contemplated by the Acts respectively in cases where the sum demanded and due does not exceed £20." And a little later : "The Distress (Costs) Act, 1827, is, it may be observed, a general Act dealing not only with poor rates but with other rates as well, and the limitations which it imposes are still in force, as it appears to me, with regard to distresses for such other rates." That is the judgment which Lord Davey in terms so significant approved.

It is not suggested that the Sewers Acts have expressly repealed the Distress (Costs) Acts. What is said is that a comparison of the Sewers Acts, on the one hand, and the Distress (Costs) Acts, on the other, reveals such incompatibility that so far as sewers rates are concerned, the provisions of the earlier Acts are by implication repealed. I do not think that that proposition is established. Indeed, I think that in section 55 of the Sewers Act, 1833, and in section 7 of the Sewers Act, 1849, a distinction is drawn between charges antecedent to the distress warrant and the charges of the distress. The former are to be specified in the warrant ; the latter are left vague. It is the latter with which the Distress (Costs) Acts deal.

I think these statutes are all capable of being read together, and if that is true, in the cases with which they are concerned, the limitations imposed by the Distress (Costs) Acts, 1817 and 1827, remain. Though what is being recovered is a sewers rate, if the scale is exceeded, I do not think there is anything to prevent the complainant going to the justices to ask for appropriate relief.

I think that the rule should be made absolute, and that the case should go back to the justices with a direction that the Distress (Costs) Acts are still of full force and effect, and that the limits laid down in those Acts are those which are to be observed by persons levying distresses for sums less than £20.

Mr. Justice Avory.—I agree. The question is whether a later statute is inconsistent with an earlier statute. The judgment which my Lord has delivered, following the House of Lords in *Coster v. Headland* (22 *The Times* L.R., 441 ; [1906] A.C., 286) is reinforced when it is remembered that that case followed after *Hill v. Pannifer* (20 *The Times* L.R., 324 ; [1904] 1 K.B., 811), where Mr. Justice Channell said this, dealing with the Distress for Rates Act, 1849 : "I think the only question we have to consider is whether the words of the operative part of the statute 12 and 13 Vict., c. 14, are inconsistent with the continued existence of a statutory limit of the charges in respect of these distresses which had previously existed. It seems to me that they are. It is inconsistent with there being a maximum limit of charges to say that a man is to have his reasonable costs. The present case shows it. There are costs which do exceed that maximum limit, and which are found to be in point of fact reasonable. It seems to me, therefore, that the later statute is necessarily inconsistent with the continued existence, not of the other statute as a whole, but of the other statute as applicable to distress for poor rate, which is the subject of this case." That is the view presented by Mr. Montgomery. It was expressly overruled by the Court of Appeal in *Coster v. Headland* (21 *The Times* L.R., 123 ; [1905] 1 K.B., 219), where Lord Collins, M.R., said, at p. 231 : "I feel bound to differ from the decision of the Divisional Court in *Hill v. Pannifer* (*supra*)." The House of Lords adopted the views of the Court of Appeal, and overruled *Hill v. Pannifer* (*supra*).

Mr. Justice Salter.—I am of the same opinion. I think Mr. Montgomery's strongest point was that relating to the costs of obtaining the distress warrant which are allowed by section 7 of the Sewers Act,

1849. Under the Distress (Costs) Acts no provision is made for the costs of obtaining the warrant, and therefore it is urged that the statutes are inconsistent. But I see that the same point arose in *Coster v. Headland* (22 *The Times* L.R., 441; [1906] A.C., 286), and I think that that decision concludes this case.

[Solicitors—Messrs. Simmons and Simmons, for Mr. R. A. Hodges, Cambridge; Messrs. McBride and Co., for Mr. Wm. R. Greenland, Thetford.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.) 1926. Oct. 29.

FAULKNER v. HYTHE CORPORATION.*

Private Street Works — Objection to proposed works — Application by local authority to justices — To be made before works are executed — Private Street Works Act, 1892 (55 and 56 Vict., c. 57), ss. 7, 8.

When an objection is lodged to proposed works under s. 7 of the Private Street Works Act, 1892, the local authority must apply under s. 8 to the justices to determine the objection before the works are executed. After the works are completed, the justices have no jurisdiction to determine an objection under s. 7.

This was a case stated by justices for the borough of Hythe, sitting as a Court of Summary Jurisdiction at the Town Hall, Hythe, to determine the matter of objections made under section 7 of the Private Street Works Act, 1892, in pursuance of section 8 of that Act, on an application by the respondents in respect of a notice of objection made by the appellant under section 7 of the Private Street Works Act, 1892, to the proposals of the respondents relating to property situate in Albert-road, Hythe. The application was heard on July 13, 1926, when the said Court of Summary Jurisdiction, having heard an objection to their jurisdiction made by counsel for the appellant, decided that they had the power to hear and determine within the meaning of section 8 of the Private Street Works Act, 1892.

Upon the hearing of the said matter the following facts were agreed between counsel for the respondents and counsel for the appellant.

The respondents as the Urban Authority within their district resolved that Albert-road (a road upon which the appellant's property abutted) was not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the Urban Authority, and that the respondents as such Urban Authority as aforesaid should sewer, level, pave, metal, flag, channel and make good and provide proper means for lighting such street and that the expense incurred by the respondents should be apportioned on the premises fronting, adjoining, or abutting on such street or part of the street in pursuance of section 6 of the Private Street Works Act, 1892.

The respondents' surveyor prepared:—

(*a*) A specification of the private street works referred to in the resolution with plans and sections.

(*b*) An estimate of the probable expenses of the works.

(*c*) A provisional apportionment of the estimated expenses between the premises liable to be charged therewith under the Act. These were duly approved by the respondents in the manner provided by the Private Street Works Act, 1892.

The resolutions approving the specification, plans and sections, estimate and provisional apportionment were published in the manner specified in part 2 of the Schedule to the Private Street Works Act, 1892, and copies thereof were served on the owners of the premises, including the appellant, shown as liable to be charged in the provisional apportionment, within seven days after the date of the first publication, namely, on December 29, 1923, and the necessary publications were made.

An amended apportionment was duly served on the appellant on January 21, 1924.

On January 23, 1924, the appellant served a notice on the respondents in writing objecting to the proposals of the urban authority on ground (*b*) specified in section 7 of the Private Street Works Act, 1892, namely, that Albert-road was a highway repairable by the inhabitants at large.

No application to the Court of Summary Jurisdiction to appoint a time for determining the matter of objections under section 8 of the Private Street Works Act, 1892, was made by the respondents until after the work was completed and final apportionment made and notice thereof served. The notice of final apportionment was served on the appellant on September 1, 1925, and a similar objection was made by the appellant under section 12 of the Private Street Works Act, 1892, by notice in writing on the respondents on September 3, 1925, as had been raised to the said proposals of the respondents under section 7 of the Private Street Works Act, 1892.

On July 2, 1926, the respondents as such urban authority as aforesaid applied to the Court of Summary Jurisdiction to hear, determine and appoint a time for determining the matter of the said objection made by the appellant under section 7 of the Private Street Works Act, 1892, in pursuance of section 8 of the Private Street Works Act, 1892.

The date appointed was July 13, 1926.

On the part of the appellant it was contended: That the Private Street Works Act, 1892, should be construed as a whole and that section 8, in view of the preceding and subsequent sections of the Act and of the scheme of the Act and certain *obiter dicta* of Lord Alverstone, C.J., and Mr. Justice Wills, should be read as if the words "before the commencement of the works" were inserted in the section after the words "at any time after the expiration of the said month" and before the words "may apply to a Court of Summary Jurisdiction."

On these grounds the appellant contended that upon the true construction of the Private Street Works Act, 1892, the justices had no jurisdiction on July 13, 1926, to hear and determine the said objection made by the appellant to the proposals of the respondents under section 7 of the said Act.

On the part of the respondents it was contended that the appellant was not in any way prejudiced by the hearing being delayed, since if the Court decided that the highway was repairable by the inhabitants at large he and others would be relieved of the expenditure, and that the words in section 8 "at any time after the expiration of the said month" must bear their ordinary interpretation, and that the justices were not at liberty to insert words into a statute which did not appear therein.

The attention of the justices was called by the appellant to the case of *Wirral Rural District Council*

* Reported by J. W. Hall, Esq., Barrister-at-Law.

v. Carter (19 *The Times* L.R., 153 ; [1903] 1 K.B., 646) and the *obiter dictum* of Lord Alverstone, C.J., on page 649 and certain expressions used in the same case by Mr. Justice Wills, and to the case of *Hayles v. Sandown Urban District Council* ([1903] 1 K.B., 169) and *Pearce v. Maidenhead Corporation* ([1907] 2 K.B., 96). It was admitted that these cases were not cases which directly decided the case before the Bench, but it was contended that the expressions of the learned Judges should bear weight.

The appellant referred to section 12 of the Private Street Works Act, 1892, and contended that after the final apportionment was made and notice thereof served the only grounds of objection which could be raised to the final apportionment were the grounds set out in subsection 2 of section 12 of the Act, and that this was not consistent with the Court of Summary Jurisdiction having the power to determine an objection made under section 7 of the said Act after the final apportionment had been settled.

The justices were of opinion that the *obiter dicta* quoted were merely ancillary to the case before the Court and were not in any way considered judgments or applicable to the present case ; and that section 12 of the Private Street Works Act, 1892, was not inconsistent with construing section 8 in the words of that section in that, until the notice of objection of the appellant to the provisional apportionment had been dealt with under section 8, it would be impossible to make a binding legal final apportionment to which sections 12, 13, and 14 would apply.

The justices considered that they had no right to insert words in an Act of Parliament unless subsequent sections of the same Act were entirely inconsistent with the ordinary construction to be placed upon the words.

The question upon which the opinion of the Court was desired was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law in holding that they had jurisdiction despite the lapse of time and the events which had happened, and, if not, what should be done in the premises.

By the Private Street Works Act, 1892, section 6 (3) : ". . . During one month from the date of the first publication the approved specifications . . . shall be kept deposited at the urban authority offices. . . ."

By section 7 : " During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may . . . object to the proposals of the urban authority on any of the following grounds . . . (*b*) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large. . . ."

By section 8 (1) : " The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed and copies of such notice shall be served upon the objectors. . . ."

Mr. C. R. Havers appeared for the appellant ; Mr. W. M. Andrew (Mr. A. F. Clements with him) for the respondents.

The Lord Chief Justice.—This is a case stated by justices, and the point which is involved in it may be very concisely stated. It is whether in section 8 of the Private Street Works Act, 1892, a true construction of the words relating to the application by the urban authority at any time after the expiration of the month therein referred to, involves the meaning that the application is to be made while the works are still proposed works and before they have been started upon. Reference has been made to certain observations in *Wirral R.D.C. v. Carter* (19 *The Times* L.R., 153 ; [1903] 1 K.B., 646), in *Hayles v. Sandown U.D.C.* ([1903] 1 K.B., 169), and *Pearce v. Maidenhead Corporation* ([1907] 2 K.B., 96), which assume, rather than hold, that that is the true construction. In my opinion that is the true construction as is made plain by the whole scheme of this statute, and, moreover, by particular phrases to be found in these sections. The scheme is this : That where the street is not yet sewered, levelled, paved, &c., the urban authority may pass a resolution and the surveyor shall thereupon prepare a specification, estimate, and provisional apportionment. That resolution has to be published in the manner provided by section 6, and there is to be a month during which, as provided by section 7, the owner of any premises shown in the provisional apportionment as liable to be charged may, by written notice, object to the proposals. The grounds of such objections are enumerated, and one finds in the body of the objections, for example (*d*), that the proposed works are insufficient or unreasonable or that the estimated expenses are excessive. The work is then a matter of proposal. Passing to the next section, one finds that it is the duty of the urban authority to apply to a Court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, that is to say, they must apply for objections to be heard to the proposed works. Then follow section 9, as to incidental works, section 10 as to apportionment, and then a very significant section, section 11, where the whole process is to be repeated *de novo* if the urban authority from time to time desire to amend the specification, plans, &c., and that chapter of the story, so to say, is closed and we pass to section 12, beginning with the words : " When any private street works have been completed." I do not see that the words " before the commencement of the works " are omitted from section 8. In my view, the scheme of these sections and the vocabulary employed, show that that application is to be made before the commencement of the works, otherwise it would be grotesque to speak of objections to proposed works. It is not necessary to repeat the facts of this case. The point of them is this : That it was not until the whole work had been carried out and the whole of the expense incurred and the final apportionment made, that this particular owner of premises had an opportunity, if indeed it was an opportunity, of taking the preliminary point that this street, as to which he was to bear a part of the cost of repair under this statute, was all the time a highway repairable by the inhabitants at large. That was not an objection which could be taken at the time of the hearing : it was an objection which arose upon the proposed works. I think, therefore, that the point taken by the learned counsel for the appellant in the Court below was right, and that the justices were without jurisdiction at that stage to deal with such an application. I think, therefore, that this appeal succeeds and that whatever order, and there seems to be some doubt as to the precise terms and effect of the order made, was in those circumstances made by these justices is null and void.

Mr. Justice Avory.—I am of the same opinion. The only ground upon which the decision of the justices that they had jurisdiction can be supported

is the ground taken by Mr. Andrew, that under section 8 there is no limitation of time within which the urban authority may apply to the Court of Summary Jurisdiction; but when that section is looked at, I think it is clear that this is one of those instances where the word "may" has to be construed in a mandatory sense, and further, it is clear, looking at this section, that that provision about the urban authority applying to the Court only has relation to the question of an objection which has been made under section 7 to the proposed works, and it can have no application to an objection which is provided for by section 12 after the works have been completed. The word "may" here is undoubtedly used in the permissive sense, because there may be or may have been no objection raised, and therefore there may be no need for the application to the Court. But it clearly contemplates that, if an objection has been made under section 7, then the urban authority shall apply to the Court of Summary Jurisdiction, and in my opinion, if they fail to do that, then the justices have no jurisdiction at all to deal with any question of final apportionment.

Mr. Justice Salter.—I am of the same opinion. If sections 9 and 10 of the Act are read as it appears to me they should, strictly speaking, be read, before sections 7 and 8, I think it will be sufficiently clear that Parliament was intending that objections to the provisional apportionment should be dealt with and disposed of before the works are begun, and I think that view is considerably strengthened by a consideration of the terms of section 11.

[Solicitors—Messrs. E. C. Rawlings, Butt, and Bowyer; Messrs. John Hands and Son, for Mr. H. Stainer, Hythe.]

Chan. Div. (Clauson, J.) 1926. Nov. 11.

IN RE SIKES—MOXON AND ANOTHER v. CROSSLEY AND OTHERS.*

Will — Construction — Specific legacy — "My piano"—Sale of article after date of will—Subsequent purchase of similar article—Wills Act, 1837 (1 Vict., c. 26), s. 24.

A testatrix, who at the time when she made her will had an ordinary piano that had been converted into a player-piano, made in her will a bequest of "my piano." The testatrix afterwards bought a new motor player-piano, and the old piano was sold and removed from her residence, and was not in her possession at her death.

Held, that as the particular piano bequeathed had been sold before the death of the testatrix the specific legatee was not entitled to the motor player-piano.

Miss Hannah Maria Sikes, of Doe Royd, Almondbury, Huddersfield, by her will dated June 4, 1921, appointed the plaintiffs, Mr. George Dunhill Moxon and Mr. James Edward Mellor, her executors and trustees. The will contained, among other provisions, the following bequest:—"I bequeath my piano to Beatrice Elizabeth Leigh." The testatrix directed her trustees to divide her residuary estate between the defendants, the Huddersfield Infirmary and the Victoria Sick Poor Nurses' Home, Huddersfield. Among the pecuniary legacies was one of £2,000 to Beatrice Elizabeth Leigh.

On May 29, 1923, the testatrix purchased from Messrs. Moore and Moore, of London, an electric motor player-piano for £228 18s. and a stool, making a total of £231 8s., which sum was paid by her on June 7, 1923. The old piano was removed from the testatrix's residence in June, 1923, and was not in her possession at the date of her death on February 14, 1926.

Beatrice Elizabeth Leigh, on April 18, 1922, married Mr. William Royston Crossley. She was the first defendant to the originating summons, which was issued by the plaintiffs for the purpose of deciding whether the electric motor player-piano which the testatrix possessed at the date of her death passed to the defendant Beatrice Elizabeth Crossley, or whether it formed part of the residuary estate of the testatrix bequeathed to the defendants, the Huddersfield Infirmary and the Victoria Sick Poor Nurses' Home.

The piano which the testatrix had at her house at the time when she made her will had been originally an ordinary piano, but had been converted into a player-piano. It was alleged by the defendant Mrs. Crossley that the testatrix sold it to her (Mrs. Crossley's) husband for £5 at the time when she bought the new electric motor player-piano.

Mr. R. H. Hodge appeared for the plaintiffs; Mr. F. R. Evershed for the first defendant, Mrs. Crossley; and Mr. Wilfrid M. Hunt for the other defendants, the residuary legatees.

Section 24 of the Wills Act, 1837 (1 Vict., c. 26), provides that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Mr. Justice Clauson, in giving judgment, said that in her will the testatrix was pointing to, and meant to give, that particular piano which she possessed at the date of her will, though the word "my" might not be quite conclusive to make a gift a specific gift. But having arrived at that conclusion with regard to the gift in this will of "my piano," could it be said that a contrary intention appeared on the face of the will? Mr. Justice Swinfen Eady, as he then was, in the case of *In re Clifford—Mallam v. McFie* (28 *The Times* L.R., 57; [1912] 1 Ch., 29), referred with approval to, and applied, the following passage in a judgment of Vice-Chancellor Wood, in *Goodlad v. Burnett* (1 K. and J., 341, at p. 348):—"When I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention' to which the Act, in its 24th section, refers does not appear on the face of the will."

In his (his Lordship's) opinion, the result was that there was a contrary intention on the face of this will, and the specific legatee did not get the piano because the particular piano bequeathed to her had been sold before the death of the testatrix. The costs would come out of the residuary estate.

[Solicitors—Messrs. Helliwell, Harby, and Evershed, for Messrs. Jubb, Booth, and Helliwell, Halifax; Messrs. Crossman, Block, and Co., for Messrs. Hirst, Smailes, and Downey, Huddersfield.]

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

Chan. Div. (Romer, J.) 1926. Nov. 17.

LAYZELL AND ANOTHER v. THOMPSON AND OTHERS.*

Highways — Ferry — Franchise ferry—Grant—Evidence.

The Court held that a franchise ferry between South Benfleet and Canvey Island had been granted to the plaintiffs' predecessors in title.

This was an action by Mr. Albert Richard Layzell and Mr. William Henry Theobald for a declaration that they were entitled to and were possessed of an ancient ferry across Benfleet Creek between the causeway at South Benfleet, Essex, and the highway opposite on Canvey Island. They also sought an injunction to restrain the defendants, their servants, and agents, from disturbing the plaintiffs in the possession or enjoyment of the ferry.

Mr. Macmorran, K.C., and Mr. Hodge appeared for the plaintiffs; Mr. Manning, K.C., and Mr. G. M. Simmonds for the defendants.

Mr. MACMORRAN said that the defendants had disturbed the plaintiffs' ferry by the establishment and maintenance of a rival ferry service over the creek separating the mainland of Essex from Canvey Island. The population of Canvey Island had in recent years increased from 300 to 5,000. It was only necessary for the plaintiffs to prove a possessory title. (See *Peter v. Kendal* (6 B. and C., 703); and *Trotter v. Harris* (2 Y. and J., 285).) The disturbance could not be justified. There had been a ferry at the place in question since 1848.

Mr. MANNING said that the plaintiffs' ferry was not an ancient or franchise ferry with an obligation to serve the public at all hours of the day or night. A ferry granted by Royal Charter was a continuation of the main road, and it could not be said that the plaintiffs had any exclusive title of that kind.

MR. JUSTICE ROMER, in delivering judgment, said that the case was unique in one respect among ferry cases, because at low water the tidal creek could be traversed on foot. There was a highway on the mainland down to the causeway, and the highway was continued on the Canvey Island side. Carts could proceed over the causeway at low water, and foot passengers could do so over planks and stepping-stones. He had a very difficult question to determine, and one which he wished could have been submitted to a jury. It was difficult because of the almost total absence of documentary evidence in support of the claim to the ferry.

The census of 1911 showed a population of 500 in Canvey Island. At the present time it appeared that there was a resident population of over 5,000. Consequently, in considering the evidence of user in past days, one must expect it to be comparatively meagre. The ferry was never of any great value, and was from time to time held by people of no very great education or substantial position in life. One might therefore readily expect the various owners to be ignorant of the duties attached to a franchise ferry. As to the nature of a franchise ferry, reference had been made in the course of the arguments to *Letton v. Gooden* (L.R., 2 Eq., at pp. 130, 131); and to *Simpson v. Attorney-General* (20 *The Times* L.R., 761; [1904] A.C., at p. 490).

His Lordship also referred to *Hammerton v. Earl of Dysart* (31 *The Times* L.R., 592; [1916] 1 A.C., at p. 102). No authority had been brought to his notice indicating that the owner of a franchise ferry was bound to charge the same toll at all times of the day and at all times of the year. Two other cases were useful as showing the kind of evidence on which a jury should find the existence of a ferry. They were *Trotter v. Harris* (2 Y. and J., 285) and *Peter v. Kendal* (6 B. and C., 703). He also referred to Pease and Chitty on "Markets and Fairs" at p. 23.

There was evidence of acts by former owners of the ferry, *e.g.*, in respect of the charges, which were not permissible, but those acts rather indicated a want of knowledge than a recognition of the fact that no exclusive right had been granted. On the whole, regarding himself as a jury, he came to the conclusion that in times gone by there had been a grant of a franchise ferry to the predecessors in title of the plaintiffs who were in possession of the ferry. That being so, he must grant the injunction.

[Solicitors—Messrs. Bentley and Jenkins, for Messrs. Snow and Snow, Southend-on-Sea; Messrs. Maitland, Peckham, and Co.]

* Reported by J. L. DENISON, Esq., Barrister-at-Law.

K.B. Div. (Rowlatt, J.) 1926. Nov. 16.

TOLLEMACHE v. INLAND REVENUE COMMISSIONERS.*

Revenue — Supertax — Occupation of family mansion—Permission of trustees—Annual value of house—Whether to be included in occupant's income—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. A.

The Court held that the occupant of a family mansion, under the terms of a will by which trustees were given general powers of management of the real estate and a discretion to admit to the mansion the present occupant or certain members of his family during his lifetime, must be regarded as being in occupation under the will, and that the profits and gains representing the annual value of the house formed part of his income for purposes of supertax.

This was a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant, the Right Hon. Bentley Lyonel John Tollemache, Lord Tollemache, appealed against assessments to supertax in the sums of £17,434 and £18,000 for the years ending April 5, 1921, and April 5, 1922.

By the will of the appellant's grandfather, the late Lord Tollemache, the mansions of Peckforton Castle, Cheshire, and Helmingham, Suffolk, were devised to trustees upon certain trusts. The trustees during the life of the appellant were given powers to manage or superintend the real estates and generally to deal with the estates as if they were the absolute owners thereof, and to exercise all the powers which by the Settled Land Acts, 1882 to 1890, were conferred on a tenant for life in possession of land. There were provisions for the payment of annuities, interest on legacies, and other sums charged on the real estates, and for the discharge of mortgages and other charges affecting the real estates. The residue or so much

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

thereof as the trustees in their uncontrolled discretion should think fit was to be applied to the maintenance and benefit of the appellant during his life, or for the benefit of certain other persons as the trustees should determine. There was the following further proviso :—

"Provided always that it shall be lawful for the trustees during the lifetime of Bentley Lyonel John Tollemache to permit him or his wife or any of his children to occupy and enjoy the mansions or either of them with the furniture and effects therein and the garden parts and appurtenances."

The trustees at all material times permitted the appellant to occupy Peckforton Castle and to enjoy the use of the furniture of the castle, and they also paid to him an allowance of £600 a month. It was admitted by the appellant that that sum, together with the appropriate addition for income-tax, should be included in his supertax returns. The annual value of Peckforton Castle for the purposes of assessment to income-tax under Schedule A of the Income Tax Acts for each of the years ending April 5, 1920, and April 5, 1921, was £859 5s., and the appellant was assessed to income-tax under Schedule A in respect of the premises for each of these years.

The following were the items the inclusion of which in the supertax returns was disputed :—

—	1920-21. £ s. d.	1921-22. £ s. d.
(i.) Annual value of Peckforton Castle ..	859 5 0	859 5 0
(ii.) Rates, &c., on Peckforton Castle paid by trustees	303 6 7	141 3 5
(iii.) Appellant's supertax paid by trustees ..		2,798 4 6 2,000 0 0

The payments under (ii.) and (iii.) were made by the trustees directly.

It was contended on behalf of the appellant : (*a*) That as regards item (i.) Peckforton Castle was vested in the trustees, who had absolute discretion to deal with it as they pleased ; that the appellant had no right to reside there ; that the trustees could turn him out at any time ; that, accordingly, the appellant had no power to sublet the castle, and that the annual value thereof formed no part of his total income. (*b*) That as regards item (ii.) it was part of the trustees' duty to keep up the property and pay the rates and taxes thereon, and that these payments were not payments made on behalf of the appellant. (*c*) That as regards item (iii.) these payments were casual gifts and, being made directly by the trustees, were not received by the appellant as income. (*d*) That neither the annual value of the castle nor any of the payments under heads (ii.) or (iii.) formed part of the appellant's income for the purposes of supertax.

On behalf of the Crown it was contended : (*a*) That as regards item (i.) the appellant was in the position of a tenant for life of the castle, or, alternatively, that he was occupier of the castle with the permission of the trustees and had the power of subletting. (*b*) That as regards item (ii.), if the appellant was in the position of tenant for life of the castle the rates and taxes would fall upon him and these payments were made by the trustees for his benefit. (*c*) That as regards item (iii.) these payments were made in discharge of the appellant's debts and were for his benefit, and that therefore they were on the same footing as the monthly allowances paid to him by the trustees. (*d*) That the annual value of the castle and the payments under heads (ii.) and (iii.) formed part of the appellant's income for the purposes of supertax.

The Special Commissioners decided :—(1) That the annual value of Peckforton Castle and grounds should be included in the supertax returns. (2) That the supertax payments made by the trustees on behalf of the appellant were clearly payments made for his benefit, and that these payments should be included in his supertax returns. (3) That on the view that the appellant was the occupier of Peckforton Castle he was liable for the rates and taxes thereon, and the payment of these by the trustees was a payment on his behalf, and this amount should be included in the supertax returns, and income-tax must be added to the payments under (ii.) and (iii.).

From this decision an appeal was brought.

Mr. A. M. Latter, K.C., and Mr. Cyril King appeared for the appellant ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt, in giving judgment, said that the matter was really a simple one. A house had been assessed under Schedule A. The question of supertax arose, and it became necessary to find the total income of the person living in that house. The question to be determined was whether the annual profits and gains represented by the annual value of the house were his profits and gains, or, on the other hand, were the profits and gains of some other person, so that they did not come into the occupant's income at all, though he had the advantage of having the house at his disposal.

There had been cases where the question at issue was whether the occupation by the subject was merely occupation and nothing more, the familiar example being occupation by a servant of his employer's house, where every conceivable interest remained in the employer. It had been held that when the interest remained wholly with a person in the position of employer the servant was not assessable. In the present case, however, there was no question of there being any relation of employer and employed. The real question was whether the appellant was to be considered as being in a position analogous to that of a person who had been merely lent a house, or whether the house should be regarded as having been his house for the time that he lived in it.

He was of opinion that the appellant clearly occupied the house under the will and that there was no analogy to the case of a loan at all. It was true that the trustees had a discretion whether they would admit him or not, but when once he was permitted to live in the house he must be regarded as being in occupation under the will as long as he remained there. That appeared to be the principle laid down in *Drummond v. Collins* (31 *The Times* L.R., 482 ; [1915] A.C., 1,011). The Solicitor-General had submitted that, in his view, when once the trustees had given the appellant permission to reside in Peckforton Castle they could not turn him out. It was not necessary to express any opinion on that point, as he (his Lordship) was deciding the case on the footing that the trustees could turn him out, but that they had not done so in the year in question. It was grotesque to say that Lord Tollemache, living in the home of his ancestors, was there in the position of a gratuitous licensee. Precisely the same reasoning applied to the income allowed to the appellant under the will. It could not be said that he had received it on the footing of either generosity or charity.

The decision in *Commissioners of Inland Revenue v. Wemyss* (8 Tax Cas., 551) did appear to present a substantial difficulty. The distinction there drawn was that the will contained an extraordinary clause of forfeiture. It was difficult to see why such a clause of forfeiture in any way affected the question of occupation or interest in lands before the forfeiture occurred, but the Judges in that case had certainly laid great stress on that clause, and he was justified in distinguishing the present case on the ground that there was no such forfeiture clause.

In view of his decision on the first point, it followed that the appellant was in rateable occupation of the house, and the rates paid by the trustees must be regarded as having been paid on his behalf. The appeal would be dismissed, with costs.

[Solicitors—Messrs. Hasties; the Solicitor of Inland Revenue.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1926. Nov. 5.

REX v. NORTH—EX PARTE OAKEY.*

Prohibition—Ecclesiastical Court—Order made without jurisdiction—Vicar alleged to have committed an ecclesiastical offence—General citation—Non-appearance of vicar—Order for costs against him in his absence—Right of appeal against order—Delay in applying for writ—Prohibition not refused.

Prohibition will issue in respect of an order of an Ecclesiastical Court made without jurisdiction, notwithstanding that an appeal lay from such order to a higher Ecclesiastical Court and thence to the Privy Council.

This was an appeal by the Rev. John Polycarp Oakey, vicar of Eye, from the judgment of the Divisional Court, consisting of the Lord Chief Justice, Mr. Justice Avory, and Mr. Justice Shearman (the latter dissenting), discharging a rule *nisi* for a writ of prohibition directed to the Vicar-General and Official Principal of the Consistory Court of Ipswich, the prohibition being from proceeding against the Rev. John Polycarp Oakey under an order of the Consistory Court, ordering him to pay the costs and expenses incurred by Miss Short, a parishioner of Eye, who applied to the Consistory Court for a faculty to restore a fresco on the wall of the church of St. Peter and St. Paul, which represented angels carrying a scroll, bearing the words "Worthy is the Lamb that was slain," and which had been obliterated by distemper during some restoration work in the church, and also from proceeding on a monition requiring the vicar to pay, within fourteen days, the taxed costs, amounting to £42 13s. 6d., and the expenses of restoring the fresco, amounting to £74 14s. 6d.

The writ of prohibition was asked for on the ground that the judge of the Consistory Court had exceeded his jurisdiction in ordering the vicar to pay the costs and expenses, as the vicar was no party to the proceedings before the judge of the Consistory Court.

Mr. Ernest Charles, K.C., and Mr. Harold Hardy appeared for the appellant; and Mr. E. W. Hansell for the respondent.

Mr. Ernest Charles, in opening the appeal, said that Miss Mary Elizabeth Short, of Hillside, Eye, had applied to the Consistory Court for a faculty to restore a fresco on the wall of the church of St. Peter and St. Paul at Eye, which had been painted in 1869 by her father, Mr. William Short, who was an accomplished artist. The fresco, which had been obliterated by distemper during restoration work, represented angels carrying a scroll bearing the words "Worthy is the Lamb that was slain." The Church Council supported the petition for a faculty to restore the fresco.

The practice in the Ecclesiastical Court was to submit the petition to the Chancellor, and he, having considered it, then issued his *fiat* for a citation to be issued. If there was no appearance to the citation, it went through if approved by the Chancellor. The citation issued was sent to the vicar to be put up on the door of the church, and was an invitation to anyone interested in the parish to enter an appearance to the citation and say, if they objected, that they did not want the fresco restored.

In this case no appearance was entered to the citation, and Mr. North held a Court on July 24, 1925, at the church of St. Peter and St. Paul. There was no opposition. The vicar did not appear at the hearing on July 24. The Tacon trustees, who were patrons, appeared, and expressed regret that the fresco had been distempered over; they said that they had employed a very distinguished architect to do the restoration work and that they took the whole responsibility. The Tacon trustees financed the work of restoration.

The Chancellor granted to Miss Short the faculty to have the fresco restored, and directed the Rev. J. P. Oakey to pay the costs of the proceedings and to pay the expenses incurred in restoring the fresco. This order was made by the Chancellor, notwithstanding the fact that the Rev. J. P. Oakey was not a party to the proceedings. He did not enter an appearance to the citation, and did not oppose. Such an order, contended counsel, was contrary to justice and to the rules of the Common Law. The petitioner, having got the faculty which she petitioned for, was satisfied, but the Chancellor made an order for costs against one who was not a party to the proceeding. He ordered the vicar to pay the costs, although there was no opposition. It was contrary to law and to justice that a person who was not a party to a proceeding should be burdened with the costs of it.

Lord Justice Bankes said that the only question which the Court had to decide was that of jurisdiction, and the Court would not go into the merits of the case.

Mr. Charles contended that the decision of the majority of the Divisional Court was based on a misconception with regard to the effect of a general citation. The majority of that Court had treated the citation as binding on the vicar because the petitioner had put the names of certain persons in the petition, and on that ground it was said that he had to come to the hearing to show cause, failing which he must pay the whole of the costs of the proceedings and the expenses of restoring the fresco. A proceeding by way of special citation was a different thing from a citation issued in the ordinary way. A general citation was only an invitation. If it were desired to enforce a person's attendance, that must be done by serving on him personally a citation which required him to do something, and informing him that if he made default an order would be made against him. That was a different matter from a general citation. In this case it was the trustees who had given the order to do the restoration work, and it was they who

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

paid for it, and the architect was employed by them. If anybody should intervene, the trustees were obviously the persons to do so. There was good ground in this case for the issue of the writ of prohibition.

Mr. E. W. Hansell, for the respondent, said that the only question the Court had to decide was whether the writ of prohibition ought to issue, and the Court had not to see whether the action of the Consistory Court was all that it should be. The whole trouble was caused by the action of the vicar. In 1923 a faculty was granted to the vicar and churchwardens which authorized certain work to be done, but did not authorize interference with this particular fresco. Therefore the vicar allowed something to be done which he was not authorized to do, and being done, was clearly illegal. Another question which the Court would consider was that of delay. In July, 1925, the order against the vicar was made, and in September the vicar was served with that order, which stated quite clearly that the vicar was to pay the two sums in question. He also knew in September that it was proposed to enforce that order, and the vicar did absolutely nothing until March 9, 1926. Anybody who applied for a writ of prohibition must apply promptly.

But the main question for decision was whether the majority decision of the Divisional Court was right, viz., that this was not a case for prohibition, but for appeal. It was open to the vicar to appeal, first to the Court of Arches, and then to the Privy Council. The decision of the majority of the Divisional Court was right.

Lord Justice Bankes.—This is one of those unfortunate cases in which difficulties have arisen in a parish because of some unauthorized interference with either a memorial, or a memorial window, or a pew, or some part of the ornamentation of the church in which some particular person, or some particular family, has a special interest, and it is all the more unfortunate where, as here, a dispute like that results in litigation. I very much regret, from one point of view, that the Court is called upon to intervene, and one regrets that the Court should be called upon in any case similar to this case to intervene ; but my own feeling in this particular case is that there is a special reason for regret, because it is so obvious that the whole of the difficulties which have arisen here and have been referred to might have been obviated if a little more care had been exercised, or a little more forethought on the one hand, and, on the other hand, one assumes from the evidence that was given by the trustees and by the architect, that even if this order was to stand, the money would not come out of the reverend gentleman's pocket, but would come out of the trustees' pocket, who, before the Chancellor, took the whole responsibility. However, one cannot allow oneself to be influenced by such considerations, nor can one for one moment in one's own mind form on the merits of the dispute, if I may use that expression, any opinion which should influence one's decision upon the particular point that has been brought before the Court.

What seems to me to be, and what must be the first consideration here, is, what is the rule of law in reference to such a question as is here brought before us, where it is alleged that an order has been made in a judicial proceeding against a person who has never had an opportunity of being heard before the order was made ? There is no sort of doubt about what the rule of law is, and what is the rule of law applicable, not only to proceedings in the King's Courts, but to proceedings in the Ecclesiastical Courts. I will just refer to a passage in Broom's Legal Maxims in which the rule of law is laid down in quite plain terms, which I think must be generally accepted without reference to particular authority. What is stated there is this (7th edition, at p. 89) : "It has long been a received rule, that no one is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard." That seems to me the overriding rule which this Court has to apply in reference to an application such as this, and I should like just to refer to one or two authorities where that rule has been appealed to and applied in cases which were commenced before the Ecclesiastical Courts. There is one case in 1832, *Capel v. Child* (2 Cr. and J., 558). It is quite true that the proceedings were not there challenged by process of prohibition, but there are some observations in Mr. Justice Bayley's judgment to which I wish to refer. The short facts there were these. It was a case arising in what was then the diocese of London, and the complaint against an incumbent was that he neglected his duties, and a monition issued directing him to appoint a curate and pay a curate. He did neither the one nor the other. The Bishop then appointed a curate, and the reverend gentleman neither paid the curate nor allowed him to do any duty in the parish, and ultimately, after a further monition, the Bishop issued a sequestration. The validity of these proceedings was challenged. The other case was a case in the diocese of Worcester, and there the complaint was that the incumbent did not reside in his vicarage, and the Bishop issued a monition requiring him to reside in his vicarage. That reverend gentleman seems to have been possessed of a terse and forcible vocabulary. He addressed letters to his Bishop, to which I will refer in a moment. Ultimately the Bishop considered that the vicar had not complied with the monition, and issued a sequestration, and there again the proceedings were challenged. In each case the rule of law to which I have referred was the one upon which reliance was placed, and in each case the Court has, I think, made valuable observations in reference to the application of that rule to this class of case. In *Capel v. Child* (*supra*), this is what Mr. Justice Bayley said, and I should like to read some substantial portion of his judgment. He says, at p. 579 : "It would be quite sufficient if the Bishop were to call the party before him, and to state to him the grounds on which he thought the duties were inadequately performed, by reason of his negligence ; and he should have asked whether he had or had not any grounds on which he could answer that charge ; but, is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard ? In our Courts of Law you cannot obtain a judgment against a party without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear, or else you enter an appearance for him, according to the Act of Parliament expressly made for that purpose, and made because it is considered an invariable maxim of law that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing in Court, before a judgment shall be pronounced against him. In the case of proceedings before magistrates on summary conviction, if the conviction does not state either that the party was summoned, or that he appeared, the conviction is bad. If you remove a corporator, and it turns out

that he was not summoned, however gross and flagrant his misconduct may have been, he is entitled to be restored ; and I know of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard. There is a case of *Rex v. Benn and Church* (6 Term Rep., 198), in which, where a warrant of distress, which is in the nature of an execution, had issued, not grounded on a previous summons, Lord Kenyon laid it down most distinctly as an invariable maxim of our law that no man shall be punished before he has had an opportunity of being heard. Now in this case it is impossible, as it seems to me, to say that the requisition is not in the character of a judicial proceeding. It does not call upon the party to show cause, but, *transit in rem judicatam*, it requires him to do the act ; and the period of time from which he is to do that act is the period of time limited by the Act of Parliament—giving him no further time to show cause against the requisition being acted upon. And the appointment of a curate by himself ; what is the effect of that ? Why, the effect of a curate being appointed by himself, or of an appointment of a curate by the Bishop, is, for so long a time as the curate shall continue, to deprive him of a portion of the profits of his benefice ; it is, to all intents and purposes, a deprivation from him, for so long a time as that curate shall continue, of £75 a year." In the other case of *Bonaker v. Evans* (16 Q.B., 162) there is a short passage in the judgment which I should like to refer to, but I may perhaps, by way of passing, refer to the language of the reverend gentleman when he was called upon to reside in the rectory. In answer to the first monition, in which he was directed to reside in the rectory, the reverend gentleman said : "To the Right Reverend Bishop," and so forth, "I," so-and-so, "vicar" of so-and-so, "as by this my affidavit, solemnly declare that, on Saturday, the 19th instant, I took possession of, and commenced residence in, my said damp and uncomfortable hole of a vicarage house at Church Honeybourne aforesaid, in consequence of your monition." What he did was that he went to sleep there a certain number of nights, and the Bishop apparently had him watched, and having had him watched he issued another monition in which he inserted the number of dates upon which the reverend gentleman had slept there. In reply to that monition the reverend gentleman said : "In reply to your letter of the 31st ultimo enclosing, by order of the Bishop, 'a copy return of the number of nights Mr. Bonaker has slept in the vicarage house at Church Honeybourne since service of the monition,' I beg to say that the author is a malicious liar." However, that is not so material. What is material is the passage from the judgment of Baron Parke in which he said (16 Q.B., at p. 171) : "The Bishop, then, acting judicially in this respect, the main question for our consideration is, whether the sequestration ordered by him is a proceeding simply in the nature of a distress to compel residence, or altogether, or even in part, *in pœnam* for previous non-residence or absence. If it be the latter, then the Bishop ought to have given the incumbent an opportunity of being heard before it was issued ; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary." There are a number of authorities which could be cited to the same effect. I only refer to those because they do definitely state that this procedure in the Ecclesiastical Court is in the nature of a judicial proceeding. They do definitely state that an order of sequestration and an order for payment of a sum of money are, either or both of them, acts affecting the person or property of the individual which cannot properly, according to our law, be made unless and until the individual has had an opportunity of being heard before the making of the order. In those circumstances, it seems to me that our duty is, regardless of the facts or merits, to consider whether, in this particular case, in view of the nature of the proceeding taken—that is, the application for prohibition—the Chancellor has offended against that rule.

With regard to the form of the application, it is agreed that the issue of the writ is discretionary, and it is said that in this case there are several grounds upon which the Court should refuse to exercise its discretion. One is the question of time. It is quite clear that the Court takes into consideration the question whether there has been a long delay in making an application in dealing with the question whether it should exercise its discretion. Here, in my opinion, there has been no such delay as would justify the Court in exercising discretion against the applicant, because the monition, which I regard as an effective part, and a very effective part, of the order which is complained of, was not issued till February 11, 1926, and the motion for the rule *nisi* was on the following March 9. I think myself, therefore, that the objection on the ground of time fails.

Then it is said that the Court ought to take into account the fact that there is a right of appeal, and should not grant the rule in a case where there is, as here, a right of appeal. I am not going to express any opinion on the question whether there is a right of appeal, but if the contention of the party is that he is no party to the proceedings in which the order has been made, there may be a question whether he has any right of appeal. I will assume, for the purpose of my judgment, that there is a right of appeal : even then the matter is discretionary, but I think there is an authority to which Lord Justice Atkin has called my attention, *White v. Steele* (12 C.B.N.S., 383), in which the Court definitely stated that in their opinion the fact that there was an appeal to the Court of Arches was no ground for refusing a prohibition in a case somewhat similar to the present. I think, therefore, that no objection can successfully be taken to the exercise of discretion on either of those two grounds.

That brings one to the facts of the case. I do not want to go into them for the purpose of considering whether the view taken by the Chancellor was right or was wrong. It is quite obvious that the reverend gentleman was in default in this sense, that he could have prevented what is complained of if he had interfered. That is quite plain, but whether that justified the view which the Chancellor took and the order which he ultimately made, is not a matter for me to consider. I have only to consider the proceedings that were taken, and I have to ask myself : Had this gentleman any opportunity of dealing with, or answering, the case which was in fact made against him, before the order was made ? In my opinion he had not. First of all, there was the petition for the faculty. The petition, I think, negatives the idea that any order against this vicar personally was going to be asked for. It was necessary, in order to get the faculty, to suggest to

the Court by the form of the petition that what had been done had been done without authority, and that was so stated in the petition, but it seems to me that, if the petition, after stating that fact, merely goes on to ask that the applicant may have authority to reinstate what had been obliterated, any ordinary person reading it would understand that, although the ground for the petition was that what had been done had been done wrongfully, no request was going to be made to the Court that the person who was said to have acted wrongfully should either pay the costs of the proceedings or pay the costs of the reinstatement. So much for the petition. Then the petition is followed by a citation. That citation is in an antiquated form, but no doubt it fulfils its purpose, because the object is to give all and sundry who are interested in the particular matter an opportunity of coming forward to state any objection that they may have, and therefore it is addressed in the widest possible terms, but it is addressed in terms which were probably brought into existence when conditions and times were very different from what they are to-day. However, there is the citation. What is the effect of the citation? It is to give anybody and everybody interested the opportunity to appear—every parishioner, every person who can say that he is specially interested. But what is the effect, if any, if those persons to whom the opportunity is given do not appear. It seems to me that no distinction can be drawn between the butcher, the baker, and the candlestick maker, and the vicar and any other parishioner. They are all in the same position for this purpose. The opportunity is given to all and every one of them to appear, but, if they do not appear, it seems to me that they are all standing on exactly the same footing. They are persons who do not appear, and therefore, in my humble judgment, it is quite plain that they are not parties to any proceeding that may follow, and not being parties, as at present advised, my opinion is that the Chancellor had no jurisdiction to make an order against them either for costs or in any other form without intimating specially and, if need be, by a special citation, that an order is asked for against the person who has not appeared, and who is, therefore, not a party.

That, in my opinion, is sufficient to dispose of the whole matter, because, the citation being in the form in which it was, following the petition asking merely for a faculty that this lady should be entitled to restore what had been obliterated, there is no notice either to the vicar or to anybody else that any order, except the one specially mentioned, is to be asked for. In spite of that the Chancellor proceeded to make two orders which, in my opinion, he had no jurisdiction whatever to make. One was that the vicar should pay the costs of the proceedings; the other was that he should pay the costs of the restoration. In my judgment there was no obligation upon the vicar, the order being, as I think, obviously on the face of it, made without jurisdiction, to take any action until some one chose to make that order effective against him by some process of execution. That process commenced by the issue of the monition, and then he acted, and, in my opinion, he acted in time. If he had complained only of the monition, I think he would have had good ground for complaint, because it seems to me that there was no jurisdiction, without giving him an opportunity of being heard, to make an order as against him, that he should pay any particular sum for the restoration, whatever that sum may amount to. I have, I think, indicated sufficiently the grounds upon which I am unable to agree with the Court below, and the reasons why I think that these proceedings, from beginning to end, as against this applicant, were without jurisdiction, on the ground that the Chancellor did not recognize or give effect to the elementary rule of law that he ought not to make any such orders against this vicar, or anybody else, without giving him an opportunity of being heard.

I think the result is that the appeal must be allowed, with costs here and below, and I can only repeat my regret that this particular dispute has found its way into the Courts of Law.

Lord Justice Scrutton.—This is a case of some difficulty, as is apparent from the division of opinion in the Court below and the arguments to which we have listened during the last two days. It is perhaps important to state clearly exactly what the Court is doing in this case, because I see that when the judgment of the Chancellor was given in the Consistory Court of Eye it was received with cheers by the audience, and it is important to make quite clear that this Court is not deciding the merits of any question between the clergyman and the lady in this case.

A faculty having been granted to the rector and churchwardens to do certain work in the church of Eye in connexion with a war memorial, somehow or other an existing fresco, painted by the lady's father, was distempered over, that obliteration not being provided for in the faculty. The lady, not unnaturally, felt aggrieved. Whether or not the clergyman is responsible for that improper proceeding, whether or not the lady has due cause to complain of the action of the clergyman, is not being decided in this case at all. This is not an appeal from the Chancellor's decision, and this decision here given has nothing to do with the merits and it should not be received with cheers by anybody either here or in the important town of Eye. This is a technical proceeding, in that it is an application to the King's Courts to prohibit action from being taken on an order of the Ecclesiastical Courts, on the ground that that order was made without jurisdiction, and such an argument and the decision of this Court have nothing whatever to do with the merits of the question whether the clergyman was right or wrong or had anything to do with the obliteration, or whether the lady was right or wrong in complaining of the action of the clergyman.

There seems to be no doubt that, if the form of the proceedings in this case had been that a citation was issued to the clergyman by name, asking that a faculty should issue ordering him to restore, at his own expense, the fresco which had been obliterated, the matter would have been entirely within the jurisdiction of the Ecclesiastical Court, and an order might quite properly have been made, if the evidence justified it, against the clergyman to restore and pay the expense of restoring the fresco that had been obliterated, and this Court could not possibly have interfered with the decision of the Ecclesiastical Court. There seem to be ample precedents for that kind of proceeding. I find one in the case of *Sieveking and Evans v. Kingsford* (36 L.J. Eccl. Cases, 1); I find another in the case of *Hopper v. Davis* (1 Lee's Eccl. Rep., 640). In each of these cases the person who had removed from a church a particular ornament, without justification, was dealt with by the Ecclesiastical Courts, after notice to him in which he was specially cited, and in one case he was ordered to restore, and in the other case he was not ordered to restore, according to the merits. If that form of procedure

had been followed in this case, no application to this Court would have lain, but unfortunately that form of procedure was not followed in this case. The lady presented a petition that it was desired that the fresco of angels should be restored, and requested the Ecclesiastical Court "to decree a Faculty for the purpose aforesaid." One understands, and Mr. Hansell agrees, that in the practice of the Ecclesiastical Courts that faculty would be granted to the person who applied for it—*i.e.*, the lady who would do the work—but nothing whatever is said in the petition that a further order will be asked for, "though I do the work the clergyman is to pay the expense of it." That does not appear anywhere in the petition. Following that petition, a citation is issued, which I have no doubt is in an old form, addressed to all and singular, clerks and literary persons in the Diocese of St. Edmundsbury, "informing this collective assembly that it is desired that the fresco of angels should be restored," and calling upon them to show cause, if they desire to show cause, why a licence or faculty should not be granted to the petitioner accordingly. That, in the same way, gives no intimation to anybody that what is really going to be asked for is an order that, though the lady does the work, the clergyman shall pay the expense of it because he has without authority been a party to removing part of the church and, therefore, ought to pay for putting it back.

In my view, an order that anyone should pay the costs of putting back work removed without a faculty is in the nature of a penalty for an ecclesiastical offence, and it appears to me that it is one of the most fundamental principles of English law that if you are going to impose on any person a penalty for anything in the nature of an offence you shall not do so until you have clearly informed that person that the application is going to be made against him, so that he may know with what he is charged and have an opportunity of attending and meeting it. My Lord has referred to a number of cases in which that principle has been laid down. They begin with one in which some old Judge, with the quaint reference of the times, says that the first precedent was when the Lord God expelled Adam and Eve from the Garden, but He did not do so until He had called upon them to answer, and there is a series of cases from that time all laying down the same principle. In the one that my Lord has referred to—that is, *Bonaker v. Evans* (16 Q.B., 162)—Baron Parke states, at page 171: "The Bishop, then, acting judicially in this respect, the main question for our consideration is, whether the sequestration ordered by him is a proceeding simply in the nature of a distress to compel residence, or altogether, or even in part, *in pœnam* for previous non-residence or absence. If it be the latter, then the Bishop ought to have given the incumbent an opportunity of being heard before it was issued; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him."

In my view to issue a general summons to the clerks and literati of the diocese of St. Edmundsbury without including in it any statement that the thing asked for is an order that one of those clerks shall pay a sum which is in the nature of a penalty for an ecclesiastical offence is not to give a fair opportunity to that person to appear, knowing the nature of the charge against him, and answer it. Lord Justice Thesiger, in the case to which we have been referred of *Martin v. Mackonachie* (4 Q.B.D., 697, at p. 732), says: "The mode in which that suit is to be conducted, the sentence which it is open to the Judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters, to be regulated by the practice of the Court itself, and in respect of which if the Judge errs, appeal and not prohibition would be the proper remedy, unless his error involves the doing of something which, in the words of Mr. Justice Littledale in *Ex parte Smyth* (3 Ad. and E., 719, at p. 724), is 'contrary to the general laws of the land,' or, to use the language of Mr. Justice Lush in the Court below, is 'so vicious as to violate some fundamental principle of justice.'" In my view to order a man to pay what is in the nature of damages or a penalty for an offence without specifically informing him that an application is to be made that he shall pay those damages, in order that he, having notice of the exact charge made against him, may attend and meet it, is, in the language of Lord Justice Thesiger and the language of the case I have cited, contrary to both matters that are mentioned. It is contrary to the general law of the land. It is so vicious as to violate the fundamental principles of justice. The petition and the citation are both perfectly consistent with an application that the lady shall restore the fresco at her own expense. There is nothing, in my view, on the face of them to show what is going to be asked for, that a person unnamed as a special party shall be ordered himself to bear the costs of the work which the lady is getting a faculty to do.

In my view, therefore, the original order of the Chancellor was so without jurisdiction that prohibition would lie, but, further, it appears to me that the issue of the monition was equally without jurisdiction, for though the clergyman had notice of the order and notice of the taxation of costs, he had no notice that the monition was going to apply peremptorily, ordering him to pay a named sum for the costs of the reparation and restoration, and no notice either of the amount or that the monition was going to issue, and according to the ordinary principles of administration of justice in England (which I hope are not inconsistent with the principles of true religion administered by the Ecclesiastical Courts) he should have had specific notice of what was going to be asked against him. The Divisional Court below have dealt with three matters. The majority have said, first of all, that in their view there was such delay that the prerogative writ of prohibition, which is a discretionary writ, should not issue. In my view, so long as a sentence is unexecuted prohibition may lie if there is a threat to execute it, although a considerable time has elapsed from the time when the original sentence which it is then proposed to execute was promulgated. I agree with what appears to be only a dictum of Mr. Justice R. S. Wright, a Judge of great familiarity with this class of case, in *In re London Scottish Permanent Building Society* (63 L.J., Q.B., 112), that an application for prohibition is never too late so long as there is something left for it to operate upon; and when the sentence is unexecuted, a threat, a statement of intention to execute it, in my view, may be followed by a writ of prohibition, though a considerable time has elapsed from the time when the original sentence was promulgated. That is the way in which the objection that there has been delay appears to me to be disposed of. Secondly, it is said that where there is an appeal no prohibition will lie. The case to which my Lord has referred (*White v. Steele*, 12 C.B.N.S., 383), and to which my brother Atkin has referred us, appears to me to answer that.

The judgment of Mr. Justice Shaw Willes shows that in the opinion of the very strong Court that delivered that judgment the fact that there was an appeal was not necessarily in any way fatal to the claim for prohibition. The third question raised before the Court below was whether the Ecclesiastical Court had jurisdiction to deal with this matter. As I have said, I have no doubt they could have dealt with this matter on an application properly framed, and this Court could not have interferred with their decision on the merits, but in my view, on the proceeding as framed, they had no jurisdiction to inflict penal consequences upon a person not expressly named as a party to the proceedings who had no notice that an order in the nature of a penal order was to be made against him.

For these reasons, on this particular application, I think the appeal must succeed and the writ of prohibition must go, but as I said at first nothing that I have said is to be taken as any expression of opinion on the merits as between these parties, or that there is any justification for clergymen doing work in their church which is not included in a faculty, or any justification for ecclesiastical architects, however eminent, doing things which there is no faculty for them to do. England has suffered enough from eminent ecclesiastical architects in the past without their being given any greater liberty to exercise their own peculiar views in churches. As I have said, that is not the question before us. The question before us is the technical question whether the writ of prohibition should issue, and for the reasons I have given I think that such a writ should issue in this case.

Lord Justice Atkin.—This is a case which originated in the Consistory Court of the diocese of St. Edmundsbury by an applicant, Miss Short, who made quite a usual application for a faculty to have restored a decoration in the church which had been obliterated without any lawful authority. She was especially interested in the matter because the fresco was a fresco which had been executed some 50 years before by her father, who appears to have been a distinguished artist. There is no doubt that the decoration had been obliterated without authority, and that she was clearly entitled to the faculty for which she asked. She had stated in her petition that the decoration had been obliterated by order of the vicar, but she asked for no relief against the vicar and she merely asked that a faculty should be accorded to her to restore the fresco. The ordinary procedure was adopted in the case of an ordinary application for a faculty. There was a general citation issued and published in the ordinary way by notice upon the church door. It was a citation for the granting of a faculty, a citation to all the parishioners and inhabitants of the parish, and to all other persons, that is to say, persons, not inhabitants or parishioners, who were interested in the subject-matter, and a notice that, if any persons desired to object to the granting of the faculty, they were to appear before the Chancellor at a named date. Nobody did appear. The Chancellor fixed a time for the hearing of the application in public, and thereupon he made an order. The vicar did not appear. The vicar, as appears from the evidence, was in fact in a nursing home, and apparently he at the time of the hearing of the application was not in the least minded to resist the application. The only evidence before the Chancellor in connexion with the vicar, as far as I can see—we have had the notes—was, not that the vicar ordered the obliteration of the fresco, but that he consented to the obliteration of the fresco. The Chancellor, having decreed that the faculty should issue, at the same time made an order that the decoration should be restored at the expense of the vicar, and ordered the vicar to pay the costs. The question is whether there was any jurisdiction to make that order at all. The matter having proceeded to taxation of costs and to a monition upon the vicar to pay the costs within 14 days, and also a sum of £74 odd, which was stated to be the expense of restoring the decoration, within 14 days, the vicar now applies for a rule for a prohibition to prohibit the Chancellor from proceeding upon the original order and upon the monition.

It appears to me that the question which we have to decide is whether or not the Chancellor had jurisdiction, in the circumstances of the case, to make the original order upon the vicar; and it appears to me that he had not. The citation is a general citation, addressed, as I have said, not to the vicar in particular but to the parishioners and inhabitants of the parish. I do not know whether a vicar is a parishioner; he probably is. He certainly is an inhabitant, and in that sense he is included in the general citation. But apart from that there was no special direction of the citation to him, and it is quite plain, to my mind, that there was no claim in the petition for any special relief against him, or any kind of notice that he would be ordered or required to pay any costs, either of the proceedings or of the expenses of restoration. To my mind, if a Chancellor seeks to exercise any coercive power over a parishioner, or anybody else who comes within the scope of the general citation, he must see that something further is done than the general citation, and must see that the person against whom the power of the coercive jurisdiction is sought to be exercised has in fact received special notice that some sort of proceeding is being taken against him, and that some such order may be made; and in the absence of a special citation of that kind it appears to me that there is no jurisdiction in the Chancellor to exercise coercive jurisdiction over anybody in circumstances such as I have mentioned. I think, therefore, that the Chancellor had no jurisdiction to order the vicar to pay the expenses of restoring the decoration and no jurisdiction to order him to pay the costs of the proceeding.

Therefore it is quite unnecessary to deal further with the facts of the case except in so far as the facts have been discussed before us. At the present moment I am not satisfied that the Chancellor, on the mere application to restore an ornament which has been removed without a faculty, would have jurisdiction to order the vicar to pay the costs of the restoration, unless it were proved that he was the person who in fact caused the ornament to be removed; and I doubt for myself whether the mere fact that an incumbent consented to something being done which was contrary to ecclesiastical law is in itself, on such an application, sufficient ground for ordering him to pay expenses. It may very well be that such a consent is in the nature of an offence against ecclesiastical law, and it may very well be, therefore, that it brings him within the punitive jurisdiction of the Chancellor; but it appears to me that that may very well be solely the subject of a special application on that footing. I say no more about it than that. I do not intend to decide the point. In any case, it is quite obvious that the incumbent ought to have special notice of such a grave charge as that he has been in fact privy to a breach of the

ecclesiastical law, and has subjected himself to such penalties as may be appropriate to that.

There being no original jurisdiction, it appears to me that the vicar is entitled to a prohibition, and that he is entitled to a prohibition because there has been a breach of the fundamental principle of law, that a party is entitled to have a notice of claim against him and to be heard before he can be deprived of his property or his rights. The order being made without jurisdiction, it was quite without effect; it was a *brutum fulmen* upon which nothing could validly be done. The parties proceeded to tax the costs under the order. The order for taxation was, as I have said, made without jurisdiction, and it appears to me to have no effect upon the vicar's liability. They then proceeded to claim a monition against the vicar, requiring him to pay costs, and also requiring him to pay the sum which I think the monition adjudicates to be the sum of £74 odd, a sum which the vicar had no opportunity at all of questioning and no opportunity of ascertaining whether that was a correct sum or not. I think, with my brother Scrutton, that that in itself would indicate that that monition, so far as it related, at any rate, to the expenses, was made without jurisdiction; but it matters not in the view I take, because it obviously followed upon an order which had been made without jurisdiction.

In those circumstances, the applicant appears to me to be entitled to a writ of prohibition because he is threatened with a sequestration of his living for non-compliance with an order made without jurisdiction. Only two grounds, I think, can be suggested, or were suggested, why the writ should not go. One was, that it was said that the vicar ought to have appealed from this order to the Court of Arches. To begin with, I myself am very far from satisfied that he had a right of appeal at all, because I am very doubtful whether the true position is that a person has any right to appeal unless he has been made properly a party to the cause or matter either by being specially cited or by in fact appearing upon the general citation. It appears to me quite plain that the fact that there is a remedy by appeal is no answer to a writ of prohibition, where the want of jurisdiction is a want of jurisdiction based upon the breach of a fundamental principle of justice, as I deem this to be. There is plenty of authority for the proposition that prohibition will lie, notwithstanding appeal, both in the case of Ecclesiastical Courts—a case which has been mentioned by the Lord Justice—and also in the case of County Courts, where prohibition has gone over and over again, notwithstanding the fact that there was also a right to question the judgment by appeal.

The only other question is the question of time, and upon that I see no reason at all for withholding the writ. An order has been made by a Court which has no jurisdiction, which, as far as the applicant is concerned, is a mere *brutum fulmen*, and which, while no proceedings are taken upon it, does not affect him at all, but which, as soon as proceedings are taken, will very closely touch, I suppose one may say, his pocket in respect of sequestration, quite apart from the indignity of the proceeding. Then is the time when he is called upon to act. He does act, within, I think, less than a month from the time of the issue of the monition to him. That seems to be a very reasonable time, in view of the complicated questions which arose, questions of law. I think he was entitled to take advice upon the matter, and I do not think it is suggested that he was not. I do not think that there has been any delay which the Court ought to take into account.

For these reasons it appears to me that the appeal should be allowed with costs here and below, and that the rule should be made absolute for prohibition as prayed.

Mr. CHARLES.—The appeal will be allowed accordingly, my Lord?

LORD JUSTICE BANKES.—Yes.

[Solicitors—Messrs. Brooks, Jenkins, and Co.; Messrs. Morris and Bristow, for Messrs. Brundell and Russell, Eye.]

K.B. Div. (Avory and MacKinnon, JJ.) } 1926. Nov. 17.

ROBINSON, FISHER AND HARDING v. BEHAR.*

Sale of Goods—Auction—Conditions of sale—"Lot to be taken away . . . the day after sale"—"All lots uncleared . . . shall be re-sold"—Refusal by buyer to clear lots—Whether re-sale obligatory upon auctioneers.

Certain goods were put up for sale by auction, the conditions of sale printed on the auctioneers' catalogue providing: "The lot to be taken away and paid for . . . the day after sale," and "upon failure of complying with the above conditions . . . all lots uncleared within the time aforesaid . . . shall be re-sold." A purchaser, through his own negligence, bid for a lot for which he had not intended to bid, and the lot was knocked down to him. He afterwards endeavoured to persuade the auctioneers to put up the lot for sale again, but they declined. Upon his refusing to pay, an action for the purchase price was brought by the auctioneers, and the purchaser contended that under the conditions of sale it was obligatory upon the auctioneers to re-sell the lot in question, and that he could be charged only with any deficiency upon re-sale.

Held, that the words "all lots uncleared . . . shall be re-sold" did not impose any obligation upon the auctioneers, but merely conferred upon them an option of re-selling at their discretion, and that the auctioneers were entitled to recover the full price at which the lot was knocked down to the purchaser.

This was an appeal from the judgment of the Judge of the West London County Court, who had given judgment for £56 in favour of the plaintiffs, Messrs. Robinsen, Fisher and Harding, auctioneers.

The plaintiffs had put up certain goods for sale by auction at Willis's Auction Rooms, St. James's-square, on December 9, 1925. The goods were offered for sale upon certain conditions of sale printed in the auctioneers' catalogue, the material conditions being as follow:—

"4. The purchasers to give in their names and places of abode, and to pay down 5s. in the £, or more, in part of payment, or the whole of the purchase-money, if required; in default of which, the lot or lots so

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

purchased to be immediately put up again and re-sold.

"5. The lot to be taken away and paid for, whether genuine and authentic or not, with all faults and errors of description, at the buyer's expense and risk, the day after sale; neither Messrs. Robinson, Fisher and Harding nor the sellers being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot; and making no warranty whatever.

"7. Upon failure of complying with the above conditions, the money deposited in part of payment shall be forfeited; all lots uncleared within the time aforesaid shall be re-sold by public or private sale, and the deficiency (if any) attending such re-sale shall be made good by the defaulter at this sale."

The defendant, Mr. Jack Behar, carpet dealer, had intended to bid for Lot No. 62, but was absent in the smoking room when that lot was knocked down, and returned to the sale room after Lot. No. 63 had been put up and its description announced. Under the impression that Lot No. 62 was still being offered, he bid £56, and Lot No. 63, a Persian carpet, was knocked down to him at that price. As soon as he discovered his mistake, he asked the auctioneers to put up Lot No. 63 for sale again. They, however, declined, and again on the following day refused a similar request. The defendant refused to remove the lot, or to pay for it, and the plaintiffs sued him for £56, the price at which it had been knocked down to him. The defendant pleaded that the lot had been sold to him under a mistake. He further contended that, upon his refusal to clear the lot the day after sale, the auctioneers were obliged under condition 7 of the conditions of sale to re-sell, and that his liability was confined to the deficiency, if any, upon such re-sale. The County Court Judge found as a fact that the defendant had been negligent, and the plea of mistake therefore failed. He gave judgment for the plaintiffs for £56.

The defendant appealed.

Mr. J. D. Casswell appeared for the appellant; Mr. W. H. Moresby for the respondents.

Mr. Justice Avory.—This was a claim by the plaintiffs, who are auctioneers, for £56, the price of goods bargained and sold on December 9, 1925. The particulars of claim are as follow: "The £56 is the amount of the defendant's bid for a Persian carpet (being Lot 63) at an auction sale by the plaintiffs held on December 9, 1925, at Willis's Rooms, King-street, St. James's-square, S.W.1. The bargain and sale relied on is the said sale at the said auction." It appears that the defendant intended to purchase another lot, No. 62, but that, owing to his own negligence, he made a mistake and purchased Lot. No. 63 for £56. *Prima facie*, therefore, there was no answer to this claim; the defendant did not dispute that he had in fact bid for this particular lot, and that it had been knocked down to him. It was, however, contended on behalf of the defendant that he was not liable in this action by reason of the conditions of sale printed on the auctioneers' catalogue. The argument presented is a curious one, and it means that if a man has bought something and afterwards regrets it, he can insist under condition 7 of these conditions of sale on the lot being re-sold and the deficiency, if any, being made good by the defaulter. It might happen that in such a case there would be no deficiency, and that the lot would be sold at an enhanced price, and the Court is not told what would be the contention in such circumstances. The argument is that, because under condition 5 "The lot is to be taken away and paid for, whether genuine and authentic or not, with all faults and errors of description, at the buyer's expense and risk, the day after sale," and because this buyer did not take away this lot the day after sale, it thereupon became compulsory upon the auctioneers to re-sell and debit the defendant with the deficiency or, as I have suggested, credit him with any surplus. Counsel has strenuously argued that condition 7 is mandatory and compulsory, and that it is impossible to give any other meaning to it. Looking at conditions 4, 5, and 7, I have no hesitation in coming to the conclusion that the words "shall be forfeited," "shall be re-sold," in condition 7 are not mandatory or compulsory upon the auctioneers, but permissive, and must be read in that sense; in other words, condition 7 confers on the auctioneers an option to exercise the powers conferred on them by its terms, and the present defendant is not entitled to insist on the performance of these conditions, but was in the circumstances liable to pay. I am of opinion, therefore, that the learned County Court Judge rightly decided that the plaintiffs were entitled to recover. I say nothing about a point in regard to waiver of these conditions of sale by the parties which was taken below, and which, it is said, the County Court Judge was inclined to favour. I do not think it necessary to express any opinion on that point, as I am clear upon the grounds which I have stated that this appeal ought to be dismissed.

Mr. Justice MacKinnon concurred.

[Solicitors—Mr. Stanley O. Matthews; Messrs. Haslewood, Hare and Co.]

House of Lords.
(Viscount Cave, L.C., Lord Atkinson, Lord Shaw of Dunfermline, Lord Sumner, and Lord Carson.)

1926. Nov. 18.

W. N. HILLAS AND COMPANY, LIMITED v. REDERI AKTIEBOLAGET ACOLUS.*

Ship—Charterparty—"Cargo to be brought to and taken from alongside the steamer"—Meaning of "alongside"—Custom of port of Hull.

The plaintiffs, as shipowners, chartered a steamer to the defendants to carry a cargo of timber from the Baltic to Hull. The charterparty contained a clause as follows: "Cargo to be loaded and discharged with customary steamship dispatch . . . according to the custom of the respective ports. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." The steamer arrived at Hull in due course. One customary mode of discharging a timber cargo at the port of Hull was to erect a staging from the ship's side to a line of rails on which bogies ran, and to place the timber on the bogies. The nearest rail was some distance away from the side of the quay. On the refusal of the defendants to carry the timber to the bogies, the plaintiffs did the work and claimed to recover the cost from

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

the defendants. The defendants proved that by the custom of the port of Hull the cost of placing the timber on the bogies was to be borne by the shipowners.

Held, that the custom relied on by the defendants was inconsistent with the language of the charterparty, that the word "alongside" was not proved to have acquired any conventional meaning in the timber importing trade at Hull, and that the plaintiffs were therefore entitled to recover.

The Turid (38 *The Times* L.R., 423 ; [1922] 1 A.C., 397) followed.

Decision of the Court of Appeal (42 *The Times* L.R., 69) affirmed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 69) affirming a judgment of Mr. Justice Greer (41 *The Times* L.R., 546).

The respondents, the owners of the steamship Oresund, chartered the steamer to the appellants to proceed to Karlesborg and there load from agents of the appellants a full cargo of timber, and, being so loaded, to proceed to Hull (Victoria Dock) or West Hartlepool as ordered. Clause 3 of the charterparty provided as follows : "The cargo to be loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The steamer loaded a cargo of timber under the charterparty, and arrived at the Victoria Dock, Hull, as ordered. One usual mode of discharging a timber cargo at that dock was that a platform should be erected from the ship's side to a line of rails on which bogies ran, and that the timber should be placed on the bogies and run to the timber merchant's yard. The distance from the edge of the quay to the nearest rail was about 18 feet. The platform consisted of some portion of the cargo.

The appellants declined to take the cargo from the side of the quay to the bogies. The respondents were therefore obliged to do the work themselves, and they demanded from the appellants the expenses which they had incurred. The appellants refused to pay, and the respondents then brought an action to recover this sum.

The appellants by their points of defence alleged, and they proved, a custom of the port of Hull as to the discharge of wood cargoes, by which the shipowner was obliged to remove the cargo from the steamer and place it upon the quay space opposite the steamer, or upon bogies running along the quay at which the steamer lay, or to lower the cargo into open lighters supplied and brought alongside by the receivers, and to pay for the labour necessary to perform the above work. This custom was embodied in a document signed by the representatives of the Timber Trade Federation and of the Documentary Committee of the Chamber of Shipping on June 23, 1899.

Mr. Justice Greer held that the custom in this case imposed duties on the respondents of taking the goods beyond a place that could properly be described as "alongside," and that the appellants had failed to prove that the word "alongside" had acquired a special trade meaning in the Hull timber inporting trade. He therefore held that the custom was inconsistent with the express words of the charterparty. In his opinion the case was indistinguishable from *The Turid* (38 *The Times* L.R., 423 ; [1922] 1 A.C., 397). He accordingly gave judgment in favour of the respondents.

The Court of Appeal (Lords Justices Bankes, Scrutton, and Atkin) affirmed this decision.

Mr. Stuart Bevan, K.C., Mr. Le Quesne, K.C., and Mr. Clement Davies, K.C., appeared for the appellants ; Mr. Raeburn, K.C., and Sir Robert Aske, for the respondents, were not called on.

The Lord Chancellor.—My Lords, where the meaning of a commercial document in common business use has been the subject of judicial decision, it is plainly undesirable in construing a similar document to draw fine distinctions.

The charterparty which is here in question was the subject of decision in the case of *The Turid* (38 *The Times* L.R., 423 ; [1922] 1 A.C., 397), decided in this House in the year 1922, and, after giving full consideration to the argument on behalf of the appellants, I have found it impossible, as did the Court of Appeal, to distinguish the present case from the case of *The Turid* (*supra*). Here, as in that case, the charterparty provides that the cargo is to be "taken from alongside the steamer at charterers' risk and expense as customary." Here, as in that case, the charterers pleaded that there was a custom of the port under which the expense in dispute was to be paid by the ship. The expense in question in *The Turid* (*supra*) was the expense of putting up a staging from the ship, which had to lie some distance from the quay, and of carrying the timber across that staging on to the quay. In the present case the sum in dispute represents the cost of putting up a staging from the ship, which in this case was alongside the quay, to certain rails and carrying the timber across that staging and placing it on bogies on those rails. It was held in the case of *The Turid* (*supra*) that the charterers were liable for the expense, and I can see no reason why that decision should not apply in the present case.

It is said that there is a distinction, because here the staging was placed across land, whereas there it had to cross the water. That seems to me not to be a substantial distinction. In each case the timber had to be taken from alongside the ship and carried for some distance. Again, it is said that here no additional expense was thrown upon the ship by reason of this staging, because the charge of the stevedores was the same as if the timber had been dumped on the quay-side. I do not think that that point is really open. The claim was for the additional expense caused by this operation, and the judgment was for any additional expense so caused. The amount has been agreed between the parties, and I think it is no longer possible to maintain that nothing whatever could in any case be recovered in this action.

Lastly, it is said that, in view of the custom at Hull, the word "alongside," which normally refers to or connotes contiguity, has a special meaning, and that under the custom delivery "alongside" means delivery either into a lighter or on to bogies on the rails or on some space beyond the rails. In my view, the evidence fell far short of establishing that meaning of the word "alongside." I agree with a sentence in the judgment of Mr. Justice Greer where he said : "In my judgment, a custom of the kind proved in this case, which is not expressly directed to establish

a customary meaning of a word, cannot be said to have this effect indirectly merely because the custom cannot be given effect to without giving a special meaning to the word." In my view, that argument, like the others, fails.

My Lords, on the whole, I am of opinion that this appeal fails, and should be dismissed with costs.

LORD ATKINSON.—My Lords, I concur.

LORD SHAW OF DUNFERMLINE.—My Lords, I also concur.

LORD SUMNER.—My Lords, I agree.

LORD CARSON.—My Lords, I also agree.

[Solicitors—For the appellants, Messrs. Pritchard and Sons, for Messrs. Andrew M. Jackson and Co., Hull; for the respondents, Messrs. Botterell and Roche, for Messrs. Sanderson and Co., Hull.]

K.B. Div. } 1926.
(Salter and MacKinnon, JJ.) } Nov. 19.

BRACEY v. PALES.*

Landlord and Tenant — Restrictions — Tenant rent-free — Whether protected — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7).

The Rent Restriction Acts afford no protection to a tenant who is rent-free.

This was an appeal from a decision of the Deputy-Judge of the Barnet County Court, holding that the defendant, Mr. William Henry Pales, a painter and decorator, who had for many years been in the employ of a building firm, and had been permitted by his employers to reside rent-free in a house belonging to them which came within the protection of the Rent Restriction Acts, could not avail himself of the provisions of the Acts.

The plaintiff, Mrs. Ellen Bracey, was the widow and executrix under the will of her husband, who was a member of a firm of builders and decorators at Watford and Boreham Wood, Herts. The defendant, Mr. William Henry Pales, was a painter and decorator, in the employ of the above firm. He had for many years occupied a cottage known as The Homestead, Boreham Wood, which belonged to his employers. Adjoining the cottage was a yard belonging to the builders, and one of their signboards was displayed there.

The defendant first occupied the cottage in 1905 and it was not disputed that he had paid rent for it before the war. In 1916 he went abroad on military service and was absent for three years. During his absence his wife died, and his children ceased to reside in the cottage, which was afterwards let to a Mrs. Harding. On his return from military service the defendant resumed his former employment and at first occupied another house at Boreham Wood. After a short time The Homestead became vacant and he occupied it again. There was a conflict of evidence whether any rent was paid by the defendant after the war, but the County Court Judge found that none had in fact been paid.

In April, 1925, Mr. Bracey, the defendant's employer, died, and his widow, the present plaintiff, continued to carry on the business for a time. On September 12, 1925, she gave up the business and told the defendant of her intention to do so, but nothing was said in regard to the defendant's residence at The Homestead. A few days later a Mr. Fudge, who had been in the habit of collecting rents for the plaintiff's husband, called on the defendant and suggested that henceforward the defendant should pay a rent of 13s. 7d. per week. The defendant paid rent for three weeks, but Mr. Fudge subsequently received instructions from the plaintiff's solicitors to refund the amount paid by the defendant.

On February 22, 1926, the plaintiff brought an action against the defendant claiming possession of The Homestead and mesne profits since September 12, 1925. The defendant contended that he was protected as a tenant lawfully in possession under the Rent Restriction Acts. The County Court Judge held that the defendant had been allowed to remain as a servant rent-free in The Homestead at Mr. Bracey's pleasure and that he could not avail himself of the protection afforded by the Acts. Accordingly he gave judgment for the plaintiff.

The defendant appealed.

Mr. Malcolm Hilbery appeared for the appellant; Mr. H. I. P. Hallett for the respondent.

MR. JUSTICE SALTER, in giving judgment, said that, if it had been necessary to determine whether the defendant had ever been a common law tenant of the plaintiff or her husband since 1919, a question of some difficulty might have arisen. It was, however, not necessary to decide that question because, even if the defendant had been a common law tenant, he was not now a tenant within the meaning of the Rent Restriction Acts so as to be entitled to avail himself of their protection. If he were a tenant at all, it was clear that he was a tenant rent-free, and the Acts afforded no protection to such a tenant. That conclusion could be supported if one had regard to the structure of the Acts; to the decision in *Hornsby v. Maynard* (41 *The Times* L.R., 102; [1925] 1 K.B., 514), where it had been laid down that rent for the purposes of those Acts meant pecuniary rent only; and more particularly to the wording of section 12, subsection 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Section 12 was the definition section, and by subsection 7 it was provided:—

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

When one applied that section to the present case, it became clear that the house in question was one to which the Act applied, but that the tenancy of the defendant was to be regarded as if it did not exist and never had existed. Since there was no existing tenancy of the defendant to which the Act applied, then he ceased to be a tenant for the purposes of the Act, and the case was removed from the restriction upon orders for possession which was enacted by section 5, subsection 1, [re-enacted by section 4 of the Act of 1923]. The plaintiff, therefore, was entitled to avail herself of her common law legal right to possession, and the appeal failed.

MR. JUSTICE MACKINNON concurred.

Leave to appeal was granted.

[Solicitors—Messrs. Watkins, Pulleyn, and Ellison, for Mr. F. Cookesley Slater, Boreham Wood; Messrs. Sharpe, Pritchard, and Co., for Messrs. Sedgwick, Turner, Sworder, and Wilson, Watford.]

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

K.B. Div. (Rowlatt, J.) } 1926. Nov. 23.

TODD v. EGYPTIAN DELTA LAND AND INVESTMENT COMPANY, LIMITED.*

Revenue — Income-tax — Company—Residence —Management abroad—Whether resident in this country—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D., Cases IV. and V.

Although a company, which is registered in this country but has its control and management abroad, resides where it is controlled and managed, yet it does not reside there exclusively, but it necessarily resides in this country so as to be liable to income-tax, because it is obliged by law to perform in this country certain duties which cannot be performed from abroad, such as the keeping of a register of shareholders and allowing the public to inspect the register.

This was an appeal by the Crown from a decision of the General Commissioners for Income Tax for the City of London given on November 16, 1925, upon an appeal by the Egyptian Delta Land and Investment Company, Limited, whose registered office was at No. 211-214, Gresham House, Old Broad-street, against assessments to income-tax under Cases IV. and V. of Schedule D in respect of the years 1919, 1920 to 1924, and 1925.

The company was incorporated in England in 1904, and among its objects were the purchase of lands in Egypt and the development of the resources of those lands. In 1907 by a special resolution of the company it was resolved :—"That it is desirable that the business and affairs of the company should henceforth be managed and directed entirely from Egypt and that accordingly the articles of association be varied."

In pursuance of that resolution the business of the company was in 1907 transferred to Cairo, and had since been controlled, managed, directed, and carried on entirely in Cairo. All the London directors retired in that year and a new board, the members of which were all permanently resident in Cairo, was appointed. No directors' meeting had since been held in the United Kingdom. The secretary resided in Egypt, and the seal and all books of the company were kept in Egypt. The company's banking account was with the National Bank of Egypt at Cairo, the company's account with the London agency not being entirely closed, but being used only for the payment of small disbursements, to the amount of £8 or £9 annually, made by the agency on instructions from Egypt. The register of transfers was kept in Cairo, where transfers of shares were passed before being registered in London. The accounts were made up and audited, and dividends were declared and paid exclusively from Cairo.

In order to comply with the requirements of the Companies Acts there was a registered office of the company in London at which the registers of members and directors and bearer warrants were kept. To meet those statutory requirements the company paid a fee to Mr. F. J. Horn, who provided them (together with several other companies) with a registered office at his address at Gresham House, where their name appeared on the door. No room or part of a room was appropriated to the company, and there were in fact more companies than rooms. The London secretary performed the statutory duties of filing the annual summary with the Registrar (after it had been checked and signed in Egypt), and also dealt with correspondence from shareholders and transmitted to Cairo applications for share warrants and transfers which might be sent to the registered office. His position was purely formal ; he had no power of attorney and no power to do anything more than the law required the company to do here.

The company contended that the case of *Swedish Central Railway Company, Limited v. Thompson* (41 The Times L.R., 385 ; [1925] A.C., 495) was distinguishable, that the company was resident in Egypt and not in the United Kingdom ; and that the mere fact that it had a registered office here and complied with the statutory requirements of the Companies Acts did not constitute residence for the purposes of the Income Tax Acts.

The Crown contended that the case was not distinguishable from *Swedish Central Railway Company, Limited v. Thompson* (*supra*) ; that the essential and important elements of incorporation in this country, of the situation of the registered office here, and of the activities required by law to be performed here, were present in this case ; and that the activities of the London secretary were appreciable and important.

The General Commissioners held that *Swedish Central Railway Company, Limited v. Thompson* (*supra*) was distinguishable, and that the company was not resident here.

The Crown appealed.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown ; Sir John Simon, K.C., and Mr. Bremner for the respondents.

Mr. Justice Rowlatt, in giving judgment, said that one thing was clear, namely, that the mere fact of registration in this country did not determine the question of residence. A company could be registered without any tie of locality being put upon it. In those circumstances the authorities decided that it could not be said to reside in the place to which it merely owed its birth. Another point he thought was clear—that where a company had its control and management there it resided, although not necessarily exclusively. What he had to decide was whether a company which had an establishment in this country but was managed abroad necessarily resided here.

It was not only that a company had to perform certain duties here, such as the making of returns, which it might do from abroad, but the Act required that it should have a place here. It seemed to him, applying the analogy of a natural person, that the company was always to be at home here. Sir John Simon had treated that obligation of the company as an obligation to have a place where process could be served. That was true, but the other obligations —to keep a register, to allow the public to inspect the register, &c.—were all things which the law insisted that the company should be here to do. It seemed to him that that constituted the idea of residence. It was contended that the company could change its residence, and that was true of residence in the sense of the place where it managed its affairs, but Parliament had said that the registered office must be in this country. That was perhaps an accident, but the company must have an establish-

* Reported by J. W. Hall, Esq., Barrister-at-Law.

ment somewhere, and that establishment was here. Companies could not be incorporated as ambulatory bodies having no residence anywhere.

That was his opinion upon the question, but even if his opinion had been otherwise he would have hesitated long about expressing it in view of what Lord Justice Warrington (as he then was) said in *Swedish Central Railway Company, Limited v. Thompson* ([1924] 2 K.B., 255).

It was said that that was *obiter*. He thought that it was not a mere "remark by the way" but a ground of the decision, though it might be that the decision was also based upon a wider ground. He thought that the appeal should be allowed.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Herbert Smith and Co.]

Prob., Divorce, and Adm. Div. } 1926.
(Lord Merrivale, P.) } Nov. 24.

HODSON AND ANOTHER v. BARNES (BARNES AND OTHERS INTERVENING).*

Will—Seaman's will—Writing on eggshell—Wills Act, 1837 (1 Vict., c. 26), s. 11.

The defendant's husband, who was a pilot on the Manchester Ship Canal, executed a will in ordinary form in 1920, and after his death in 1925 the defendant found in his bedroom on the top of a wardrobe an empty eggshell on which was written in her husband's handwriting, in indelible ink, "17—1925. Mag. Everything i possess.—J. B." The initials of the name of the defendant's husband were "J. B.," and he always called her "Mag."

The plaintiffs, as executors, propounded the will of 1920, and the defendant, alleging that the will of 1920 had been revoked by her husband's true last will, made in 1925 while at sea—namely, the writing on the eggshell—claimed a grant of letters of administration with the will of 1925 annexed.

Held, (1) that without the aid of evidence from extrinsic circumstances the writing on the eggshell could not be deemed to be a testamentary disposition, (2) that it was not proved to have been made at a time when the testator's position corresponded to that of a soldier *in expeditione*, and the Court must pronounce against the alleged will of 1925 and in favour of the will of 1920.

For the first time in the records of the Court writing on the shell of a hen's egg was propounded as a will. The action concerned the testamentary dispositions of the late Mr. James Barnes, a pilot on the Manchester Ship Canal, formerly of Greenbank, Allport-lane, Bromborough, who died on June 18, 1925, leaving property worth about £5,500. The plaintiffs, Messrs. William Henry Hodson and Robert Southwood, as executors, propounded a will of the testator dated October 27, 1920, executed in ordinary form.

The defendant, Mrs. Margaret Barnes, the widow of the testator, said that the will propounded was revoked by the true last will made by the testator in 1925 while at sea, and that that will, which was written on an egg, appointed her the universal legatee and devisee of the property. She claimed a grant of letters of administration with the will of 1925 annexed.

The executors traversed the defence. Mr. Robert Barnes, of Copthill, Peaslake, Surrey, son of the testator, and other relatives who were interested under the 1920 will, intervened, and also disputed the 1925 will and propounded the will of 1920.

Mr. Clifford Mortimer and Mr. A. Lewey appeared for the executors; Mr. Bayford, K.C., and Mr. T. Bucknill for the widow; and Mr. Cotes-Preedy, K.C., and Mr. G. Tyndale for the interveners.

Mr. Bayford, opening the case for the defendant, said that the testator was employed by the Manchester Ship Canal Company as a pilot, and that he also had a retainer from the Anglo-American Oil Company. He died on June 18, 1925, aged 68. The will set up by his widow was written in the testator's handwriting, in indelible ink, on the empty shell of a hen's egg. It read as follows:—

"17—1925. Mag. Everything i possess.—J. B."

The President.—It is a fragile thing. It is here.

This was propounded, continued counsel, as the will of a seaman at sea under section 11 of the Wills Act, 1837, and was sufficient to pass the whole of the estate. The testator, who was a widower when he married the defendant in June, 1914, always called her "Mag." By his first wife he had three sons, William, Ernest, and Robert.

In 1917 he had an accident in a ship and suffered internal injuries. He had to diet himself, and he took eggs with him when he went to his work. He made the will of October, 1920, after a bad heart attack. That will gave to the widow £400 and an annuity of £52, a house in Beaconsfield-road, Tranmere, for life, and certain jewelry and trinkets; £100 to the testator's son William; and half of the residue in trust for the testator's son Robert absolutely, and the other half in trust for the four children of his son Ernest, who died in 1918. In August, 1924, the testator bought a bungalow at Bromborough. He told his wife several times later that he intended to execute a codicil. Once he told her that he had made another will.

On June 17, 1925, he went to Liverpool on business and was taken very ill. His wife brought him home, and he died next day. The will of 1920 was read after the funeral, and, as the defendant always thought that there had been a codicil, she entered a *caveat*. She was cleaning out the testator's bed room on October 15, 1925, when she found in the well on the top of a wardrobe an eggshell and a piece of paper charred at one end with some sealing wax on it. The wardrobe top was very dusty, but not the shell, and it could not have been there long. On the egg she read the writing and at once summoned a maidservant and her mother, and also her solicitor, Mr. T. W. McLean, who saw the egg.

In law, a pilot was a mariner or seaman, which expressions included, roughly, anybody in the merchant service. It had been decided that a purser, a chaplain, a naval surgeon, and even a woman typist in the Lusitania (*In re Hale*; [1915] 2 I.R., 362) came within that category. Where a person came within that category he was on maritime service. There were many cases of wills being made in harbour. Counsel referred to *In re M'Murdo* (L.R., 1 P. and D., 540); *In re Patterson* (79 L.T., 123), where a

* Reported by William Latey, Esq., Barrister-at-Law.

will was made on a river ; *In re Lay* (2 Curt., 375), where a will was made on shore ; and *In re Parker* (2 Sw. and Tr., 375). In the present case the testator's service was partly in the tidal portion of the river Mersey. There was also authority for a testator's initials being sufficient in certain circumstances.

Mrs. Margaret Barnes, giving evidence, said that the testator, after being put on diet, often took uncooked eggs with him when he went to work. They were boiled for him at the pilots' station. He had told her that he did not want to make another will because the solicitor's fees were so heavy. After 1924 he often said that he was leaving her everything.

The eggshell was produced, resting in cottonwool in a small wooden box, and was identified by the witness. It had a small hole at one end and had evidently been blown.

Mrs. Barnes, cross-examined, said that she was present at the death of her husband's son Ernest, and she and the testator had promised that he (the testator) would leave something to Ernest's children.

Mr. MORTIMER.—Was there any reason for his leaving all to you to the exclusion of his children ?—He had been very good to them. It was a natural thing to leave all to his widow.

The witness agreed that Mr. Hodson, managing clerk to Messrs. Simpson, North, and Co., was a close friend of the testator. She had not told Mr. Hodson that her husband was a bad old man and that she was going to upset his will. Her husband was not eccentric. They had had several quarrels in 1925.

In reply to Mr. COTES-PREEDY, Mrs. Barnes said that she was a barmaid before marrying the testator in 1914.

Mr. Noel C. Callister, a helmsman on the Manchester Ship Canal, said that he remembered the testator aboard a ship one day asking if an officer knew how to blow an egg correctly.

After further evidence was given of the nature of the testator's service, and that the egg was shown by the defendant to three witnesses directly after she found it, Mr. MORTIMER and Mr. COTES-PREEDY submitted that there was no case.

Mr. BAYFORD referred to *In re Austen* (2 Rob. Ecc., 611) (which the PRESIDENT distinguished from the present case) ; *In re Corby* (1 Spinks, 292) ; *In re Hayes* (2 Curt., 338), and *In re Saunders* (L.R., 1 P. and D., 16). He recalled an unreported case during the Boer War which came before Lord Gorell, where the words "all to mother," written by a soldier on half an envelope, were admitted as a soldier's will. The soldier died on active service.

The PRESIDENT.—And was in peril of his life. Here the man was not on a desert island. He had access to paper and ink any day, and had already made two wills.

Mr. W. H. Hodson, one of the plaintiffs, said that he was managing clerk of the Liverpool firm of solicitors acting for the plaintiffs, and had been with them for 60 years. He had known the testator for 20 years as a friend, and had prepared wills for him in 1906 and 1920. He had often met him after the 1920 will was executed, and he had never expressed a desire to alter it.

Further evidence having been given for the plaintiffs, there was a short legal argument.

LORD MERRIVALE (to Mr. Mortimer).—Does your argument come to this : That a seaman at sea in the sense of section 11 of the Wills Act, 1837, must be in practically the same position as a soldier *in expeditione* ?

Mr. MORTIMER.—Yes, my Lord. "At sea" are the essential words.

The PRESIDENT, in giving judgment, said that he found, as a fact, that the writing on the eggshell was that of the testator. The two questions which then arose were :—(1) Was it a testamentary disposition ? (2) Was it a will of a mariner at sea within the exception provided by the Wills Act, 1837 ? It was not difficult to conceive a state of facts in which unquestionably it would be a testamentary document. Barnes had handed the eggshell over to a custodian to be put in a secret place. But the writing itself, without any evidence from extrinsic circumstances, could not be said with any certainty to be a testamentary disposition. It ran :—"17—1925. Mag. Everything i possess.—J. B." Taken by itself, who could say that it disposed of the property ? If the word "to" had been there, it might have made a considerable difference, but he must follow the principle defined by Sir John Nicholl in *Passmore v. Passmore* (1 Phill. Ecc. Rep., at p. 218) :—

"The Court must judge . . . whether it was written and intended as a formal, permanent will . . . or whether it was a deliberative and temporary paper, which expressed the impression and wishes of the moment, and was never afterwards thought of, or adverted to. In the latter case it can only be established by the aid of extrinsic circumstances."

In the present case the testator was familiar with the process of making a landsman's will. As a testamentary act the writing on the egg was one of the most grotesque proceedings conceivable on the part of a man in a responsible position, with a mind capable of grasping the subjects involved, and with ample facilities for making an ordinary will. He was asked to say that the testator took the egg, from which he had blown out the contents, and had written his will upon the shell after a paroxysm of heart trouble. Not only was it one of the most incredible things of which he had ever heard, but it was inconsistent with the character of the testator. The Court must act on proof and not on speculation and conjecture.

All that the evidence showed was that in a recess on the top of a wardrobe the eggshell was found, together with a piece of paper which had been used as a taper to melt some sealing wax. Correspondence by the widow, written before the discovery of the shell, showed that the will of 1920 was the only one of which she had any knowledge. He must hold that the writing on the eggshell was not a testamentary disposition.

There was another difficulty which went to the root of the widow's case. He shared the opinion of his predecessors that nothing should be done to limit the operative value of section 11 of the Wills Act, 1837, with regard to nuncupative wills, but it must not be fantastically extended to cases to which it was not intended to apply. Extreme cases had arisen with regard to soldiers and seamen on service, but even supposing that the testator was a mariner at sea for certain parts of his duties, it did not follow that he was a mariner at sea at all times in the sense of the exception provided by the Wills Act, 1837.

He did not find affirmatively that the writing on the egg was made when the testator was on shipboard, or going to his duties there, or returning from them, or that his position corresponded in any way

with that of a soldier *in expeditione*. His duties were intermittent. At times he was living ashore in a bungalow. The allegations of the defence therefore failed.

His Lordship pronounced against the alleged will on the eggshell and in favour of the will of 1920. He would not go so far as to say it was a cruel joke on the part of the testator, as suggested by Mr. Bayford. He would allow the widow's costs out of the estate, and also those of the interveners.

[Solicitors—Messrs. Pritchard, Englefield, and Co., for Messrs. Simpson, North, Harley, and Co., Liverpool; Messrs. Finch, Jennings, and Tree, for Mr. T. W. McLean, Liverpool; Messrs. Greenfield and Cracknall, and Messrs. Smiles and Co., for Mr. H. G. C. Day, Liverpool.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926.
Nov. 11.

RIVERSDALE MILL COMPANY, LIMITED v. HART.*

Master and Servant—Truck Acts—Lancashire cotton trade—"Standard list" of wages—Deductions for bad work—Truck Act, 1831 (1 and 2 Will. IV., c. 37), ss. 3, 23—Truck Act, 1896 (59 and 60 Vict., c. 44), ss. 2, 9.

Section 3 of the Truck Act, 1831, provides for the payment in current coin of the Realm of "the entire amount of the wages earned by or payable to any artificer . . . in respect of any labour done by him."

Section 23 permits an employer to make, and contract to make, reasonable deductions from wages in respect of certain specified matters.

Section 2 of the Truck Act, 1896, prohibits an employer from making, except under certain conditions, "any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman for or in respect of bad or negligent work or injury to the materials or other property of the employer. . . ."

Section 9 provides for the exemption from the provisions of the Act by order of the Secretary of State of persons engaged in certain trades, either generally or within a particular area.

By order dated March 3, 1897, the Secretary of State exempted from the provisions of the Act persons engaged in the weaving of cotton in the county of Lancashire.

The respondent, a weaver of cotton in Lancashire employed by the appellants, was negligent in performing certain work and, in accordance with a custom which had long existed in the Lancashire trade, the employers deducted a reasonable sum from the "standard list" rates of wages which had been agreed between the employers' and workers' organizations, as the remuneration for good, merchantable cloth, and paid her the balance as her wages.

Held (per Avory and Salter, JJ., Lord Hewart, C.J., dissenting), that this deduction was not illegal as being in contravention of the provisions of the Truck Acts.

Per Avory and Salter, JJ.: The implied contract between the parties was that the respondent should be paid according to the "standard list," subject to a fair deduction for bad work, and that, as the order of March 3, 1897, exempted the parties from the provisions of s. 2 of the Act of 1896, the appellants were entitled, as they would have been before the passing of that Act, to make deductions for bad work in calculating the amount of wages due. The deduction was made from the standard list to ascertain the wages earned; it was not made from the wages earned.

Per Lord Hewart, C.J.: "The entire amount of the wages earned by or payable to" the respondent within section 3 of the Act of 1831 was the amount specified in the "standard list" and not that amount less an uncertain sum to be assessed by the employers by way of damages, and, therefore, the deduction made by the appellants was illegal.

Judgment in favour of the employers was given in this appeal, by way of case stated, from Bolton justices, which raised the question of the legality of the customary method of paying pieceworkers in the textile trades.

The respondent, a woman textile pieceworker named Nellie Hart, preferred in the Bolton Police Court against the appellants, her employers, the Riversdale Mill Company, Limited, a claim under the Employers and Workmen Act, 1875, for the sum of 6d., being the balance of wages alleged to be due to her and unlawfully deducted by the employers, who counterclaimed for 1s. in respect of damages suffered by them through the negligence of the respondent.

It was admitted that the respondent was negligent, and that the 1s. claimed by the employers was a fair claim for the damage done to the employers' cloth through her negligence.

The case stated found that it was the duty of the respondent to weave a good merchantable cloth by performing her work without negligence and in a careful manner; that she was to be paid for her work according to a standard list, an implied condition of which was that the prices in the list should apply to good merchantable cloth produced by the observance by the respondent of her duty as a weaver. There was a practice to pay more than the standard price if the materials provided by the employer were defective, as payment for extra work due to defective material. But if the workmanship of a weaver was bad or negligent, there was, and had been for many years, a custom to pay a sum less than the sum contained in the standard list—namely, the standard list price less compensation assessed by the employer of a reasonable amount in respect of the loss suffered by him through damage to his cloth. It was admitted for the purpose of the case that the deduction of 6d. was fair and reasonable and less than the actual loss caused to the employers.

The employers contended that section 3 of the Truck Act, 1831, had nothing to do with a deduction

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

for bad work; that the amount of wages "earned by" and the amount "payable to" a workman were not necessarily the same thing, but that in this case the amount shown in the standard list was not "earned" because some of the work was bad, and that that amount was subject to a deduction for bad work. Nor was it "payable" to the weaver, because the amount to be paid was the net wage after the deduction, which formed no part of the wages. It was further contended that the effect of the order made by the Home Secretary on March 3, 1897, exempting the cotton weaving industry from the operation of the Truck Act, 1896, was to leave the industry free to make contracts permitting deductions in respect of bad work.

On the part of the respondent it was contended that the claim was based upon section 3 of the Truck Act, 1831, and that the Truck Act, 1896, had no application to the case.

The justices were of opinion that the standard list was the rate of wages applicable, and held that the employers had illegally deducted 6d. by way of fine from the wages of the respondent, and gave judgment for the respondent for 6d. On the employers' counterclaim the justices gave judgment in their favour for 1s.

The employers appealed.

Mr. Cyril Atkinson, K.C., and Mr. Harold Derbyshire appeared for the appellants; Mr. Eastham, K.C., and Mr. Laski for the respondent.

The following judgments were read:—

The Lord Chief Justice.—This is a case stated by justices for the county borough of Bolton. It arises out of a complaint or claim preferred by the present respondent under the Employers and Workmen Act, 1875, against the present appellants, the Riversdale Mill Company, Limited, who were the employers, for the sum of 6d., being a balance of wages alleged to be due to the respondent as a weaver of the employers, and unlawfully deducted from her wages. That complaint or claim was heard on February 1, 1926. The justices found that the sum of 6d. was illegally deducted and they accordingly awarded the respondent that amount. The employers had counterclaimed for the sum of 1s. in the following terms: "Take notice that upon the hearing of this summons the defendants intend to set up a counterclaim against the plaintiff for damages sustained by the defendants by reason of the plaintiff's negligence in the discharge of her duties as a weaver and/or in the alternative damages for breach of contract of service. Particulars: April 28, 1925, To value of cloth belonging to the defendants and damaged by the plaintiff by reason of the plaintiff's negligence in the discharge of her duties as a weaver, 1s. . . ." Upon this counterclaim the justices found for the employers and awarded them 1s. as damages.

The employers were dissatisfied with the determination and accordingly a case was stated. It is not necessary that I should read the whole of the case, but certain parts of it ought to be read. It was admitted by counsel for the respondent, for the purposes of the case, and only for the purposes of the case, that the respondent was negligent and that the 1s. claimed by the employers was a fair claim for the damage done to the employers' cloth through the negligence of the respondent. The case further finds that the respondent was employed by the employers as a cotton weaver in a cotton weaving mill under a customary contract of service whereby the employers were to find the warp and the weft and the respondent was to weave the warp and the weft into cloth. The case goes on to say that it was the duty of the respondent to weave a good merchantable cloth by performing her work without negligence and in a careful manner, and that the respondent was to be paid for her work according to a standard list, and then the case adds the following words: "An implied condition of which was that the prices in the list should apply to good merchantable cloth produced by the observance by the respondent of her duty as a weaver." In other words, the respondent was employed to weave well and not to weave badly.

The case goes on to say: "In the event, however, of the material provided by the employers being defective, there is a practice to pay a sum higher than that contained in the standard list as payment for extra work due to defective material." On the other hand, "if the workmanship of a weaver was bad or negligent, there is and has been for many years a custom to pay a sum less than that contained in the standard list—namely, the standard list price less compensation assessed by the employer of a reasonable amount in respect of the loss suffered by the employer for damage to his cloth. It was admitted for the purpose of the case that the deduction of 6d. made in this case for bad work was fair and reasonable and less than the actual loss caused to the employers." Then comes this significant paragraph: "Deductions for bad work are and have been for many years the usage and custom in the cotton weaving trade of Lancashire and have always been and are an incident of a weaver's contract of service and have always been and are taken into account in calculating the correct wages. It was admitted by the employers' witnesses that fines and deductions for bad and negligent work had always been objected to on principle by the workmen as a class." It was further mentioned to us in the course of the argument, and it is common ground, that a weaver is employed from day to day and a contract of service can be put an end to by one day's notice. "A wages book was produced by the employers, the production of which was objected to by counsel for the workman on the ground that such book was not receivable in evidence against the workman, and it was admitted by the witness producing the book that the weavers did not sign the book and were not concerned with the book." A specimen sheet of the book is exhibited to and forms part of the case, "subject to the fact that we, the said Court, refer to the said objection as to the admissibility of this document."

In that state of facts it was contended by the respondent that the claim was based upon the provisions of section 3 of the Truck Act, 1831, whereby the entire amount of the wages is payable to the workman and no deduction is lawful, except the deductions mentioned in that Act. The employers, on the other hand, contended that section 3 of the Act of 1831 had nothing to do with the deduction for bad work, that the Act dealt only with payment to a workman in kind instead of in coin, and that the amount of wages earned by and the amount of wages payable to a workman were not necessarily one and the same thing. Such is the case as stated, and upon the questions which it involves I have the grave misfortune to differ from the other members of the Court.

The first question which arises is: What was the amount of wages payable to the respondent under the contract with the employers? The justices were of opinion that the standard list was the rate of wages applicable, and that, in my view, was a conclusion of fact by which this Court is bound if there was

evidence to support it. In my opinion, there was ample evidence to justify such a conclusion, and, indeed, on the facts as stated, I should have come to the same conclusion myself. It seems to me that the real contract between the parties was that the wages for work done should be paid in accordance with the standard list, and that if the workmanship was bad or negligent the employers should be entitled to compensation, that is to say, to damages, to be assessed at a reasonable sum in respect of the loss suffered by them—a totally different thing from making a deduction from wages. The employers seem to have recognized that that is the true position by counterclaiming 1s. in respect of the damage sustained by them. Moreover, Mr. Eastham told us, and I accept what he said, that the argument for the employers before the justices proceeded on the basis that the 6d. was in fact a deduction from the respondent's wages and that it was permissible for employers to make a deduction from wages for bad work; and in the sheet of the wages book produced by the employers and exhibited to the case the column in which the deduction would appear is headed "Abatement for bad work, &c.," and this abatement would be made from the amount in the column headed "Weavers' Wages" in order to arrive at the amount in the final column headed "Net Wages."

I cannot help thinking that the argument advanced before us on behalf of the employers was an ingenious afterthought. The scheme of it was to get rid of any difficulty connected with deductions from wages by the simple device of saying that no deduction should be regarded as having been made from wages inasmuch as the amount of the wages was not ascertained until the deduction had been made. From what, then, are the deductions to be made? Apparently from some notional figure representing an ideal standard of wages which never becomes actual until suitable deductions have been made from it. I am bound to say that, if this kind of reasoning is sound, both the Legislature and the Courts would appear to have wasted a good deal of time upon problems connected with the Truck Acts.

It follows that, in my opinion, "the entire amount of the wages" payable to the respondent was the amount specified in the standard list, and not that amount less an uncertain sum to be assessed by the employers by way of damages, and if this view is correct, the case is concluded by the decision of the House of Lords in *Williams v. North's Navigation Collieries* (1889), *Limited* (22 *The Times* L.R., 372; [1906] A.C., 136), where it was unanimously held that section 3 of the Truck Act, 1831, renders illegal any deduction by an employer when he is paying wages other than the deductions expressly authorized by the Act.

With regard to the so-called custom to make deductions for bad work, it is sufficient to say that, even if the practice had been generally recognized and acquiesced in as a term of the contract by the workmen, instead of having been always objected to by them on principle, it would have been, in my opinion, illegal as a contravention of the provisions of the Truck Act, 1831.

It may be observed that, if the appellants' contention that the entire amount of wages earned or payable is the amount specified in the standard list less an uncertain sum to be assessed by the employers for bad or negligent work were right, no weaver in Lancashire would ever know with any certainty what his wages are to be. If he were asked what wages he earns, he would have to say: "I do not know. There is a standard list of wages, but deductions of uncertain amount to be assessed by my employers on account of alleged bad work may be made from the wages specified in the standard list, so that I never know how much I am earning." Such a state of things is, in my opinion, quite contrary to the provisions and the spirit of the Truck Acts. See the analysis of the Act of 1831 in the judgment of Mr. Justice Keating, concurred in by Mr. Justice Williams and Mr. Justice Willes, in *Archer v. James* (2 B. and S., 61)—an analysis, I may say, not differed from by the rest of the Court.

In view of the decision of the House of Lords already referred to, it is, I think, unnecessary to consider the arguments addressed to us with reference to the Truck Act of 1896. I think, therefore, that this appeal fails.

Mr. Justice Avory.—With the profoundest respect for the judgment just delivered by my Lord, I am unable to concur in it. The question before the justices in this case was whether the respondent, Nellie Hart, was entitled to claim from the appellants the sum of 6d. as the balance of wages due to her as a weaver in a cotton mill in Lancashire. The justices held that the said sum of 6d. had been illegally deducted from the wages by way of fine and gave judgment in her favour for that sum. On behalf of the respondent it is contended that the non-payment of the said sum of 6d. amounted to a deduction from the wages earned in breach of section 3 of the Truck Act, 1831, and that under section 4 of the same Act she was entitled to recover the same. On behalf of the appellants it is contended that the entire amount of the wages earned by the respondent had been actually paid to the respondent in accordance with the statute. In my view, the effect of the findings in the special case is that the respondent was employed to weave a good, merchantable cloth, under an implied contract that she should be paid for her work according to a standard list, subject to a fair and reasonable deduction for bad work. It is admitted that the 6d. is a fair and reasonable deduction in this case, and therefore, in my opinion, the amount paid to the respondent less the 6d. did represent the entire amount of the wages earned by her.

The question that arises is whether the calculation of the amount of wages in this manner is forbidden by the Truck Acts, 1831 to 1896, or by the decisions upon those Acts. With regard to the statutes, I find nothing in the principal Act of 1831 which expressly forbids a deduction for bad work in the calculation of the wages. The Hosiery Manufacture (Wages) Act, 1874, section 1, expressly recognizes the right to deduct for bad workmanship. The Truck Act, 1896, by section 2, forbids any deduction from the sum contracted to be paid to the workman, or any payment by the workman to the employer for or in respect of bad work unless the terms of that section are complied with. In my opinion, this section impliedly recognized that deductions for bad work had theretofore been lawfully made in calculating the amount of wages due and introduced a new protection for the workman in respect to such deductions, but section 9 of the Act of 1896 provided that the Secretary of State might grant exemptions from the provisions of the Act in respect of persons engaged in any particular trade within any specified area, and by Order made on March 3, 1897, the Secretary of State granted exemption from those provisions in respect of persons engaged in all branches of the weaving of cotton in the county of Lancashire. The result, therefore, is that while that

Order remains in force the employer is not affected by the provisions of the Act of 1896, and in my view is entitled, as he was before that Act, to make deductions for bad work in calculating the amount of wages due. I see no difference in principle between this case and the case of the worker employed in piecework, the amount of whose wages cannot be calculated until it is ascertained at the end of the week what work she has done.

The question remains whether the decisions on these statutes are in conflict with the view which I have expressed. In the case of *Williams v. North's Navigation Collieries* (1889), *Limited* (22 *The Times* L.R., 372 ; [1906] A.C., 136), which was relied on for the respondent, there was no dispute that the entire amount of the wages had been earned by the workman, and the deduction which was objected to was for an antecedent debt due to the employer. It is true that in that case Lord Loreburn, L.C. (22 *The Times* L.R., at p. 372 ; [1906] A.C., at p. 140), used the expression that the employer " in ascertaining how much is payable as wages . . . can subtract nothing except the deductions expressly sanctioned by the Act," but I think that must be read in its application to a case where the entire amount of the wages earned by the labour of the workman is not in dispute. The cases of *Chawner v. Cummings* (8 Q.B., 311) and *Archer v. James* (2 B. and S., 61) were relied on by the appellants and, in my opinion, support their contention in this case. In both of these cases there was a difference of opinion in the Exchequer Chamber, but they were not dissented from in the House of Lords in *Williams v. North's Navigation Collieries* (1889), *Limited* (*supra*). On the contrary, both Lord Davey and Lord Atkinson, who commented upon them, expressed the opinion that the basis of the decision in those cases was that the alleged deductions were elements only in calculating the real amount of the workman's wages. Lord Davey (22 *The Times* L.R., at p. 373 ; [1906] A.C., at p. 142), said : " In *Chawner v. Cummings* (*supra*) the plaintiff was presumed to have contracted upon the usual and well-known terms in the trade, and certain customary deductions which had been made from his nominal wages were held not to be in the nature of payment at all, but the mode of calculating and ascertaining the actual amount of his wages. *Archer v. James* (*supra*) was a similar case, and was decided in the first instance on the authority of *Chawner v. Cummings* (*supra*). In the Exchequer Chamber three Judges held that *Chawner v. Cummings* (*supra*) was wrongly decided, and three other Judges, on the other hand, approved the decision, and held that the deductions in question in the case before them were in the same category and were elements only in calculating the real amount of the workman's wages." Lord Atkinson (22 *The Times* L.R., at p. 374 ; [1906] A.C., at p. 146) said : " The several authorities cited appear to me to support rather than refute the contention of the appellants. They may, I think, be roughly divided into two classes—namely, those cases like *Chawner v. Cummings* (*supra*), in which charges were made by the employer for the use of the instrument by which the workman did his work and earned his wage ; and those like *Hewlett v. Allen* (8 *The Times* L.R., 793 ; 10 *The Times* L.R., 464 ; [1892] 2 Q.B., 662 ; [1894] A.C., 383), in which payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts. . . . In the first class of cases it was successfully contended that the charges made by the master were not deductions properly so-called from sums due for wages earned, but were sums to be taken into account in ascertaining the amount of wages actually earned."

In the case of *Pritchard v. James Clay* (*Wellington*), *Limited* (42 *The Times* L.R., 139 ; [1926] 1 K.B., 238), this Court held that there had been an infringement of the Truck Act of 1896 on the ground that the provisions of that Act with regard to the deductions had not been complied with. In view of the fact that the cotton weaving trade in Lancashire is exempt from the provisions of that Act, I do not think that this decision has any application to the present question.

I, therefore, come to the conclusion that neither in the statutes nor in the reported decisions is there anything making it illegal to calculate the wages earned as was done in this case, and that the respondent was not in the circumstances entitled to recover the 6d., and that the appeal should accordingly be allowed. The fact that the appellants put forward a counterclaim ought not, in my view, to be regarded as inconsistent with their contention on the main question, but only as an alternative to their defence, and it should, in the circumstances, be dismissed and this case remitted to the justices to enter judgment for the appellants on the claim and for the respondent on the counterclaim, with such costs as the justices may determine.

Mr. Justice Salter.—I agree that this appeal should be allowed. In my opinion, the justices were wrong on both points. They should have dismissed the claim and the counterclaim. The contract between the parties was wholly an implied contract—implied from the usage and course of dealing in the trade. The contract, so far as it deals with payment, provides for three events : First, where the employer provides good material and the workman does good work ; secondly, where the workman does good work but the employer provides bad material ; and thirdly, where the employer provides good material and the workman does bad work. In the first event, the agreed amount of the wages is the sum shown on the standard list. In the second event, the agreed amount of the wages is a sum larger than that shown on the standard list, but the method of ascertaining it is not set out in the case. In the third event, the agreed amount of the wages is a sum to be computed by subtracting from the standard list such sum as the employer reasonably considers to be fair. If the first event had happened the amount of wages earned by the workman would have been 8s. 11½d. If the second event had happened, the wages earned would have been some larger sum. The event which in fact happened was the third, and the employer subtracted from the 8s. 11½d. the sum of 6d. This was admittedly a reasonable sum, and the amount of wages earned by the workman was therefore 8s. 5½d. : 8s. 5½d. was paid to the workman in cash.

I entertain some doubt whether there was any evidence of a trade usage from which the term set out in the case could be implied in the contract, because it is found that the workmen always objected to the alleged usage. Further, it might be said that this usage, even if proved in fact, is bad in law as being unreasonable, oppressive, or uncertain. If the term of the contract set out in the case is not valid, then the contract, so far as it is set out in the case, makes no provision for the event which has happened. But the employer has availed himself of the workman's labour and taken the cloth and doubtless sold it. That being so, there is an implied promise to pay

what is fair and right. The plaintiff's claim on *quantum meruit* is found in the case. It is 7s. 11½d. If, then, the alleged usage is good, the plaintiff has been paid in cash the full amount of the wages earned by or payable to her. If the alleged usage is bad, she has been paid in cash 6d. more than the full amount of the wages earned by her. The plaintiff had, therefore, no cause of action against the defendants at common law. The defendants, also, had no cause of action against the plaintiff. Even if the bad work was a breach of the contract (which I doubt, seeing that the contract provided for it), the defendants suffered no damage thereby, because they paid a reduced sum for the work, a sum fixed by themselves. The counterclaim should have been dismissed.

Then, is there anything in the Truck Act, 1831, to give the plaintiff a cause of action for 6d. more than she has been paid, although she has no right to it at common law? That Act deals mainly with payment in kind. So far as it deals with non-payment and deduction and set-off it deals with two matters—the right of the employer to satisfy a cross-claim by deduction from wages earned and the right of the employer to satisfy his cross-claim by set-off in the workman's action for wages. There are three cases: First, where the cross-claim is permitted by the Act (sections 23 and 24). Here the employer may deduct from the wages earned. In this case, the wages payable are less than the wages earned. Secondly, where the cross-claim is for a matter forbidden by the Act (sections 5 and 6). Here the employer can neither deduct from the wages earned nor set-off against an action for wages. Indeed, by section 6, the cause of action is destroyed altogether. Thirdly, where the cross-claim is for a matter neither permitted nor forbidden by the Act. Here the employer cannot deduct from wages earned. He must pay them in full, although it is more than he owes the workman. But he can set-off his claim in an action by the workman for wages unpaid. *Williams v. North's Navigation Collieries* (1889), *Limited* (22 *The Times* L.R., 372; [1906] A.C., 136), was a case of this class. The employers had a claim for money due from the workman under a judgment. It was held illegal to deduct it from the wages earned, but it was admitted that the workman's action for the unpaid balance of wages earned must fail, because the set-off was good.

If the view I have taken of the contract of employment is correct, the Truck Act, 1831, has no application. Section 3 requires that the entire amount of the wages earned by and payable to the plaintiff shall be paid to her in coin. The amount of wages payable may, in some cases, be less than the amount of wages earned—it can never be more. Here the amount of wages earned by and payable to the plaintiff was, in one view, 7s. 11½d., in another view, 8s. 5½d. The employers did not deduct anything, and had no right to deduct anything, from the wages earned by the respondent. They made a deduction (or subtraction or abatement) from the standard list; they made no deduction from the wages earned.

I think the matter can be tested by considering what the position would have been if this had been a case of the second instead of being a case of the third class which the contract provides for—if the work of the respondent had been good and the material provided by the employers had been bad. The respondent would have been entitled to a sum in excess of the standard list. Supposing a sum of 2s. had been found in the case as being a proper addition, I do not think it could be denied that the sum of 10s. 11½d. would have been the amount of the wages earned by and payable to the respondent. If the wages arrived at by an addition to the standard list are the wages earned by the workman, it seems to me to follow that the wages arrived at by an agreed deduction from the standard list are also the wages earned by and payable to the workman. I agree with the direction which Mr. Justice Avory has indicated.

The appeal was accordingly allowed.

[Solicitors—Messrs. Rawle, Johnstone and Co., for Messrs. John Taylor and Co., Manchester and Blackburn; Messrs. Patersons, Snow and Co., for Messrs. Fielding and Fernihough, Bolton.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926.
Nov. 11.

BOWEN v. WILSON.*

Motor-cars — Brakes — Requirement of two independent brakes—Separate brakes acting on same drum—Whether independent—Motor Cars (Use and Construction) Order, 1904, art. II. (4).

Where a motor vehicle has two separate brakes operating separate brake blocks, the mere fact that both brakes apply their brake blocks to one and the same brake drum does not prevent the brakes from being independent brakes within art. II. (4) of the Motor Cars (Use and Construction) Order, 1904, provided that the vehicle is so constructed that the brake drum is really part of the wheel and not of the brakes.

This case, stated by the Cardiff stipendiary, raised the question whether a B.S.A. motor-bicycle, fitted with a hand brake and a foot brake applying separate brake blocks to the same brake drum, had "two independent brakes" within the meaning of article II. (4) of the Motor Cars (Use and Construction) Order, 1904. The appellant was convicted by the stipendiary of not having two independent brakes.

Mr. Doughty, K.C., and Mr. Jenkin Jones appeared for the appellant; Mr. Wightman Powers for the respondent.

Mr. Doughty contended that "brake" meant that part of the mechanism which extended from the handle or pedal to the brake shoe, and that the brake drum was a part of the wheel designed to receive the impact of the brake. If not, practically every modern motor-car broke the law; for all, or nearly all, adopted that principle, including taxicabs licensed by Scotland Yard.

The Lord Chief Justice.—But is not the brake drum a part of the braking mechanism in the sense that, if it were broken off, neither brake could act, and yet the wheel might go on? The object of the order is to provide alternative means of safety. Is that attained when both brakes operate on the same brake drum?

Mr. Justice Salter.—But there must be a point at which the brake is applied to the bicycle. Where is it, if not where the brake shoes press on the brake drum?

Mr. Powers cited dictionary definitions of a "brake" as a contrivance for retarding the motion

* Reported by J. W. Hall, Esq., Barrister-at-Law.

of vehicles by means of friction. He submitted that the brake drum was part of the braking apparatus, and that the wheel was perfect and complete without it.

MR. JUSTICE AVORY.—The efficiency of a brake must depend on the existence of something on which it acts. Of course, if the brake drum were taken away the brakes would not be effective.

Mr. POWERS.—The wheel, *qua* wheel, is perfectly complete without the brake drum; the brake is perfectly useless without it.

MR. JUSTICE AVORY.—Every brake is useless without a wheel.

The following considered judgments were delivered:—

The LORD CHIEF JUSTICE.—This is a case stated by the learned stipendiary magistrate for the city of Cardiff. The matter arises in the following way. An information was preferred against the appellant for unlawfully driving a motor-cycle upon a highway, "without having two independent brakes in good working order and of such efficiency that the application of either to the motor-cycle would cause one of the wheels to be so held as to be effectually prevented from revolving or would have the same effect in stopping the motor-cycle as if such wheel were so held." After hearing the evidence, the learned stipendiary convicted the appellant for not having two independent brakes upon the motor-cycle as required by law.

The question for this Court is whether in coming to that determination the learned magistrate was right in law; in other words, whether there was evidence before him to permit the conclusion to which he came. The provisions of the Motor Cars (Use and Construction) Order, 1904, relevant to the matter are to be found in article II., paragraph (4): "The motor-car shall have two independent brakes in good working order and of such efficiency that the application of either to the motor-car shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving, or shall have the same effect in stopping the motor-car, as if such wheels were so held. Provided that in the case of a motor-car having less than four wheels this condition shall apply as if instead of two wheels on the same axle one wheel was therein referred to." The interpretation of that order was considered by this Court in the case of *Cannon v. Jefford* (31 *The Times* L.R., 489; [1915] 3 K.B., 477), where the question raised was to some extent similar to the question raised here—namely, whether in the actual mechanism employed there were between the two brakes common factors of such a kind as to deprive the brakes of the character of being independent of each other.

What is found in this case with reference to the brakes may be shortly stated. The motor-cycle was fitted with two levers; one of the levers was controlled by hand and the other by the foot. The hand lever communicated with a brake block called the hand-brake block; the foot lever communicated with another brake block called the foot-brake block; and there was fixed to the spokes of the back wheel of the motor-cycle a brake drum. The hand lever, when it was used, caused the hand-brake block to press upon that brake drum; the foot lever, when it was used, caused the foot-brake block to press upon the same drum; and the case finds that the hand lever and the foot lever could be used separately or together. Neither the hand-brake block nor the foot-brake block could work efficiently or at all except by pressure upon the brake drum. More than that, the case finds that any flaw or defect in or accident to the brake drum which interfered with the efficient working of one brake block would also interfere in a similar manner with the efficient working of the other brake block; that is to say, both brake blocks were dependent upon the efficient condition of one brake drum.

In those circumstances the learned magistrate was of the opinion that the intention in framing the order was that if one of the brakes failed the other independent brake could be used in its stead, and he was further of the opinion that the hand lever and brake block and the foot lever and brake block had a certain factor common to each—namely, the brake drum, and that the breakage of the brake drum would put both brake blocks out of action. He therefore came to the conclusion that the motor-cycle had not two independent brakes.

In the course of the argument I was much impressed by what was urged on the part of the respondent to the effect that the object of this provision was, so far as possible at any rate, to secure two completely independent brakes, that the business of the brakes is to stop the revolution of the wheel, and that a brake is of little account if for any reason, when it is used or sought to be used, it fails, and the wheel nevertheless revolves. We were pressed by the argument that this brake drum is not really a part of the wheel but a part of the brake; and that if anything went wrong with it—if, for example, it was severed from the wheel, or if it became partially severed so as to be loose—neither the one brake nor the other, however operated, would produce any effect upon the revolution of the wheel; and it was conceded that, as there is one brake drum, so also there might mechanically be two, one being acted upon by the hand lever and the other being acted upon by the foot lever. But, looking at the facts as a whole, I have, not without reluctance, come to the conclusion that the true view is that this brake drum is not really a part of the brake; it is not a factor common to the two brakes; it is rather to be regarded, as Mr. Doughty contended, as a part of the wheel; and if that view of the facts is correct, as upon consideration I have come to the conclusion it is, then there were no materials to justify this conviction, because the conviction is based upon the view that a part of the wheel itself is a factor common to the two brakes.

For those reasons, and not without diffidence and reluctance, I have come to the conclusion that this appeal succeeds.

MR. JUSTICE AVORY.—I have arrived at the same conclusion. The grounds of the learned magistrate's decision are to be found in the case. They are to this effect: "Any flaw or defect in or accident to the said brake drum which interfered with the efficient working of one brake block would also interfere in a similar manner with the efficient working of the other brake block, *i.e.*, both brake blocks depended upon the efficient condition of the said brake drum"; and the learned magistrate further says: "I was of opinion that the intention in framing this order was that if one of the brakes failed the other independent brake should be used in its stead. I was also of opinion that the hand-lever brake block and the foot-lever brake block had a certain factor common to each—namely, the said brake drum, and that the breakage of the said brake drum would put both brake blocks out of action." I do not think it is correct to say that the brake drum in this case was a factor common to each of the brakes. In my view the brake drum was no part

of the brake, but was a part of the wheel upon which the brake acted when it came in contact with it. The brake ended at the brake block, and although it is true to say that the efficient working of each of the brakes depended upon the efficient condition of the brake drum and that the breakage of the brake drum would put the brakes out of action, the same might be said of any part of the wheel or of the machine with which the brake block is intended to be brought into contact with a view to arresting the revolution of the wheel. I do not think that the brakes in this case can be said not to be independent or not to be efficient because a part of the machine upon which the brake is intended to act may break or become damaged, whether it be part of the wheel itself or any other part of the machine.

In my opinion, therefore, the learned magistrate misdirected himself and there was no evidence upon which he could properly hold that there had been an infringement of the Motor Cars (Use and Construction) Order, 1904, in this case; and the appeal should therefore be allowed.

MR. JUSTICE SALTER.—I agree. The question is whether this brake drum is part of the mechanism which applies the retarding force, or part of the vehicle to which the retarding force is applied. With pneumatic tires it is not possible to apply this form of brake in the old-fashioned way to the rim of the wheel, and therefore the wheel is fitted with what is in effect an alternative rim in order that the brake may be applied to it. I think it is part of the vehicle and not part of the brake, and I agree with the judgment of my brethren.

[Solicitors—Messrs. Amery Parkes and Co., for Mr. Evan Rowlands, Swansea; Messrs. Smith, Rundell, Dods and Bockett, for Mr. Cecil G. Brown, Town Clerk, Cardiff.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926.
Nov. 11.

KINGSBURY v. DIRECTOR OF PUBLIC PROSECUTIONS.*

Dangerous Drugs—Supply—Register of persons supplied—Obligation to keep—Exception—Administration by or under direct personal supervision of medical man — Dangerous Drugs Regulations, 1921, regs. 4, 9.

By reg. 4 of the Dangerous Drugs Regulations, 1921, "Except when the drugs are lawfully dispensed in pursuance of a prescription given by a duly qualified medical practitioner . . . or are supplied by a duly qualified medical practitioner or registered veterinary surgeon who dispenses his own medicines, in accordance with the conditions hereinafter specified, no person shall supply or procure or offer to supply or procure any of the drugs to or for any person in the United Kingdom who is not licensed or otherwise authorized to be in possession of the drug. . . . Provided that administration of the drugs by or under the direct personal supervision of a duly qualified medical practitioner . . . shall not be deemed to be supplying the drug within the meaning of this and the following regulations."

By reg. 9, "Every person who supplies any of the drugs shall comply with the following provisions:—(*a*) He shall enter or cause to be entered in a register kept for the sole purpose all supplies of the drug purchased or otherwise obtained by him and all dealings in the drug effected by him . . . in the form and containing the particulars shown in Schedule 1 to these regulations. . . ."

Held, that the word "administration" in the proviso to reg. 4 as to administration by a medical man is not confined to administration in an emergency as contrasted with a general supply, and that the words "personal supervision" are not limited to cases where the medical man is personally present when the dose is taken.

This was a case stated by Sir William Pryke, the late Lord Mayor of London. On March 1, 1926, an information was preferred by Inspector Pay, of the City Police, against the appellant, Dr. George Chadwick Kingsbury, who was both a barrister and a registered medical practitioner. The information stated that the appellant, between August 20, 1925, and February 2, 1926, unlawfully failed to comply with the provisions of regulation 9 of the regulations dated May 20, 1921, made by the Secretary of State under section 7 of the Dangerous Drugs Act, 1920, in that, having supplied quantities of a certain dangerous drug, to wit, morphine, to a person unknown, he did not enter or cause to be entered in a register kept for the purpose, in the form and containing the particulars shown in Schedule 1 to the regulations, all dealings in the drug effected by him; that was to say, that he did not enter the name or address of the person to whom the drug was supplied, and did not record in a day book the name and address of the patient to whom it was supplied, contrary to section 13 (1) of the Dangerous Drugs Act, 1920, as amended by the Dangerous Drugs and Poisons (Amendment) Act, 1923.

The appellant pleaded "Not Guilty," but consented to be dealt with summarily. The late Lord Mayor convicted him, and ordered him to pay a fine of £25, and £10 10s. costs.

On the hearing before the Lord Mayor, the following facts were proved or admitted:—The appellant was a Doctor of Medicine, and his name duly appeared in the Medical Register for 1925. In 1902 he was called to the Bar, and had practised regularly as a barrister since that date. Old patients of his, and barrister friends in the Temple, had occasionally asked his advice, but he had never accepted any fee from any patient since his call to the bar. Subsequently to the passing of the Dangerous Drugs Act, 1920, the appellant undertook, at the earnest solicitation of two of his old patients, to try to cure them of their having to take certain daily quantities of morphine. In both cases the morphine had been administered by doctors, originally during prolonged illnesses of the patients, and was taken on the average in four doses *per diem*. Towards the carrying out of his promise the appellant made purchases of morphine in quarter-grain tabloids to the average amount of 17 to 20 grains weekly. He paid for the morphine himself at a cost of about £25, and made

* Reported by J. W. HALL, Esq., Barrister-at-Law.

no charge to the patients for it. He took no fee for his treatment of the patients, the first of whom was cured before the end of 1924.

During the period covered by the summons, August 20, 1925, to February 2, 1926, the appellant was treating the remaining patient, a worker in the City, and was adopting the gradual reduction treatment. Before the hearing he had succeeded in reducing the drug taken to one-fiftieth of the daily dose taken at the beginning of the treatment. He had seen this patient every other day, even during his own holidays, and, on the days of his visits, had left with the patient the necessary supply of morphine for the proper doses for that day and the succeeding day, with instructions as to the time and method of taking it. On no occasion did the appellant ever depart from that method of treatment, and he had never entrusted the drug to any person other than the patient, save on one occasion (before the period covered by the summons) to the patient's wife. He did not actually see the patient take the drug, but stated that he would have known if the patient had been getting morphine from other doctors.

Dr. Dill Russell, a regional medical officer, visited the appellant on three occasions during December, 1924; gave him the Home Secretary's memorandum of the duties of doctors under the Dangerous Drugs Acts; and stated that he would have to keep the register as explained therein. The appellant gave all the information asked for by Dr. Dill Russell. He further expressed his desire to cooperate in every way with the Home Office, but made it clear that he did not consider that the regulations about keeping a register applied to him. He also objected to giving the names and addresses of his patients, as he thought that subjecting them to police supervision would militate against their recovery. Dr. Dill Russell had never at any interview pressed for those names and addresses, but he told the appellant that he was not sent by the Home Office in any inquisitorial or hostile spirit.

Dr. Roche visited the appellant on October 15, 1925, to inquire about the two aforesaid patients. The appellant told him that the first, a woman, had been cured for a year, and that he was very hopeful of the man, his only remaining case. He showed Dr. Roche his notebook, which did not give the name or address of his patient, and those he declined to disclose. He did not record the name and address of the patient in any book.

Mr. Anderson, a Home Office inspector, called on two occasions to inspect the appellant's notebook, to see whether it complied with the Home Office demand that it should contain the name and address of the patient. The appellant said that, while he had no desire to do anything contrary to the wishes of the Home Secretary, he had not seen his way to disclose the name and address.

The appellant contended (*a*) that regulation 9 of the regulations of May 20, 1921, was *ultra vires,* as not being authorized by section 7 of the Dangerous Drugs Act, 1920, under which it purported to be made; (*b*) that in any case it did not apply to him, as he was not a dispensing doctor; and (*c*) that the proviso to regulation 4 completely exempted him from regulation 9 and the schedule as to records, as the administration of the drug by or under the personal supervision of a duly qualified medical practitioner was not deemed to be a supplying of the drug within the meaning of the regulations, and that he came within one or both the branches of the proviso.

The respondent contended (*a*) that regulation 9 was *intra vires,* and that the appellant was bound to keep the record, including the name and address of the patient; (*b*) that in regulation 4 the words "administration of the drug by a duly qualified medical practitioner" meant that the doctor must administer every dose by his own hand; and (*c*) that the words "administration under the direct personal supervision of a duly qualified practitioner" meant that the doctor must be present and either see the patient administer each and every dose to himself or see the nurse or other person administer such dose to the patient.

The late Lord Mayor was of opinion that regulation 9 was a valid regulation, and that in the circumstances the proviso to regulation 4 was not applicable to the appellant. He accordingly found the appellant guilty, and fined him, as above stated.

The following are the material extracts from the regulations of May 20, 1921:—

"Regulation 4.—Except when the drugs are lawfully dispensed in pursuance of a prescription given by a duly qualified medical practitioner . . . or are supplied by a duly qualified medical practitioner or registered veterinary surgeon who dispenses his own medicines, in accordance with the conditions hereinafter specified, no person shall supply or procure or offer to supply or procure any of the drugs to or for any person in the United Kingdom who is not licensed or otherwise authorized to be in possession of the drug. . . . Provided that administration of the drugs by or under the direct personal supervision of a duly qualified medical practitioner . . . shall not be deemed to be supplying the drug within the meaning of this and the following regulations.

"Regulation 9.—Every person who supplies any of the drugs shall comply with the following provisions:—(*a*) He shall enter or cause to be entered in a register kept for the sole purpose all supplies of the drug purchased or otherwise obtained by him and all dealings in the drug effected by him . . . in the form and containing the particulars shown in Schedule 1 to these regulations. . . . [The form in the schedule contained columns for 'Name and address of person, body, or firm to whom sold or supplied.']

"A duly qualified medical practitioner who records in a day book particulars of any of the drugs supplied by him to any patient, together with the name and address of the patient and date of the supply, may, in lieu of keeping the register . . . enter . . . in a book to be kept for the purpose references under the appropriate dates to the records in the day book. . . ."

By section 13 (1) of the Dangerous Drugs Act, 1920, as amended by section 2 of the Dangerous Drugs and Poisons (Amendment) Act, 1923:—

"Any person who acts in contravention of, or fails to comply with, any regulation made under this Act; . . . shall be guilty of an offence against this Act."

Mr. Norman Birkett, K.C., and Mr. Arthur H. Davis appeared for the appellant; Mr. H. D. Roome for the respondent.

Mr. Birkett, in opening the case for the appellant, said that their Lordships would be glad to hear that at the proceedings before the Lord Mayor it was said by Mr. Roome, and reiterated by the Lord Mayor in registering the conviction, that a technical offence had been committed, but that there was no reflection whatever upon the character of Dr. Kingsbury. In a sentence, what was said was: "You have not

kept the record required," to which he answered : " I have done all that the law requires of me."

The appellant's two arguments below had been (*a*) that regulation 9 was not within the powers conferred by section 7 of the Dangerous Drugs Act, 1920 ; and (*b*) that, in any case, regulation 4 relieved him of the duty of complying with that regulation. The Act of 1920 was designed to deal with the improper trafficking in drugs and not to interfere with the normal use of them by doctors and with the confidential relations between doctors and their patients. The only specific references to medical practitioners in section 7 related to prescriptions and dispensing, which were not within the general words relating to manufacture, sale, distribution, and possession of drugs.

When one came to section 10, which gave to constables the power to enter and inspect books, it could not be supposed that a constable was intended to be able to enter a doctor's surgery and demand to see the books and the names and addresses of the patients. Under section 14 he could arrest without warrant a patient whom he suspected of committing an offence.

With regard to administration " by or under the direct personal supervision of " the medical practitioner, " administer " was a word not unknown to the criminal law. He referred to *Rex v. Harley* (4 C. and P., 369). Neither " by " nor " under the direct personal supervision of " implied physical presence, *Reg. v. Michael* (9 C. and P., 356).

" Direct personal supervision " in no way implied the physical presence of the practitioner. If that were intended it would have been easy to say so in a regulation involving such serious penalties for breach of it. There was no authority upon these words, but there was a case in which a man in Greece was held to be in " actual personal occupancy " of premises in Scotland (*Whitelaw v. M'Gowan,* 43 Sc.L.R., 346).

The Lord Chief Justice.—If you begin to discuss the meaning of " occupancy " you launch upon a sea which has a very remote shore.

Mr. Birkett, in conclusion, submitted that the course which Dr. Kingsbury followed of making regular visits at short intervals, and of giving to the patient only enough morphine to last him, in accordance with the treatment, till the next visit, was the normal ordinary practice which the highest people in the medical profession had recommended in their report on Drug Addiction for the guidance of the Ministry of Health. Suppose that a doctor required the patient to take minute doses of the drug at frequent intervals, it would need a millionaire to undergo treatment if the doctor had always to be personally present. He submitted that there was no evidence to justify the finding that the administration of this drug had not been under the direct personal supervision of Dr. Kingsbury. The matter, from Dr. Kingsbury's point of view, was now academic, as the patient was now completely cured.

Mr. Roome, at the request of the Court, dealt first with the proviso to regulation 4, and submitted that " direct personal supervision " was the strongest phrase that could be used. Here what was done was to supply the patient with a quantity of the drug which was intended to last two days, but which the patient might have taken within a few hours.

The Lord Chief Justice.—Suppose a doctor personally administers a dose of medicine to a patient at 11 a.m., and says : " If his temperature rises a degree give another dose to-night ; otherwise wait till I see him again at 11 a.m. to-morrow." Would that be " direct personal supervision " ?

Mr. Roome.—I think it would ; it would be too oppressive to hold otherwise.

Mr. Justice Avory.—May not the matter be tested in this way: If another doctor were called in in consultation, would he not say to Dr. Kingsbury, " What have you been administering ? " and would not Dr. Kingsbury say, " I have administered such and such doses of morphine." The other doctor would ask, " Did you personally supervise the administration ? " He would receive the reply, " Yes, I saw the patient every other day, and specified precisely how much he was to take, and watched the effect." Could you say that that would be inaccurate ?

Mr. Roome.—I think it would be too high a description of what was done. Counsel contended that the onus was on the appellant to prove that he fell within the proviso. The regulations were for the protection from themselves of those addicted to drugs, and to prevent double supply by more than one doctor. It was no great hardship that a name and address should be divulged.

The Lord Chief Justice, in giving judgment allowing the appeal, said that in the course of an extremely interesting argument some matters had been stirred with which it was not necessary to deal. At the close of the argument the question which really emerged was a simple question, and one capable of brief statement. It was this : Upon the true construction of the proviso to regulation 4 was that which was here complained of " administration " of morphine " by or under the direct personal supervision of a duly qualified medical practitioner " ?

When the special case was examined, no doubt was left as to the contention made by the prosecution in the Court below ; he would read its *ipsissima verba* : " That in regulation 4 the words 'administration of the drug by a duly qualified medical practitioner' meant that the doctor must administer every dose by his own hand ; and that administration 'under the direct personal supervision of a duly qualified medical practitioner' meant that the doctor must be present, and either see the patient administer each and every dose to himself, or see the nurse or other person administer such dose to the patient." Whatever else might be said of that contention it was wholly free from ambiguity, and that contention was held to be right by the late Lord Mayor.

After reading the facts set out in the case, his Lordship continued :—Mr. Roome, with his usual frankness, now no longer contended that, subject to proper provisions and precautions, the actual personal presence of the doctor was necessary. But it was contended that when the terms of the proviso were contrasted with the body of regulation 4 the word " administration " was confined to a particular emergency as contrasted with regular supply. It was said that if that were not so great mischief might arise to the patient himself, because he might consume a quantity of the drug without a record being made, and have the opportunity of obtaining further supplies. But the Court had to construe what the regulations said, not what they might have said.

On the same page of the regulations were the words, in regulation 5, " in case of emergency." It would have been easy to put those words in regulation 4. The question of amending the regulations was not for the Court, but for the Department concerned. It seemed to him as impossible to limit the words of the proviso to cases of emergency as it

was to limit personal supervision to cases where the doctor was personally present. Looking at the words of the regulation as part of a much larger whole, he did not think that it was restricted to the limited meaning contended for, and, when once that had gone, on the facts of this case he thought that there was direct personal supervision. He expressed no opinion as to amendment of the regulations, but the decision of the Court below could not be supported, and the appeal must be allowed, with costs.

MR. JUSTICE AVORY and MR. JUSTICE SALTER concurred.

[Solicitors—Messrs. Ashurst, Morris, Crisp, and Co. ; the Director of Public Prosecutions.]

K.B. Div. (Roche, J.) } 1926. Nov. 22.

NORTH SHIPPING CO., LIMITED v. JOSEPH RANK, LIMITED.*

Ship—Bill of lading—Short delivery—Claim by indorsees of bills of lading.

In an action for freight by shipowners against indorsees of bills of lading the defendants counterclaimed for short delivery. The shipowners denied short delivery, and contended that in any event the indorsees of bills of lading had no right to sue.

Held, on the facts, that the defendants had failed to prove the alleged short delivery, and the counterclaim must therefore fail. Consideration of the question whether the indorsees of bills of lading could sue in respect of missing cargo was thus rendered unnecessary, and the question was left undecided.

The plaintiffs in this case claimed a sum for balance of freight.

Sir Robert Aske appeared for the plaintiffs ; Mr. Dickinson for the defendants.

The claim was admitted, but the defendants counterclaimed for short delivery ; and the action therefore resolved itself into a claim by the defendants for the value of the missing goods.

By a charterparty dated June 22, 1923, the steamer North Anglia, belonging to the North Shipping Company, was chartered to go to Karachi and there load a full and complete cargo of wheat and/or maize in bags and bring it to one safe port in the United Kingdom or one of certain other specified ports at the option of the charterers.

The charterparty provided, *inter alia,* that "The number of packages signed for in bills of lading to be binding on steamer and owners unless errors or frauds be proved, and all cargo on board to be delivered, and any shortage to be paid for at spot market value on day of arrival of vessel."

The steamer went to Karachi and loaded a cargo which in the bills of lading was stated to be 57,230 bags, each weighing 224lb. The defendants were indorsees of the bills of lading, and the steamer was ordered to discharge in the Victoria Dock, London. By the bills of lading the contract was subject to the conditions and exceptions contained in the charterparty. When the discharge was completed it was found that only 57,094 bags were forthcoming. Two of these were lost in the process of lightering, and were not material to this case, and the defendants now counterclaimed for a shortage of 136 bags.

Evidence was given by the defendants that 57,230 bags had been shipped at Karachi, and that the weight stated to have been shipped was the correct weight for that number of bags.

Evidence was given by the plaintiffs, the shipowners, that every bag which had been shipped at Karachi had been discharged in London. The steamer on the way home called only at Port Said and Gibraltar, and it was impossible that any of the bags could have been taken out before arrival in London.

SIR ROBERT ASKE submitted that the onus was on the ship to show that the intake tally was wrong, and the onus was on the defendants to show that bags actually shipped had not been delivered. He submitted that the evidence showed that the tally had been very carelessly kept at Karachi, and that the number of bags said to have been shipped must be wrong. [He referred to *Sanday v. Strath Steamship Company, Limited* (37 *The Times* L.R., 665 ; 26 Com. Cas., 277) ; *Smith v. Bedouin Steam Navigation Company, Limited* (12 *The Times* L.R., 65 ; [1896] A.C., 70).] And the bags when discharged were left lying in barges for some weeks before being weighed ; and there was no evidence that any watch was kept during that time, when theft would have been possible. So far as weight was concerned, the difference alleged to exist between the weight shipped and that delivered could be accounted for by ordinary shrinkage on the voyage without any theft at all.

MR. DICKINSON referred to *The Pauline* (4 Ll.L., 221); *Hain Steamship Company v. Herdman* (11 Ll.L., 58) ; *Royal Commission on Wheat Supplies v. Ocean Steamship Company* (11 Ll.L., 123) ; *North Steamship Company v. Barnett* (12 Ll.L., 65) ; and to Carver on Carriage by Sea, sections 63 (*a*) and 65. By the terms of the condition the shipowners must be liable unless they had satisfied the Court that there had been error or fraud in fixing the number of bags loaded.

MR. JUSTICE ROCHE in the course of his judgment said that the case raised two points. First, it was said that the defendants were not the proper party to sue or, at most, could recover only nominal damages ; and second, that the counterclaim in itself was ill founded and disclosed no ground of action. As to the first point, which appeared to be based on certain observations made by Mr. Justice Bray in *Steamship Den of Airlie Company, Limited v. Mitsui and Company, Limited* (17 Com. Cas., at pp. 122, 123), he would express no opinion, because in the view which he took of the facts it was unnecessary to deal with that point. Whether in such a case as this the bill of lading holder or the charterer was the proper party to sue was an important question which might some day have to be determined, but he would merely note that the point had been taken, and it would be open to the plaintiffs if the case went to a higher Court. On the second point, the first feature to be remarked was that the amount of cargo short delivered was a very small proportion of the whole, some 13 tons out of 6,000 tons. He was satisfied that no part whatever of the wheat which was put on board was lost before delivery. The bills of lading were signed "weight unknown," and the decision in *New Chinese Antimony Company v. Ocean Steamship Company* ([1917] 2 K.B., 664) showed that such a provision did not raise even a

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

prima facie case against the ship, and he was satisfied that all the grain that was shipped was delivered except such small quantity as might disappear by natural shrinkage on the voyage.

His Lordship discussed the evidence in detail, and held that the defendants had failed to prove accurately either the weight loaded or the weight discharged; and he concluded that the quantity alleged to have been lost, if it was in fact lost, was no more than could be accounted for by natural shrinkage.

Judgment was therefore given for the plaintiffs on the claim and on the counterclaim, and a stay was granted on the usual terms.

[Solicitors.—Messrs. Botterell and Roche, for Messrs. Botterell, Roche, and Temperley, Newcastle-on-Tyne; Messrs. Thos. Cooper and Co.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1926. Nov. 9.

SHUTTLEWORTH v. COX BROTHERS AND COMPANY (MAIDENHEAD), LIMITED, AND OTHERS.*

Company — Articles of association — Alteration of article—Power of shareholders—*Bona fide* for benefit of the company—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), s. 13 (1).

By s. 13 (1) of the Companies (Consolidation) Act, 1908: "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles. . . ."

The power to alter or add to the articles under this section must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and the question whether a given alteration of or addition to the articles is for the benefit of the company is a question for the shareholders, acting *bona fide*, and not for the Court, and the Court will not interfere with the action of the shareholders except on grounds on which it would interfere with a verdict of a jury.

Dicta of Peterson, J., in *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (36 *The Times* L.R., 428; [1920] 2 Ch., 124) disapproved.

This was an appeal and cross-appeal from the judgment of Mr. Justice Avory after trial of an action with a jury at Reading Assizes.

The action was brought by the plaintiff claiming (1) damages for wrongful dismissal from his position as a manager of the defendant company, and (2) a declaration that he was still a director of the company, and an injunction to restrain the company from altering the articles of association.

Mr. Justice Avory gave judgment for the plaintiff on the claim for wrongful dismissal. Against that order the defendants appealed. But on the claim for a declaration the learned Judge gave judgment for the defendants, and the plaintiff cross-appealed against that judgment.

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

This report concerns the cross-appeal only, which raised a question with regard to the validity of an alteration in or addition to one of the articles of association of the defendant company.

The facts are stated in the judgment.

Mr. S. Lowry Porter, K.C., and Mr. H. McKenna appeared for the plaintiff; and Mr. Vachell, K.C., and Dr. Earengey for the defendants.

Lord Justice Bankes.—This is a cross-appeal brought by the plaintiff in an action commenced by him in which he sought to challenge the validity of a resolution of shareholders in a company, the effect of which was to deprive him of his position as a permanent director of the company.

The short facts to which it is necessary to refer are these. The company in question was a company which was incorporated in May of 1921 to take over a timber and builders' merchants business which had been carried on at Maidenhead by three persons, the plaintiff being one of them, and a Mr. Beare and a Mr. Ernest Burton Norris being the other two. These three had carried on business in partnership, and this company was incorporated for the purpose of taking over as a going concern, and carrying on, that business. By Article 17 of the articles of association it was provided that the number of directors should not be less than three nor more than seven. Article 18 provided that "The following persons shall be the first directors of the company"—Beare, Ernest Burton Norris, Shuttleworth (the plaintiff), Thomas Norris, who was the father of Ernest Burton Norris, and a gentleman of the name of Fritche. The article went on to provide that they should be permanent directors of the company, "and each of them shall be entitled to hold such office so long as he shall live unless he shall become disqualified from any of the causes specified in Article 22." It is not necessary to refer to Article 22 except to say that none of the causes there referred to occurred, and that there was no ground under Article 22 which entitled the shareholders, or any one, to remove this gentleman, Mr. Shuttleworth, from the position to which he became entitled under Article 18. Mr. Shuttleworth, in fact, was appointed the works manager, in addition to being a director; he was appointed works manager at a salary, and so he remained, without any question or complaint, for some considerable time. Then in 1924 and 1925 trouble arose, and there were irregularities in reference to the receipt of and accounting for cash by this gentleman. As a result of inquiry into that matter he was summarily dismissed. He brought an action claiming damages for this alleged wrongful dismissal, and the defendants then set up that the circumstances justified his dismissal. They did not allege that these circumstances amounted to dishonesty on his part, but they alleged that these circumstances amounted to incompetence on his part. After a full hearing the jury found a verdict for the plaintiff. That verdict was challenged in this Court, and on November 5 we decided that there was ground upon which the jury were justified in coming to their conclusion.

But at the trial the jury were also asked to deal with the plaintiff's complaint that he had been wrongfully deprived of his position as a permanent director, and his complaint was that there had been an alteration of the articles of association which was invalid. The alteration was one which added to Article 22, as an additional ground, the words "If he"—that is, a director—"be requested by all the other directors to resign his office." That alteration

was passed after due notice in November of 1924, but no action was taken against the plaintiff under the amended article until some considerable time afterwards. The plaintiff's complaint in his statement of claim was that the amendment of the article was a breach of the contract to be implied from the articles of association, and "that the said proposed article is not *bona fide* for the benefit of the company as a whole." He was therefore challenging the validity of the alteration.

The power to alter articles is conferred by section 13 (1) of the Companies (Consolidation) Act, 1908, which provides: "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles. . . ." It is not suggested here that there is anything expressly contained in the memorandum which controls the power conferred by that section of altering or adding to the articles, but it is said that it is well established that, although the section in the widest terms gives that authority to a company, the Courts will exercise a supervision over the exercise by the company of that power, and will test the question whether the exercise of the power by the company has or has not been a valid one. It is said, and truly said, that the test which has been applied by the Court is the one which was laid down by the Master of the Rolls, Lord Lindley, in *Allen v. Gold Reefs of West Africa, Limited* (16 *The Times* L.R., 213; [1900] 1 Ch., 656). I will refer to the test at once. What he says at page 671 is this: "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded." There is no question here as to the manner required by law. What is said is that this resolution was invalid because, applying Lord Lindley's test, it was not *bona fide* for the benefit of the company as a whole. What happened after the passing of the resolution was, that for some time no action was taken, but after the lapse of some months a resolution was passed by which all the directors decided or resolved that the plaintiff should resign his position as director. That is referred to for the purpose of showing or proving that the original action of the shareholders, who were also directors, in passing the original resolution altering the articles was not *bona fide*, that it was a personal act of vindictiveness on the part of these gentlemen, and that, whatever the meaning of the test taken as a whole may be, there was evidence here upon which the jury were entitled to arrive at the conclusion that these gentlemen were actuated by a wrong motive, and therefore could not be said to have acted *bona fide*. The jury were asked one question, which they divided into two, on this point. They were first asked whether the action of these gentlemen was *bona fide*. They answered "No," and upon that, of course, a question arises at once whether there was evidence entitling them to come to the conclusion that the action of these gentlemen, which is challenged, was not *bona fide*, because if there was, there is an end of the matter. Mr. Justice Avory, who tried the case, said, in summing up to the jury, that he was strongly of opinion that there was no evidence upon which they could find want of good faith; but he left it to the jury, in case there might be any appeal in reference to his decision, if he decided that there was no such evidence. As I have said, the jury negatived good faith. Subsequently, Mr. Justice Avory was asked to rule, and did rule, that there was no evidence to support that finding, and he therefore entered judgment for the defendants. It is that judgment which is challenged.

The first matter that we have to consider is whether Mr. Justice Avory was right in coming to the conclusion to which he did come in reference to there being no evidence to support that finding. After the full discussion which has taken place, and every matter that could possibly bear upon the question has been called to our attention by Mr. Porter, we are all unanimously of opinion that Mr. Justice Avory was right. It seems to me, upon the evidence, that these gentlemen were anxious throughout to take a charitable view of the plaintiff's conduct. There is not a trace of any vindictiveness or wrong motive. The fact that they thought that in the interests of the company he ought to be got rid of is, in my opinion, in circumstances such as these, no evidence of want of good faith, and speaking for myself, I think that the evidence throughout, in this case, directly negatives the idea or suggestion of want of good faith. In these circumstances, one has to consider what is the true interpretation of the test which Lord Lindley says must be applied in such a case as this. I have read his language.

The jury were asked to give their opinion, not only on the question of good faith, but on the question whether the action of these gentlemen was for the benefit of the company. Having negatived good faith, they went on to say that the action was, incidentally, for the benefit of the company. What exactly they meant by that I do not know. Of course, if it amounts to a verdict that what was done was done in the interests of the company, that verdict could only be set aside on the ground upon which verdicts of a jury can be set aside, namely, that there was no evidence which would justify twelve reasonable men in arriving at such a conclusion. In my opinion, there are certainly no grounds for setting aside that verdict, if it amounts to a verdict that the action that was complained of was for the benefit of the company. But I do not stop there, because I find a difficulty in being sure of what it was that the jury exactly meant by that verdict. Therefore I have assumed, for this purpose, that there is no direct finding upon that point, and that the Court is asked to deal with the matter as though it came before them in the same way in which it has come before Chancery Judges when they have had to decide whether, without the intervention of the verdict of a jury, they should interfere with the action of shareholders in altering the articles of association.

Assume, for the moment, that that is a correct position. The first thing one has to decide is this, in reference to Lord Lindley's decision: Is he there dealing with two quite separate things, firstly, *bona fides*—that is to say, the state of mind of the persons whose act is complained of—and, secondly, apart altogether from their state of mind, the question as to whether, in the opinion of the Court, apart altogether from the opinion or action of the shareholders, what the shareholders have done is for the benefit of the company—two quite separate considerations. I think that that view of the test has been negatived in this Court in *Sidebottom v. Kershaw, Leese and Co.*,

Limited (36 *The Times* L.R., 45 ; [1920] 1 Ch., 154). I think that there all the members of the Court, Lord Sterndale, Lord Justice Warrington, and Mr. Justice Eve, negatived that suggestion as to the meaning of Lord Lindley's words. One has therefore to deal with the test formulated by Lord Lindley in this way. Starting from the point of view that it is the shareholders to whom the statute has entrusted the power, have these shareholders acted *bona fide* in the interests of the company as a whole ? You may consider the question of *bona fides* from the point of view of whether they were actuated by an improper motive, or malice, and so forth ; and you may come to a conclusion which governs the whole case upon the question of their good faith or want of good faith. But assuming good faith in the sense of no wrong motive, then what is to be the test that the Court, sitting, as it were, as a Court of Appeal from the action of the shareholders, is to apply in reference to that part of the test which deals with the action being, in the opinion of the shareholders, for the benefit of the company ? It may be that the action is so outrageous that it throws a light upon the *bona fides* of the persons who were responsible for it, but, short of being outrageous, it seems to me that it may be so unreasonable that no reasonable men could arrive at such a conclusion, and the Court is entitled, I think, to apply the same test to the action of the shareholders as it does to a verdict of a jury, and say that the Court will not allow a decision of shareholders to stand which is so unreasonable that no reasonable people could possibly arrive at that conclusion. Of course, the case may be still stronger, and one may be able to apply another common law test, and that is, whether or not, upon the facts, the action of the shareholders is capable of being treated as for the benefit of the company. I think these are both tests which the Court may properly apply to the action of the shareholders, and I think that *Sidebottom v. Kershaw, Leese and Co., Limited* (*supra*) indicates that that is the line which the Court ought to take. I respectfully disagree with the view which seems to me to be the view of Mr. Justice Peterson in *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (36 *The Times* L.R., 428 ; [1920] 2 Ch., 124), that it is for the Court to treat the matter as though they were the sole judges in the matter, apart altogether from the action of the shareholders which the Court is called upon to deal with.

In this case it seems to me, applying the test which I have endeavoured to indicate, that it is quite impossible to say that, given good faith, which I think is abundantly proved here, the action of these gentlemen could be said to be either incapable of being for the benefit of the company or so unreasonable that no reasonable men could consider that it was for the benefit of the company, and it is quite insufficient to say that it is action which works extremely hardly upon the minority, the plaintiff, or that it is action which was specially directed against him, because the more outrageous the conduct of a plaintiff the more certain it is that the action of the shareholders, acting entirely *bona fide* and for the benefit of the company, will be directed against that person, and directed against that person because of his outrageous conduct and because, therefore, it is necessary to protect the company against that conduct.

In these circumstances, I think that this appeal fails, and that the plaintiff has failed to show either want of good faith or that the action of these gentlemen was not for the benefit of the company.

Lord Justice Scrutton.—In the view that I take of the facts and law this appeal completely fails, and I only add anything to the judgment which has just been delivered because, in my view, the argument addressed to us by Mr. Porter, coupled with some language of Mr. Justice Peterson's in *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (36 *The Times* L.R., 428 ; [1920] 2 Ch., 124), by which it is supported, if accepted would have the most disastrous results on company business in England and on the relations of the Courts to the companies.

The plaintiff, Mr. Shuttleworth, at the time when this action started was in the position of being, first of all, a permanent director of a company into which a firm had been changed, holding office so long as he should live unless he became disqualified under certain six named disqualifications contained in Article 22 of the articles. He was also manager of the company at a salary, and in 1924 it came to the knowledge of the other directors that in the course of about eleven months he had not accounted to them on twenty-two occasions for cash which he had received. The other directors took the view that that justified their immediately dismissing him from the position of manager. He objected to that decision, not unnaturally. They also, having consulted first their solicitors and then counsel as to their powers under the articles, came to the conclusion that, unless they could convict him of an indictable offence, they had no power to get rid of his position as permanent director, and they were advised, or came to the conclusion, that the way to alter that position was to hold an extraordinary general meeting to alter the articles by including in the grounds of dismissal, in Article 22, "if he shall be requested in writing by all the other directors to resign his office." The intention to propose that alteration coming to the notice of the plaintiff, he then issued a writ, first, claiming damages for wrongful dismissal without notice from his post as manager, and, secondly, claiming a declaration that he was a permanent director (which in fact he was at the time when the writ was issued) and an injunction to restrain the company from altering the articles of association. In consequence of that writ and of an application for an injunction, the extraordinary meeting at first proposed was not held, but, the Judge in Chambers and the Court of Appeal having declined to grant the plaintiff an injunction stopping the alteration, the alteration was made in the articles some few months later, though nothing was done on it for some nine or ten months. But nine or ten months afterwards, the additional fact being that a son of the plaintiff was engaged in a competing firm canvassing the customers of the defendant company, the four directors did come to a resolution in writing requesting the plaintiff to resign. The action for wrongful dismissal coming before a jury, the jury found that the twenty-two items of failure to account for money were not a ground for immediate dismissal without notice. The Judge disagreed with that verdict, but as it was not for the Judge but for the jury to determine, so long as there were grounds on which the jury could come to that conclusion, it did not matter that the Judge would have come to a different conclusion or that any member of the Court of Appeal would have come to a different conclusion. We therefore, on an application by the defendants to set aside that verdict, dismissed the appeal. Then came the second half of the case, which we are now considering, that dealing with the application for a declaration that the plaintiff was still a permanent director and for an injunction restraining the alteration

which had been made in the articles. On that the learned Judge, having had read to him the authority which used the phrase that the alteration must be "*bona fide* in the interests of the company" (Lord Lindley, Master of the Rolls, in *Allen v. Gold Reefs of West Africa, Limited* (16 *The Times* L.R., 213; [1900] 1 Ch., 656)), left the question to the jury whether the alteration was proposed and made *bona fide* in the interests of the company. The jury answered, splitting up their answer, (1) It was not *bona fide*; (2) Incidentally it was in the interests of the company. On these findings Mr. Justice Avory, holding that there was no evidence of lack of good faith, entered judgment for the company, and the plaintiff appeals.

First of all, was Mr. Justice Avory right in holding that there was no evidence of lack of good faith in the directors who proposed this resolution? I have come to the conclusion that he was and that there was no evidence on which a reasonable jury could find that the directors acted otherwise than in good faith. I am quite unable to take the view that this failure to account for these twenty-two items continuing up to date of the writ, and for some very considerable time after the writ, the items being ultimately all admitted, was other than a very serious matter in the management of the company. It appears to me that the action of the directors in considering this alteration was taken under careful advice, with no precipitation, and with a genuine desire to provide a remedy for an evil which was forced upon them—namely, that the man whom they admittedly could have dismissed by notice from the position of manager was still sitting with them as a director in spite of his serious laxity in the management of the business entrusted to him. I can see no evidence whatever on which the jury were justified in finding that the determination was taken maliciously or with a desire to spite the plaintiff, or from any other motive than the motive of doing what the directors thought best in the interests of the company. If there was no evidence of lack of good faith, the other finding of the jury appears to me to stop the appeal. They find that the alteration was for the benefit of the company. It is true they say it was "incidentally" for the benefit of the company, but I suppose that must mean that the primary motive was lack of good faith or malice, and that maliciously they were doing a thing which was for the benefit of the company; and there being no evidence of malice it still remains that they did the thing for the benefit of the company. But for the argument which Mr. Porter then suggests (and this is the only reason why I am giving a separate judgment) there would apparently be an end of the case. The point taken was, as I understand, that these Articles of Association amount to a contract with Mr. Shuttleworth that he shall be a permanent director for life except in the named conditions in Article 22, and a contract cannot be varied without the consent of both parties, and Mr. Shuttleworth never consented to the variation which was made in Article 22. That position is quite sound if you can show a contract outside the articles. If you can show a contract outside the articles, it is useless to alter the articles, because you cannot alter the contract outside the articles. The best instance of that is *Nelson v. James Nelson and Sons, Limited* (30 *The Times* L.R., 368; [1914] 2 K.B., 770), where there was an article that the directors might appoint a managing director with power to revoke his appointment, and they did appoint, by a separate document in writing, a managing director for the named term. Then during the named term they tried to use the article to revoke his appointment, although the term named in the agreement was still continuing. There the Court held—I was the Judge of first instance—"Here there is an outside contract: you cannot alter that without the consent of both parties: it is useless to say that you have in the articles a power to revoke it when you have made an independent contract which appoints the man manager for a named term." But, unless you can get an outside contract, the appointment in the article is subject to the power of varying the articles given by section 13 of the Act of 1908, and consequently, your contract is not a contract to be a permanent director, but a contract to be a permanent director subject to the power of terminating the appointment given in the articles, or any modification of the articles, which may thereafter be made, under the powers of the Companies (Consolidation) Act, 1908. Therefore, so far, on those three points, it appears to me that the appeal hopelessly fails.

But if I understood the argument which was put forward by Mr. Porter, based upon an expression of Mr. Justice Peterson's in the case of *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (*supra*), it was this. It does not matter whether the directors thought that this alteration was for the benefit of the company: the question is whether the Court thinks it was for the benefit of the company. I suppose he must further say that it does not matter that the jury say it was for the benefit of the company; that the question is whether the Court thinks it was genuinely for the benefit of the company; and that the Court, on the materials before it, ought to think that it was not genuinely for the benefit of the company and therefore reject both the honest opinion of the directors and the equally honest opinion of the jury, and say that the alteration was invalid. To adopt any view of that sort would be to make the Court manager of the affairs of innumerable companies instead of the directors to whom the shareholders have entrusted that right of management. I think, with respect to Mr. Justice Peterson and Mr. Porter, that that view is based on a misunderstanding of the expression used by Lord Lindley in *Allen v. Gold Reefs of West Africa, Limited* (*supra*) and by Lord Sterndale in *Sidebottom v. Kershaw, Leese and Company, Limited* (36 *The Times* L.R., 45; [1920] 1 Ch., 154). Lord Lindley, in *Allen's* case, (*supra*) says (at page 671) that the power of alteration "must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole." The material language there is, "exercised . . . *bona fide* for the benefit of the company." I do not read that as two separate ingredients, that (1) you must find it to be *bona fide*, and (2) whether *bona fide* or not, you must find that it is in fact in your, the Court's, opinion for the benefit of the company. I read it as being this, that the directors must act honestly having regard to, and endeavouring to effect, the benefit of the company as a whole. I think some light is thrown upon that by the way in which Lord Sterndale treats it in *Sidebottom's* case (*supra*). He repeats the language, in effect, of Lord Lindley at page 165: "Did they do it *bona fide* for the benefit of the company"; and then he goes on to say (at page 167), commenting on the decision of Mr. Justice Astbury in *Brown v. British Abrasive Wheel Company, Limited* (35 *The Times* L.R., 268; [1919] 1 Ch., 290): "He"—the learned Judge—"found as a fact that the majority shareholders . . . were not doing this for the benefit of the company or in the interests of the company at large, but entirely for their own benefit, and in their

own interests. If that finding be right, and as to that I say nothing, it was not *bona fide* ; it was not done for the benefit of the company, but for the benefit of themselves." As I understand, the learned Judge there is contrasting the acts of people who, acting honestly, consider the things that they ought to consider—namely, the benefit of the company as a whole, and endeavour to decide what will be for the benefit of the company as a whole, and the acts of those who approach the matter, not from that point of view, but from the point of view of considering what will be for the benefit of the majority of the company or themselves as distinguished from the people against whom they are legislating. From that point of view, provided that there are grounds on which reasonable people could come to a decision, considering the matters I have indicated only, it does not seem to me to matter at all whether the Court would not have come to the same conclusion. It is not the Court which manages the affairs of the company ; it is the shareholders through the directors whom they appoint ; and so long as those directors act honestly and endeavour to consider only the matters which they should legitimately consider—namely, the interests of the company as a whole and such action as will promote those interests, it seems to me quite immaterial that the Court would come to a different conclusion. The absence of any ground for a reasonable decision that a certain action is conducive to the benefit of the company may be, first of all, a ground for finding lack of good faith, because it may be said that there were no grounds on which honest people could have come to this decision and you may infer bad faith ; but secondly, given honesty, the fact that they have come to a decision for which there are no reasonable grounds may show that they have not considered the matters that they ought to have considered. On both those grounds you may set a decision aside, but in my view if they act honestly, and if the decision is such as honest and reasonable people might come to, the fact that the Court would have come to a different decision is no ground whatever for the Court to interfere. I should be very sorry if the Court took upon itself to manage matters which the directors usually understand far better than the Court does. I find, in the case to which Mr. Porter referred, *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (*supra*), Mr. Justice Peterson saying (at page 140) : "It has been suggested that the only question in such a case as this is whether the shareholders *bona fide* or honestly believed that the alteration was for the benefit of the company. But this is not, in my view, the true meaning of the words of Lord Lindley, Master of the Rolls, [in *Allen v. Gold Reefs of West Africa, Limited* (*supra*)], or of the judgment in *Sidebottom's* case (*supra*). The question is whether in fact the alteration is genuinely for the benefit of the company." If he means that, whatever the honest decision of the directors is, it is what the Court thinks, and not what the directors think, which is to be the governing matter, I respectfully disagree with the interpretation put upon Lord Lindley's words. If he merely means that the Court will interfere if the decision of the directors, though honest, is such that no reasonable people could have come to it upon proper materials, then I do not object to the explanation, and I should be prepared to act in a case like that ; but in the way in which the judgment is reported I think that the test is erroneous, for the reasons which I have given.

As I say, I have only added a separate judgment of my own because I think the point I have last dealt with is of considerable importance in the treatment of companies by the Court. For these reasons I think the appeal fails and must be dismissed, with the usual consequences.

Lord Justice Atkin.—Mr. Shuttleworth, the plaintiff in this case, was a director of the defendant company from May, 1921, when the company was incorporated, until 1926. Until 1924 he was a director on the terms of one of the original articles, Article 18, which provided that certain persons (of whom he was one) should be the first directors of the company, that they should be permanent directors, and each of them should be entitled to hold such office so long as he should live unless he should become disqualified from any of the causes specified in Article 22. Article 22 at that time provided for the vacation of the office of a director if he became bankrupt, or of unsound mind, or was convicted of an indictable offence, or ceased to hold the necessary share qualification or absented himself without leave of absence for a period of six months from the meetings of directors, or gave six calendar months' notice that he resigned his office. In 1924 the company passed an altered article by a special resolution in pursuance of section 13 of the Companies (Consolidation) Act, 1908, adding to the grounds mentioned in Article 22 a seventh : "If he shall be requested in writing by all the other directors to resign his office." Some ten or eleven months after that article was altered the plaintiff was in fact requested in writing to resign his office, and he now in this action claims that that addition to the article is invalid and that he still remains a director.

It appears to me that the first question to be determined is as to the contention raised on his behalf that there was a contract contained in the articles making him a permanent director, which is inconsistent with this additional article, and the additional article would be, therefore, in breach of contract and therefore would not be permitted by the Court, but would be invalid. That depends upon whether or not there was such a contract with the company that it would be a breach of the contract to pass this altered article. That depends upon the constitution of the contract between the plaintiff and the defendants. The principle to be invoked is the principle laid down by Lord Lindley, M.R., in *Allen v. Gold Reefs of West Africa, Limited* (16 *The Times* L.R., 213 ; [1900] 1 Ch., 656), which has been cited on another part of the case. Lord Lindley says, at page 673 : "But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered."

In order to determine that question I think it is not immaterial to remember that this company was formed to take over the business of a firm, the partners in which appear to have been three directors —Mr. Beare, Mr. Ernest Burton Norris, and Mr. Shuttleworth. The memorandum recites that the company is formed for the purpose of acquiring

their business on the terms of an agreement which is mentioned, which has not been put in evidence before us, but which we are assured contains no terms as to the appointment of the partners as permanent directors. It is to be noticed, therefore, that the contract (and it is a contract) that they should be permanent directors at a salary is contained in the articles only, and it is to be noted also that the contract is a contract which is made not only with the three former members of the firm, but is made with two additional directors, who apparently had no particular interest in the business before—namely, Mr. Thomas Norris (who, I understand, is the father of the other Mr. Norris) and Mr. Harry Fritche. The article making them in terms permanent directors also in terms says that they are to hold office unless they shall become disqualified for any of the causes specified in Article 22. It appears to me that the true inference in these circumstances is that there was a contract that the plaintiff should be a permanent director, but a contract contained in articles which themselves could be altered with the consent of the company in accordance with the provisions of the Companies (Consolidation) Act, 1908; and it appears to me that, inasmuch as the contract contemplated that the permanent office might be vacated in one of six contingencies, it was not inconsistent with the contract that was made that the article should be altered so as to add a seventh contingency to the six contingencies to which the original contract was admittedly subject. In other words, this is a contract made upon the terms of alterable articles, and therefore the contracting party cannot complain if in fact an article was altered, for the original contract contemplated that the terms might be altered in the manner provided by the Companies (Consolidation) Act, 1908. Therefore I cannot find that there was any breach of contract in making this alteration in the articles.

If that is so, then the only other question which arises is whether, apart from that, this article is upon general principles objectionable as being not honestly made within the powers of the company. For that purpose one has to consider what limits there are upon the powers of a company to alter their articles. Some limits there are, and the limits are laid down in several cases, but notably in the judgment of the Master of the Rolls in the case that I have read from, *Allen v. Gold Reefs of West Africa, Limited* (*supra*). There is a reasoned and very lucid judgment by the Master of the Rolls in which he uses the phrase about exercise of the powers "*bona fide* for the benefit of the company." But it appears to me to be a great misfortune that this Court, or any Court, should consider itself so fettered by a formula that it should not depart from that phrase and study what its real meaning is. It is not a statutory phrase which we have to construe, but we have to regard the principles which were laid down by the Master of the Rolls in the course of which he used this phrase. For my part I feel satisfied that the construction put upon that phrase and the statement of the true principles is that which is contained in the judgments which have just been delivered. The question, and the only question to my mind, is whether, not the directors, but the shareholders, in coming to a conclusion as to whether they shall alter the articles, do honestly intend to exercise their powers for the benefit of the company, and if they do, then, subject to one or two reservations which have already been explained, it appears to me that the altered article must stand. It appears to me impossible that the true view is that it is a matter of law for the Judge as to whether or not the alteration, whether made in good faith or not, is in fact—I am using the word "fact" wrongly—is in law for the benefit of the company.

It is said that it is the mark of a good Judge to amplify his jurisdiction, but I cannot contemplate the goodness of a Judge who assumes to himself the duty of reviewing the decision of every company and every industrial concern in this country on the question whether a particular alteration in the articles is or is not eventually for the benefit of the company. It is perfectly obvious that the true judges of the interests of the company in these cases are the shareholders acting in good faith. They are not only much better judges, but in a great many cases they are the only competent judges as to what is in the interests of the company and what is not. I should venture to say that, even if the question were a question to be determined by anybody else than the shareholders. The question must be a question of fact. How it ever could come to be a question of law it is difficult to imagine, and in this case there appears to me to be a finding of fact by the jury that it was for the benefit of the company. But I do not decide the case at all on that ground. It appears to me that, in the first instance, the question is solely one for the shareholders acting in good faith. It may very well be that the circumstances are such that the only inference that can be drawn is that the majority of the company are acting so oppressively that they are not acting in good faith, or another way of putting it (which I think is the way approved by Lord Sterndale) is that the decision must be one which is capable of being arrived at by persons acting in good faith and attending to the interests of the company. But that is quite a different set of circumstances to be investigated from the bare question: Aye or no, in the light of the events that have happened, does this tribunal or that tribunal think now that the alteration was or was not for the benefit of the company? With great respect to a very learned Judge, I disagree with the judgment to the contrary by the late Mr. Justice Peterson in *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (36 *The Times* L.R., 428; [1920] 2 Ch., 124) upon that point. It appears to me that the judgment of Lord Sterndale in *Sidebottom v. Kershaw, Leese and Co., Limited* (36 *The Times* L.R., 45; [1920] 1 Ch., 154), in the passage of the judgment which has been cited, makes it quite clear that his view was that the ultimate decision was to be the decision of the majority of the shareholders.

I should like further to add this. The jury in this case found that the company did not act in good faith. I am quite satisfied that there is no evidence at all upon which they could come to that conclusion. It is obvious that the facts were such as struck the directors at once on their discovery that here was a matter which concerned the interests of the company: they took steps at once to put themselves into a position in which, if it were desirable, they might cause the permanent office of director to be vacated, and the company eventually passed these resolutions. The resolutions do not take the power simply in reference to one director—they expose all the directors to the exercise of this particular power. They eventually exercised the power, not as it appears to me at all by reason of the events which had given rise to the passing of the resolution, but because of another set of circumstances which happened independently some eighteen months after the first occurrences and some eleven months after they had got the powers. I think there was no evidence upon which the jury could come to the conclusion that the

shareholders acted in bad faith in coming to this resolution.

I think, therefore, that the appeal brought by the plaintiff in this respect fails and should be dismissed, with costs.

[Solicitors—Messrs. Amery Parkes and Co.; Messrs. Rutland and Crauford, for Mr. C. Ruffe Thomas, Maidenhead.]

House of Lords.
(Viscount Cave, L.C., Lord Atkinson, Lord Shaw of Dunfermline, Lord Sumner, and Lord Carson.)
1926. Nov. 22.

WYCOMBE GUARDIANS v. BARTON-UPON-IRWELL GUARDIANS.*

Poor Law—Settlement—Illegitimate child—Child under 16 years of age—Marriage of mother—Residence of child in parish for 11 years—Removability—Settlement — Divided Parishes and Poor Law Amendment Act, 1876 (39 and 40 Vict., c. 61), ss. 34, 35.

The mother of an illegitimate child married, and she and her husband subsequently acquired a settlement in a parish in the Wycombe Union. At the time of the marriage the child, then aged 3½ years, went to live in a parish in the Barton-upon-Irwell Union, and lived there for 11 years. She then lived for four years at various places, and at the end of that period she became chargeable to the Wycombe Union.

Held, that up to the time of the mother's marriage the child had the settlement of her mother ; that the mother's marriage made no difference ; that the child was never at any time irremovable from the aforesaid parish in the Barton-upon-Irwell Union ; and that, therefore, the child had never acquired a settlement in that parish by residence plus irremovability. The third paragraph of section 35 of the Divided Parishes and Poor Law Amendment Act, 1876, dealing with derivative settlements, does not apply to a child under 16 years of age, whether the child is legitimate or illegitimate.

Decision of the Court of Appeal (42 *The Times* L.R., 349 ; [1926] 2 K.B., 3) affirmed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 349 ; [1926] 2 K.B., 3), reversing an order of the Divisional Court (42 *The Times* L.R., 127 ; [1926] 1 K.B., 212).

The question raised by the appeal was whether an illegitimate female child, aged 19 years, who resided without interruption from the age of 3½ years to the age of 15 years in a parish of the respondents' Union, and who had not since acquired a legal settlement elsewhere, had by reason of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, a settlement of her own, or whether such child took the settlement derived by her mother on the mother's marriage to a man not the child's father.

In the year 1924 Louise Madge Brant, the illegitimate female child in question, went to reside in the parish of Chipping Wycombe, in the Wycombe Union, and gave birth to a child.

By an order of two justices for the county of Buckingham, dated December 5, 1924, it was adjudged that the place of the last legal settlement of the said Louise Madge Brant, aged 19 years, a single woman, and her infant child, then chargeable to the guardians of the Wycombe Union (the present appellants), was the parish of Worsley, in the Barton-upon-Irwell Union, in the county of Lancaster ; and it was ordered that the guardians of the Wycombe Union should remove Louise Madge Brant and her infant to the Barton-upon-Irwell Union and that the Guardians of the Poor of the Barton-upon-Irwell Union should receive and provide for the pauper according to law.

On an appeal by the guardians of the Barton-upon-Irwell Union (the present respondents) to the Court of Quarter Sessions for the county of Buckingham, that Court quashed the order of removal, subject to the opinion of the High Court.

Louise Madge Brant, born on September 25, 1905, at Clapham Maternity Hospital, Lambeth, was the illegitimate child of one Margaret Baxter (formerly Brant), who was a spinster when the child was born. Apart from place of birth Louise Madge Brant had no other place of settlement than that of her mother before March, 1909. On March 17, 1909, Margaret Brant married one Ernest Edward Baxter, a native of England, with whom she resided at various places until December, 1913. From December, 1913, until the date of the order of the justices (December 5, 1924), Ernest Edward Baxter and Margaret Baxter resided continuously in the parish of Chipping Wycombe, in the Wycombe Union, in such manner and under such circumstances as to acquire a settlement in the said parish.

About the month of February, 1909, Louise Madge Brant went to reside at Walkden, in the parish of Worsley, in the Barton-upon-Irwell Union, with one George Pennington and his wife, and she thereafter resided without interruption in that parish until about the month of June, 1920, *i.e.,* from the age of 3½ years to the age of 15 years.

Neither Ernest Edward Baxter nor Margaret Baxter had ever resided in the parish of Worsley. From June, 1920, until October 22, 1924, Louise Madge Brant resided in various places without acquiring a settlement in any of them, and on the latter date she and her infant became chargeable to the guardians of the Wycombe Union.

The question raised in the special case for the opinion of the Court was whether, upon the facts above stated, the Court of Quarter Sessions was right in deciding that Louise Madge Brant did not acquire a settlement in the parish of Worsley in the Barton-upon-Irwell Union by reason of her above-stated residence in the said parish from 1909 to 1920.

A Divisional Court—the Lord Chief Justice, Mr. Justice Avory, and Mr. Justice Sankey—held that Louise Madge Brant on her mother's marriage in March, 1909, did not take the settlement her mother derived from her husband, and was thereupon relegated to her birth settlement and became capable of acquiring, and did in fact acquire, a settlement by her subsequent residence in the parish of Worsley in accordance with the provisions of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

The Court of Appeal—Lord Justice Bankes, Lord Justice Warrington, and Lord Justice Atkin—held that, as Louise Madge Brant was under 16 years of age during the whole of her residence from 1909 to

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

1920 in the parish of Worsley, she took and followed the settlement of her mother's husband, Ernest Edward Baxter, and was, in law, incapable of acquiring a settlement by residence in the parish of Worsley.

Mr. Montgomery, K.C., and Mr. Herbert Davey appeared for the appellants ; Mr. Macmorran, K.C., and Mr. Humphrey Paul for the respondents.

Viscount Cave, L.C.—My Lords : In my opinion, the result of this appeal must depend upon the answer to be given to the question whether the third paragraph of section 35 of the Divided Parishes and Poor Law Amendment Act, 1876, beginning "If any child in this section mentioned," and so on, applies to an illegitimate child under the age of 16. If it does so apply, it may well be that the appellants are entitled to succeed in this appeal ; if not, then the appeal must fail.

Upon this question there is authority. In the case of *Reigate Union v. Croydon Union* (5 *The Times* L.R., 716 ; 14 App. Cas., 465), decided in this House in the year 1889, Lord Watson, in the course of a careful analysis of the section, said this : "The provisions of the clause"—that is, the third paragraph of section 35—"have, in my opinion, no application to children under the age of 16, and do not qualify the preceding enactment of section 35 to the effect that a legitimate, or that of 4 and 5 Will. IV., to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age." It has been said with truth that on the facts of that case this particular point did not arise, but nevertheless the opinion of Lord Watson carries great weight, not only as expressing the view of that very learned lawyer, but as a link in the chain of argument upon which that case was decided. The opinion so expressed by Lord Watson was followed and acted upon by the Court of Appeal in the same year in the case of *West Derby Union v. Atcham Union* (6 *The Times* L.R., 5 ; 24 Q.B.D., 117), and in that case Lord Justice Lindley, as he then was, said this : "It would be wrong, in my opinion, not to carry into effect that interpretation so put by the House of Lords upon the statute, and I do not think in future it will be thought to be of any use to fall back upon the earlier decisions, many of which are extremely difficult to reconcile with each other." Lord Watson's opinion was subsequently referred to in more than one case in this House, for instance, in the case of *Fulham Union v. Woolwich Union* (23 *The Times* L.R., 583 ; [1907] A.C., 255), and it has not hitherto been questioned here ; nor, in my view, is there anything in the decisions of the House of Lords in 1905, in 1907, and in 1912, which have been cited to the House, which is inconsistent with the passage which I have quoted from Lord Watson's speech in the *Reigate* case (*supra*).

Further, on consideration of the terms of the section, I respectfully agree with Lord Watson's view. It had already been enacted by section 71 of the Poor Law Amendment Act, 1834, that a bastard child should have and follow the settlement of the mother of such child until such child should attain the age of 16 or should acquire a settlement in its own right ; and accordingly the provision in the second paragraph of section 35 of the Act of 1876 that an illegitimate child shall "retain" the settlement of its mother until such child acquires another settlement must, I think, refer, not to an illegitimate child under the age of 16, for whom provision had already been made by the earlier Act, but to an illegitimate child who has attained that age. If the second paragraph of the section be so construed, then the expression in the third paragraph "any child in this section mentioned" does not upon its true construction include a bastard child under 16 years of age. Whether this was the reasoning on which Lord Watson proceeded I am not sure, but in any event it has led me to the same conclusion.

For these reasons I am of opinion that the third paragraph of section 35 of the Act of 1876, on which the appellants rely, has no application to this case.

In saying that this is the only point involved in the appeal, I have not overlooked the suggestion that the proviso in the Act of 1848 does not apply to an illegitimate child ; but I think that that contention was settled the other way in the *West Ham* case (10 *The Times* L.R., 375 ; [1894] A.C., 230), and also by the opinion of Lord Macnaghten in the *Fulham* case (*supra*).

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed, with costs.

Lord Atkinson.—My Lords, I agree.

Lord Shaw of Dunfermline.—My Lords : In agreeing I desire to say that I assent to, and respectfully adopt, Lord Justice Warrington's judgment delivered in the Court of Appeal, which not only states accurately the principles to be applied but also gives a *résumé* of the authorities, which, in my opinion, is of great value.

The second observation which I wish to make is this : The *Reigate* decision of this House (5 *The Times* L.R., 716 ; 14 App. Cas., 465) was given in 1889 and was arrived at in full view of the cases decided between the year 1876 (the year of the Act of Parliament in question) and the year 1888. Those cases were four in number, they did not harmonize with each other, and it was plain that a judgment of this House was demanded as in a sense regulative of the construction to be placed upon sections 34 and 35 of the statute. Such a judgment was accordingly pronounced. But these preceding cases have been cited in this House all over again and powerfully commented upon.

My Lords, I look upon such citation as really going beyond the scope of what can be considered effective argument. My particular reason is this : The judgment of Lord Watson, agreed to by Lord Fitzgerald, was made the express subject of attention in the succeeding case of the *West Derby Union* (6 *The Times* L.R., 5 ; 24 Q.B.D., 117) and was accepted in the general and regulative sense to which I have referred. The judgment of Lord Justice Lindley, in particular, prescribes it as a general rule to be accepted and adopted in parochial settlements in England. It has been so adopted and accepted throughout the country and by the profession and the administrative bodies concerned for over a generation. Notwithstanding this, we have had this able and prolonged argument. I do not, my Lords, venture to go farther than humbly to say that the attack made upon the construction and exposition of section 35 of the Act of 1876 by Lord Watson fails. So far as I would be entitled to propone any judgment upon the subject to the House, it would be one to the effect that Lord Watson's judgment upon that topic was unquestionably sound.

Lord Sumner.—My Lords : I agree that the appeal fails for the reasons which have been given by the Lord Chancellor.

There are only two considerations I should like to add. The first is that from 1888 until *Tendring Union v. Braintree Union* (36 *The Times* L.R., 512 ;

[1920] 2 K.B., 647) and *Lexden and Winstree Union v. Windsor Union* (37 *The Times* L.R., 321 ; [1921] 2 K.B., 143), that is to say, for 30 years and upwards, it is evident that the settlement of liabilities between Poor Law Unions must have been regularly made upon the footing that the law as laid down by Lord Watson and as followed afterwards by the Court of Appeal is correctly stated, and I think it would be very undesirable to upset a course of settlements of that kind. The second observation is that, as was pointed out by Lord Justice Atkin, the construction now contended for would tend to increase the number of cases in which a child might be separated from its parents and removed to another parish, merely because of the conflict between two Poor Law Unions equally reluctant to bear the expense of its maintenance, a result to which I could only bring myself under the constraint of the clearest possible authority.

Lord Carson.—My Lords : I concur with the motion which has been moved from the Woolsack.

[Solicitors—Messrs. Ward and Melliar Smith, for Messrs. Reynolds and Son, High Wycombe ; Messrs. Reid, Sharman and Co., for Messrs. Waddington and Morgan, Manchester.]

Chan. Div. (Tomlin, J.) 1926. Nov. 25.

BUSBY v. AVGHERINO.*

Tithes — City of London — Rate prescribed by statute — Exemption from prescribed rate — Premises for which less paid before Act — Onus of proof—37 Hy. VIII., c. 12.

By the Act 37 Henry VIII., c. 12, and a decree made pursuant to it and having the force of a statute, the lessees of houses and all other hereditaments (with certain immaterial exceptions), situated in the City of London, are liable to pay a tithe of 2s. 9d. for every rent of 20s. by the year, "and so above the rent of 20s. by the year . . . by the rate aforesaid." The decree contained a proviso that in the case of premises in respect of which less sums had been accustomed to be paid for tithes before 1545, the date of the Act, the premises should be exempted from the prescribed rate.

In an action by the owners of tithes against the occupiers of premises in the City for tithe at the rate prescribed by the statute,

Held, that the onus was on the defendants to prove that the tithe paid before 1545 in respect of the premises was less than the sum prescribed by the statute.

The plaintiffs were the executors of the will of Mary Busby, who died on December 7, 1918, and, as such, they were the owners of all the rectorial or freehold tithes issuing out of or payable for or in respect of such parts of No. 15, Great St. Helen's, in the City of London, as were situated in the parish of St. Helen's, Bishopsgate.

The defendants had for various periods since March 25, 1921, held and occupied portions of No. 15, Great St. Helen's, all of which were situated in the parish of St. Helen's, Bishopsgate.

The above-mentioned tithes were payable under and by virtue of the statute 37 Henry VIII., c. 12, "An Act for Tithes in London," and a decree made thereunder. By that decree the tithes were to be computed at the rate of 2s. 9d. upon every 20s., and at 1s. 4½d. upon every 10s. of the rent of the premises in respect of which the tithes were payable, but by clause 18 of the decree it was stated that where less sums had been accustomed to be paid for tithes, those tithes should only be paid at the accustomed rate.

The plaintiffs claimed to recover as from March 25, 1921, tithes at the rate of 2s. 9d. for every 20s., or 1s. 4½d. for every 10s. of rent. The defendants alleged that the sum of 4s. 9d. a quarter, or 19s. per annum, was accustomed to be paid for tithes in respect of No. 15, Great St. Helen's at and before the date of the decree, and they admitted liability to that extent only and paid into Court the sum of £3 6s. 6d. to answer the tithes at that rate from March 25, 1921, to the commencement of the action.

Mr. G. B. Hurst, K.C., and Mr. C. A. Collingwood appeared for the plaintiffs ; Mr. Preston, K.C., and Mr. Lionel L. Cohen for the defendants.

His Lordship delivered a considered judgment in favour of the plaintiffs and gave them the costs of the action, the costs of an account which he directed being reserved.

Mr. Justice Tomlin, in the course of his judgment, said that the plaintiffs, as owners of the rectorial tithe payable in respect of premises known as No. 15, Great St. Helen's, in the City of London, whose title to the tithe was admitted, asked against the defendants, who were the occupiers of the premises, for an account of what was due to them for such tithe from March 25, 1921, and for payment of the amount certified to be due. The substantial question was whether the tithe payable in respect of the premises was a fixed annual sum of 19s. or an annual sum equal to 2s. 9d. in the £ on the annual rental of the property.

In the reign of Henry VIII. disputes had arisen between the owners and payers of tithe in the City of London and the liberties thereof, and to appease those disputes an Act, 37 Henry VIII., c. 12, was passed, the effect of which, taken with a decree made pursuant to it and having the force of a statute, was to render the lessees of houses and all other hereditaments, with certain exceptions not material to this case, situated in the City liable to a tithe of 1s. 4½d. for every rent of 10s. by the year and of 2s. 9d. for every rent of 20s. by the year, "and so above the rent of 20s. by the year ascending from 10s. to 20s. by the rate aforesaid."

The decree, however, contained in clause 18 a proviso that where less sums had been accustomed to be paid for tithes, those tithes should only be paid at the accustomed rate. That proviso exempted from the prescribed rate premises in respect of which a certain less sum had been accustomed to be paid for tithes in and before 1545, the date of the statute. That was the construction placed upon the proviso by Lord Eldon in *Warden and Minor Canons of St. Paul's v. Kettle* (2 V. and B., 1).

As the result of the charter granted by Queen Elizabeth in 1599 the tithes in question got into lay hands and in 1658 became vested in Sir John Langham, who found it necessary to resort to the Courts to assert his rights under the statute. His

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

example had been followed by several of his successors in title, predecessors of the plaintiffs.

The first question was whether, as urged by the plaintiffs, the defendants were liable for the 2s. 9d. rate unless they proved what was necessary to bring them within clause 18 of the decree, or whether, as the defendants contended, the plaintiffs were bound to prove substantially that the defendants' premises did not in 1545 pay a certain less sum. He (his Lordship) had no doubt that the plaintiffs were in the right and that the onus of proving payment of a certain less sum was on the defendants. In any case, he should hold himself precluded from giving effect to any other view having regard to the decisions on the statute in *Bramston v. Heron* (Gwillim, 1314); *Warden and Minor Canons of St. Paul's v. Kettle* (*supra*); and *Foster v. Worshipful Company of Plumbers*, decided in 1900, but only reported on a subsidiary point in 44 Sol. J., 211. He had, however, been furnished with a shorthand note of the judgment of Mr. Justice Buckley in the last-mentioned case, and that Judge had there treated the point as already determined in the sense indicated.

He (his Lordship) had therefore to determine whether the defendants had proved that in respect of the premises in question there was accustomed to be paid in and before 1545 a certain sum of less than 2s. 9d. in the £. It was not surprising that no evidence of the sum paid for tithe in or before 1545 was forthcoming, but evidence of payments made at a later date was admissible and might bring conviction to the mind of the Court that a certain sum less than 2s. 9d. in the £ was accustomed to be paid in and before that year. On such evidence the plaintiff succeeded in *Foster v. Worshipful Company of Plumbers* (*supra*).

The defendants' case was, first, that there were in Great St. Helen's in 1545 five houses each of which paid a certain sum for tithe of less than 2s. 9d. in the £, the total amount payable on the five houses being £1 0s. 6d. per quarter; secondly, that between the years 1654 and 1705 the five houses were converted into six houses, between which the £1 0s. 6d. per quarter was distributed in such manner that 4s. 9d. per quarter, or 19s. per annum, became payable in respect of one of them—namely, that now represented by No. 15, Great St. Helen's; and thirdly, that thereafter 19s. per annum was paid in respect of No. 15, except that during certain periods in circumstances which deprived the payments of significance larger sums were paid. If those matters were established by their evidence the defendants said that the decision should be in their favour.

His Lordship then proceeded to consider the documentary evidence put in to support this case, beginning with the decree dated February 9, 1662, in Sir John Langham's suit, and a book produced from the archives of the Vestry of Great St. Helen's referring to the decree.

Continuing, his Lordship said that the proper inferences to be drawn from the material seemed to him to be (1) that the extent of the liability to tithe of the property had been a matter of doubt over a long period; and (2) that the tithe owner and the tithe payer had from time to time accommodated their differences by temporary arrangements. In the face of what was actually proved and of the above inferences, it was not possible to infer that during periods when there was no evidence of payment 19s. per annum was paid rather than some other sums, and still less possible to infer that the 19s. represented some sums, or apportioned parts of other sums aggregating 19s., which were themselves certain sums of less than 2s. 9d. in the £ accustomed to be paid in 1545.

The result was that this action succeeded. The judgment would be prefaced by a declaration that the defendants were liable to pay tithe in respect of No. 15, Great St. Helen's, at the rate of 2s. 9d. in the £ and an account on the footing of this declaration.

[Solicitors—Messrs. Peacock and Goddard; Messrs. Waterhouse and Co.]

Chan. Div. (Romer, J.) 1926. Nov. 22.

ATTORNEY-GENERAL v. HORNSEY BOROUGH COUNCIL.*

Highways—Bridges—Highway repairable by inhabitants at large passing over bridge—Liability to repair bridge—"Street"—Public Health Act, 1875 (38 and 39 Vict., c. 55), ss. 4, 149, 152.

In 1882 seven streets were, in the course of the development of an estate, carried across a river on iron girder bridges. These streets subsequently became highways repairable by the inhabitants at large. An action was commenced by the Attorney-General against the local authority for a declaration that they were liable to repair and keep in repair these seven bridges.

Held, that, having regard to the fact that the word "street," as defined by s. 4 of the Public Health Act, 1875, includes (if this is not inconsistent with the context) any bridge (not being a county bridge), the plaintiff was entitled to the declaration.

This was an action by the Attorney-General, who sued on the relation of the British Land Company, Limited, claiming a declaration that the defendants, the Hornsey Borough Council, were liable to repair and to keep in repair seven bridges over the New River at Umfreville, Burgoyne, Cavendish, Duckett, Mattison, Pemberton, and Warham Roads, in the parish of Hornsey, in the county of Middlesex.

Mr. Maugham, K.C., and Mr. C. P. Sanger appeared for the plaintiff; Mr. Macmorran, K.C., and Mr. Ronald Walker for the defendants.

Mr. Justice Romer delivered the following considered judgment:—In this case His Majesty's Attorney-General, on the relation of the British Land Company, Limited, asks for a declaration that the defendants, as the urban authority of Hornsey, are liable to repair and keep in repair seven bridges within the defendants' district.

The facts, which are not in dispute, are as follow:—In the year 1882 the relators were the owners of the Harringay Park Estate, which they proposed to develop by making roads and erecting houses thereon. The estate was intersected by the New River. The relators accordingly entered into an arrangement with the New River Company for the construction by that company of seven iron girder bridges over the river and for the grant to the relators and those claiming under them of rights of way for

* Reported by J. L. Denison, Esq., Barrister-at-Law.

all purposes over and across the river by means of the seven bridges so to be constructed. In due course the seven bridges were erected by the New River Company, and the relators carried one of their new roads over each bridge. In this way there were constituted within the defendants' district seven streets, not being highways repairable by the inhabitants at large within the meaning of section 152 of the Public Health Act, 1875. But these streets, having been sewered, levelled, paved, flagged, channelled, and made good, and provided with proper means of lighting, to the satisfaction of the defendants as such urban authority, were from time to time duly declared by the defendants to be highways under the provisions of that section, and thereupon became highways repairable by the inhabitants at large. From that time, the provisions of section 149 of the Act became applicable, and, by virtue of that section, the streets and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vested in and came under the control of the defendants; and the defendants became liable to cause such streets to be repaired from time to time as occasion might require. Now, by section 4 of the Act, the word "street," if this is not inconsistent with the context, includes any public bridge not being a county bridge. In these circumstances, all seven bridges being in a state of disrepair, the plaintiff asserts that the defendants are liable to repair them. The defendants, however, repudiate any such liability.

The bridges in question are admittedly public bridges, not being county bridges. The defendants are admittedly liable to repair the seven streets; and the Act says that the streets include the bridges, there being no context that I can see inconsistent with their inclusion. At first sight, therefore, the plaintiff's claim would appear to be justified by the language of the statute. It would also at first sight appear to be justified by common sense. For if the bridges, owing to want of repair, become incapable of supporting the road surface above them, that surface will collapse, and will cease to exist as a highway, and the defendants, having no right to compel any other body or person to repair the bridges, will, unless they repair the bridges themselves, be unable to perform the duty which they concede is imposed upon them of keeping the surface in repair.

The defendants, however, contend that the matter is by no means so simple as all this, and that, in face of various authorities on which they rely, I am constrained to come to a different conclusion. And, even apart from authority, they say that the Act cannot bear the construction that the plaintiff seeks to put upon it, inasmuch as the Legislature cannot have intended to place upon urban authorities so heavy a liability as that construction involves. But the authority was not, at any rate before 1925 it was not, under any compulsion to declare a street crossing a bridge to be a highway under section 152, and if they did not wish to become liable to repair the bridge they could refrain from exercising the powers of that section. Having regard to section 82 of the Public Health Act, 1925, the authority may now no doubt in certain circumstances be compelled to declare a street a highway repairable by the inhabitants at large. But that is only when the street is sewered, levelled, paved, flagged, metalled, channelled, and made good to the satisfaction of the authority. If, therefore, "street" includes the bridge, the authority need not make the declaration and incur the liability to repair until, amongst other things, the bridge is made good to their satisfaction. I can see no reason for coming to the conclusion that in 1875 the Legislature could not have intended urban authorities to incur the liability of repairing a bridge.

I must now turn to the authorities upon which the defendants rely. They say, in the first place, that in numerous cases the Courts have considered and explained the true effect and extent of the vesting provision of section 149, and that the idea that the fabric of a bridge can become vested in an urban authority under the section is altogether inconsistent with the decisions in those cases. Mr. Macmorran, however, did not refer me to more than one of those authorities. He very properly contented himself with citing a passage from the speech of Lord Herschell in the case of *Tunbridge Wells Corporation v. Baird* (12 *The Times* L.R., 372; [1896] A.C., at p. 442), as summing up the law upon the subject. Lord Herschell there said: "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." Lord Halsbury expressed himself in much the same way on p. 437: "It is intelligible enough," he said, "that Parliament should have vested the street *qua* street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street."

Applying this criterion, it would seem that where a roadway runs across a bridge spanning a river, and the urban authority, as here, have no means of compelling any other party to keep the bridge in repair, the bridge must vest in the authority to such an extent as is necessary to enable them to keep the bridge in repair, and so maintain the street as a highway for public use.

In this connexion reference may usefully be made to the case of *Reg. v. Inhabitants of Lordsmere* (2 *The Times* L.R., 623). In that case the defendants had been indicted for the non-repair of a wall alleged to form part of a highway. The wall was in fact a retaining wall supporting the highway, which at that point ran along the side of a steep hill, and which would have slipped away without the retaining wall or some such support. It was contended for the defendants that even if they were liable to repair the highway, they were not liable to repair the wall. The jury at Quarter Sessions were directed to consider (1) whether the wall formed part of the highway, (2) whether the wall was out of repair, and (3) whether such wall was repairable by the defendants. The jury found the defendants guilty, and upon a case stated for the consideration of the Court for Crown Cases Reserved, it was held that the question whether the wall was part of the highway was not a question of law but purely a question of fact which was very properly left to the jury, and that the jury could properly answer the question in the affirmative. As I understand this case, it is an authority for the proposition that where there is, as there is here, a liability to keep in repair a highway, the question what constitutes the highway for that purpose is a question of fact. If that be so, then, apart altogether from the definition in section 4, I should arrive at the conclusion that in the circumstances of the present case the bridges form part of the highways that the defendants are admittedly liable to keep in repair. This conclusion seems to be in accordance with the statement in

Halsbury's Laws of England, Vol. 16, para. 342, that a bridge in a highway, if it be not a county bridge, is repairable as part of the highway by the persons, if any, liable to repair the highway. But, however that may be, I have in the present case the express provision that the word "street" includes any public bridge not being a county bridge. Now, if the contention of the defendants be correct, the reference to bridges in this section is not easy to understand unless the object be to make it clear that a street is a street even where it passes over a bridge. But if that were the object, it is very difficult to see why an exception should have been made in the case of county bridges, which are bridges that the county is liable to repair. Before the passing of Lord Ellenborough's Act (the County Bridges Act, 1803), the county was liable to repair every bridge (by which I mean a bridge carrying a highway *super flumen seu cursum aquæ*) unless such liability attached to some other person or corporation *ratione tenuræ* or otherwise. And this liability extended to the highway for a distance of 300 feet from each end of the bridge. It was, however, provided by Lord Ellenborough's Act that a bridge thereafter erected could only become a county bridge when erected under the direction and to the satisfaction of the county surveyor. If any bridge were made otherwise than under the direction and to the satisfaction of the surveyor, the liability to repair it would seem to have been in the persons liable to repair the highway that crossed it. For even before Lord Ellenborough's Act there were instances of structures that carried highways over a stream which were held not to be county bridges, and these structures appear to have been treated as part of the highway and repairable as such.

In *Rex v. Inhabitants of Whitney* (3 Ad. and El., 69) Lord Chief Justice Denman said that the mere fact of an arch passing over a stream did not necessarily make it a bridge. In that case the parishioners of Whitney were indicted for non-repair of a public horse and carriage way 374 yards in length. The defendants contended that a deduction must at all events be made in respect of a bridge and 300 feet at each end of it which lay within the termini specified in the indictment. The so-called bridge was a stone arch 9 feet wide, and without parapets, carrying the highway across a mill stream. At the trial Mr. Justice Park expressed the view that it was a culvert and merely left to the jury the question whether or not the road was out of repair. The Crown obtained a verdict, and a motion for a new trial was refused by the Court of King's Bench. It was suggested that Mr. Justice Park had laid it down that the structure was not a bridge in that it wanted parapets. As to this, Mr. Justice Littledale said: "The learned Judge did not lay down any proposition of law as to the want of parapets . . .; what he said was merely that . . . there was fair ground for saying that the place in question was part of the highway."

In *Reg. v. Inhabitants of County of Southampton* (18 Q.B., 841) it was held that a bridge carrying a public footpath over a stream and consisting of three planks 9 feet long and a handrail was not such a bridge as the county was bound to repair. In the course of the argument, and when it was stated that the bridge had been repaired by certain commissioners, Lord Chief Justice Campbell said: "The fact of its having been repaired by the commissioners would rather raise a presumption that it is part of the highway." I have referred to these two authorities in some detail because it seems to me that they are authorities for the statement in Halsbury's Laws of England, Vol. 16, paragraph 342, to which I have already referred. No one can doubt that in both cases the structure was a bridge, though not a county bridge, and in both cases it was regarded as being a part of the highway, and repairable as such.

Reverting once more to the question of county bridges, it is to be noted that by virtue of section 21 of the Highway Act, 1835, as construed by the Courts, in the case of all county bridges built after the passing of the Act, the liability to repair the highways leading to, passing over, and next adjoining the bridge does not rest upon the county, but is thrown upon those who would have been liable to repair the said highways, assuming that they did not cross the bridge. If, then, the object of section 4 of the Public Health Act, 1875, was to make it clear that a street for the purposes of the Act was none the less a street because it passes over a bridge, one seems driven to the conclusion that a street passing over a county bridge is not a street for the purposes of the Act. In the case, therefore, of county bridges erected after 1835 the position would be extraordinary. For the urban authority would be under no obligation and would have no power to keep in repair the highway crossing over it. If, however, the true view of the definition clause be that the structure of a bridge is to be deemed a part of the street, the exclusion of county bridges is intelligible enough. For the county is responsible for the repair of the structure of those bridges, and there was no reason, therefore, for vesting the structure in the urban authority, or imposing upon them the liability to repair such structure.

It remains, however, to consider the case of *Great Eastern Railway Company v. Hackney District Board of Works* (8 App. Cas., 687), inasmuch as Mr. Macmorran contends that I am precluded by that authority from coming to the conclusion that the defendants are liable to repair the seven bridges. In that case the railway line ran in a deep cutting much below the level of the highway, which was carried over the railway by a bridge built by the railway company under statutory powers, and in pursuance of sections 46 to 51 of the Railways Clauses Consolidation Act, 1845. The District Board of Works, having paved the highway, which was admitted to be a new street within section 105 of the Metropolis Management Act, 1855, maintained that the railway company were liable to contribute to the expenses of that operation as being owners of land bounding or abutting on both sides of the roadway of the bridge. One of the points taken by the railway company in opposition to such claim was that the fabric of the bridge was vested in the Board of Works by virtue of section 96 of the Metropolis Management Act, 1855. That clause provides that all streets being highways shall vest in and be under the management and control of the vestry or district board, the word "street" being declared by the interpretation clause of the Act to apply to and include any bridge not being a county bridge. Lord Watson, in repelling this argument on the part of the railway company, said this: "It was assumed, no doubt rightly, by the counsel on both sides of the bar, that the rights and liabilities of the appellants, with reference to this bridge, were regulated by the Railways Clauses Act, 1845." He then proceeded to examine the relevant sections of that Act, pointing out, amongst other things, that the Act appeared to distinguish the road itself from the bridge carrying it over the line, and continued as follows: "The real import of these enactments is that the substitute road shall be supported by means of a bridge pro-

vided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes. In my opinion the right of the public, or of the highway authority, is not thereby enlarged. Their right is, in the first place, in and to the road, and may extend to the materials of which it is composed; and in the second place, to have subjacent support to the road from a properly constructed bridge. They are also entitled, in terms of the statute, to have the road maintained, and to have the bridge kept properly fenced by the railway company; but these provisions do not appear to me to imply that they are to have any greater interest in the bridge and its fences, as distinguished from the road proper, than they had in the strata upon which the original road rested. These remained the property of the landowner, although burdened with a public right of way in perpetuity. The Metropolis Management Acts do not, in my opinion, confer upon district boards any larger right in the streets and highways placed under their charge than had previously belonged to the public. The statutory functions of the district board are limited exclusively to the surface of the road or street proper. In the case of new streets, what section 105 of the Act of 1855 authorizes the board to do is to 'pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair.' Keeping in view, then, that the sole object of vesting streets, and the materials of which they are composed, in district boards is to enable them effectually to perform their statutory duties in relation to the streets, I cannot suppose that the Legislature, in enacting that the word 'street' shall 'apply to and include' any bridge, intended to vest in the board anything more than the street which is carried or supported by the bridge."

Now I cannot read these last words of Lord Watson as intended to be of general application to all bridges. Had that been his intention, I cannot think that he would have examined in such detail, as he did, the provisions of the Railways Clauses Consolidation Act, 1845. As I understand his judgment, his view was this: that it could not have been the intention of the Legislature, in passing the Metropolis Management Act, 1855, to interfere by its general provisions with the special provisions as to bridges contained in the Railways Clauses Consolidation Act, 1845, and that, by virtue of the Metropolis Management Act, 1855, district boards obtained no larger right in streets and highways placed under their charge than had previously belonged to the public. I do not read his judgment as affirming the proposition that, even though a district board is unable effectually to perform its statutory duties in relation to a street without having vested in it a bridge carrying that street, the structure of the bridge nevertheless does not vest in them, or the proposition that even though the public had previously been under a liability to repair the structure of a bridge such a liability did not pass to the district boards. Such propositions, indeed, seem to be inconsistent with the language that he used.

If I put upon the section of the Public Health Act, 1875, to which I have referred the construction contended for by Mr. Macmorran, the defendants will not be able to discharge properly their duties in respect of the highways that cross over the bridges, and their liability for repair in respect of such highways would, as it seems to me, differ in a material respect from the liability of the public that existed before the passing of the Act in respect of highways carried over bridges that are not county bridges. In these circumstances there is, in my opinion, no reason why I should not give effect to what appears to me to be the natural meaning of the words of the statute. I must accordingly make the declaration that is asked for.

[Solicitors—Messrs. Russell, Sons, and Bass; Messrs. Sharpe, Pritchard, and Co., for Mr. E. B. Croasdell, Town Clerk, Hornsey.]

K.B. Div. (Roche, J.) 1926. Nov. 25.

WASSERMAN v. BLACKBURN.*

Insurance (Loss)—Bills of exchange—Loss or deprivation through dishonesty—Assured induced to discount bills by false representations—Dishonour of bills—Liability of assured—Whether loss within the policy.

The plaintiff was insured by two policies, subscribed by the defendant, against loss or deprivation of bills of exchange through theft and any other loss whatsoever through theft or other dishonesty. During the currency of the policies the plaintiff was induced by false representations to discount certain bills of exchange. The bills were dishonoured, and the plaintiff brought an action on the policies on the ground that he had suffered a loss through having dealt in the bills. The defendant contended that the above provision in the policies only covered accidental loss of documents or physical deprivation of the possession of documents.

Held, that the plaintiff's loss was caused by dishonesty within the meaning of the policy, and he was entitled to recover.

The plaintiff in this case claimed against the defendant a sum of £67 6s. 2d., as his share of a sum of over £16,000 alleged to be due from the underwriters, one of whom was the defendant, of two policies of insurance.

Sir W. Schwabe, K.C., and Mr. T. Mathew appeared for the plaintiff; Sir Leslie Scott, K.C., and Mr. J. M. H. Wilson for the defendant. Mr. F. Gahan held a watching brief on behalf of Lloyd's.

The plaintiff, by his statement of claim, said that he was at all material times interested in two "All-in" Lloyd's policies of insurance, each subscribed by the defendant, whereby he was insured against loss in accordance with the following clause:—

"Whereas the assured are desirous of effecting assurance to the extent of say £15,000 or £7,500 against the loss or deprivation as hereinafter mentioned of bonds, debentures, stocks, scrip, shares, transfers, certificates, coupons, warrants or other securities, cash, cheques, bank notes, bills of exchange, promissory notes, title deeds of landed property, or any documents of value (all and each of which are hereinafter included in the words 'such securities as aforesaid')

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

"Now it is witnessed that the several persons whose names are hereto set and subscribed each in consideration of a premium . . . the receipt of which they do respectively acknowledge, do severally but not jointly promise and agree with the assured that in case the assured shall at any time during twelve months from this date . . . lose or be deprived of or discover that they have lost or been deprived of, at any time before such discovery, any such securities as aforesaid, whether payable to bearer or otherwise, on or from the premises of the assured, their bank, or the Stock Exchange vaults, or other safe deposits, or elsewhere, by robbery, theft, fire, explosion, embezzlement, burglary, or abstraction, whether with or without violence, and whether from within or without, and whether by officers, clerks or servants . . . of the assured, or by any other person or persons, or by the negligent or fraudulent conduct of the said officers, clerks, or servants or other person or persons, or shall sustain or discover as aforesaid that they have sustained any other loss whatsoever through the theft, fraud, larceny, embezzlement, or other dishonesty of or forgery by any such officer, clerk, servant, person or persons, they the said parties hereto will respectively pay and make good to the assured such proportion of the value of any such securities as aforesaid or of the amount of any such other loss as aforesaid, which the assured have lost or been deprived of or sustained or discovered as the amount of their respective subscriptions bears to the sum assured.

"It is hereby declared that this policy, in addition to the above, indemnifies the assured against loss by reason of their having dealt in forged . . . negotiable or transferable instruments or documents. . . ."

During the existence of the policies the plaintiff was induced to discount certain bills of exchange by false representations made by one Harrison that the bills were genuine bills which had been drawn in respect of instalments of the purchase price of motor-cars payable by the purchasers under hire-purchase agreements, and that the payment of the said bills was effectively guaranteed by policies of insurance. The bills were dishonoured, and the plaintiff said that he suffered a loss of the respective amounts thereof through the fraud or dishonesty of such person, and that the bills were forged negotiable instruments, and that he (the plaintiff) sustained a loss through having dealt in them.

Mr. Wilson submitted that the bills of exchange were not forged documents within the meaning of the policy; that the plaintiff was not induced by fraud to discount the bills; and that in any event the loss was not within the policy at all. The recital showed what the clause was really intended to cover: "loss or deprivation" meant loss which was accidental, such as a document having been accidentally destroyed; and deprivation resulted from something having been taken away by some person. There must be a physical deprivation of possession against the assured's will. The later words "any other loss whatsoever" referred to the amount of the loss by deprivation of the insured thing, and not to the cause of the loss. The word "whatsoever" must be qualified by the *ejusdem generis* rule. In *Larsen v. Sylvester and Co.* (24 *The Times* L.R., 640; [1908] A.C., 295) the expression was stronger, "of what kind soever," and the intention was obviously to exclude the rule.

Mr. Justice Roche referred to *Steamship Knutsford, Limited v. Tillmans* (24 *The Times* L.R., 756; [1908] A.C., 406); and *Joseph Travers and Sons, Limited v. Cooper* (30 *The Times* L.R., 703; [1915] 1 K.B., 73).

Sir Leslie Scott submitted that the recital indicated the subject-matter of the insurance, and that the subsequent words did not force one to go beyond the recital. At the most the plaintiff could only say that the words were ambiguous, and to clear up the ambiguity one must refer back to the recital. If the plaintiff's construction was right there would have been no need for the clause at the end providing for indemnity where the assured had dealt in forged documents, for that would have been covered by "any other loss whatsoever." Under the policy the measure of the indemnity was stated to be the market price of the document lost, and that showed that loss by fraud was not within the intention of the parties.

Sir W. Schwabe replied.

Mr. Justice Roche, in the course of a long judgment, discussed the complicated series of transactions known as the Harrison frauds and various legal proceedings which had arisen out of them. He then dealt with the construction of the policy in this case. The recital set out the object of the insurance, which was to cover the loss or deprivation of, amongst other things, bills of exchange and cash. The first part of the witnessing clause provided an insurance against the loss or deprivation, by a number of perils, of the things mentioned in the recital, including theft, but not specifically including dishonesty or forgery. The later part of the clause insured against any other loss whatsoever through the . . . dishonesty of any person or persons, and, finally, there was an indemnity against loss by reason of having dealt in forged documents.

So far as regarded the first part of the witnessing clause it was argued that the plaintiff had lost cash and could claim under it, but in his (his Lordship's) view the loss was occasioned by false pretences or fraud and was not within the words of that part of the clause. But he thought that the loss was covered by the later words in the witnessing section, "or shall sustain . . . any other loss whatsoever." Those words provided against any other kind of loss whatsoever in relation to the subject-matter of the insurance through the enumerated causes, which included the dishonesty of any persons. The defendants contended that those words must be limited to the amount or items of loss arising from the causes already specified, but that argument could not be reconciled with the fact that immediately after the words "any other loss whatsoever" a new peril, dishonesty, which had not been previously mentioned, was introduced.

The defendants also contended that the presence of the declaration at the end of the clause, insuring the policyholder, "in addition to the above," in the case of dealings in forged documents, would have been unnecessary if the words "any other loss whatsoever" were not intended to have only a limited meaning. That was a weighty argument, but policies of insurance had grown up over a long period, and those who framed them were not afraid of surplusage and did not hesitate to use express words to cover things which might already be covered by general words. He held that the plaintiff's loss was caused by dishonesty within the meaning of the witnessing clause. There would accordingly be judgment for the plaintiff.

[Solicitors—Messrs. Adler and Perowne; Mr. Wm. C. Crocker; Messrs. Waltons and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Sargant, L.JJ.)
1926. Nov. 24.

HAMILTON v. SHELTON IRON, STEEL, AND COAL COMPANY, LIMITED.

LEIGH v. SAME.

TIMMIS v. SAME.*

Master and Servant—Compensation for injury by accident—Partial disablement—Capacity for light work—Opportunity taken away by a strike—Right to compensation—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), s. 1 (1).

The respondents, who were employed by the appellants, a mining company, met with accidents arising out of and in the course of their employment and were paid compensation by the appellants, and afterwards, having partially recovered, were given light work at wages at least equal to what they had been earning before the accidents, but in consequence of the coal strike of 1926 the appellants were obliged to discontinue employing the respondents. On claims by the respondents for compensation the County Court Judge awarded compensation for partial disablement.

Held, that although but for the strike the respondents would have continued to earn substantial sums, yet, as their loss of the opportunity of light work was caused not by their own act but by that of the workmen who went on strike, the Judge's award must be affirmed.

These were three appeals which were heard together as involving similar questions of law and fact. They raised a point of widespread public interest and importance in regard to workmen's compensation.

The facts in the first appeal, which were not in dispute, were as follow :—Hamilton, a collier in the employment of the Shelton Iron, Steel, and Coal Company, Limited, met with an accident on December 21, 1925, and was paid compensation by his employers. He recovered partially from the effects of the accident, but was not well enough to do his former work as a "banksman," and his employers, for whom he had worked for nearly 40 years, found him light work as a signaller, his duties being to signal the departure of the cage in which the workmen were lowered or raised into or from the mine. His wages in that employment were to be £2 12s. 6d. a week, which were substantially equal to, or even better than, the wages which he had been earning before the accident. After he had performed those duties for a week the coal strike broke out, and the employers were obliged to discontinue the employment. Upon a claim being brought in the Hanley and Stoke-upon-Trent County Court for compensation, the County Court Judge held that Hamilton was still entitled to compensation by reason of his partial disablement. The fact that the employers could not keep the pits open by reason of the strike was their misfortune, but it did not alter the facts that Hamilton could only do certain kinds of work by reason of his accident and that he had now lost his employment without his own fault. An award was therefore made for payment to him of 18s. a week.

The employers appealed.

In the first case Mr. Cave, K.C., and Mr. Colin Coley, and in the second case Mr. Cave, K.C., and Mr. Edgar Dale appeared for the appellants ; Mr. R. H. Norris appeared for the respondents.

Mr. Cave, referring to the first case, contended that the workman's partial disablement was not the cause of his being out of work. He was not disabled from earning his full wages by reason of his accident, but by reason of the strike. He relied on *Drew v. Staveley Coal and Iron Company* (129 L.T., 620) and *Williams v. Oakwood Colliery Company* (88 L.J., K.B., 878). Those cases showed that, though a strike might not deprive a man of compensation, a right to be compensated could not be given to a man who apart from the strike would not be entitled to it.

Mr. Norris contended that, though a man who went on strike might disentitle himself to compensation because his action in striking and not his injury might be the cause of his failure to earn wages, yet it was not the policy of the Legislature that a man should be deprived of his compensation because of a strike for which he might be in no way responsible. He relied, *inter alia*, upon *Cory Brothers and Co., Limited v. Hughes* (27 *The Times* L.R., 498 ; [1911] 2 K.B., 738) ; *Ray v. Vickers, Limited* (16 B.W.C.C., 200) ; *Warwick Steamship Company v. Callaghan* (5 B.W.C.C., 283) ; and *Murray v. Portland Colliery Company, Limited* ([1923] S.C., 60 ; affirmed in the House of Lords, 39 *The Times* L.R., 579 ; [1923] A.C., 566).

The facts in the other cases were not dissimilar. In Timmis's case no evidence had been given, as it had been agreed that the decision should follow the result of Hamilton's case.

The Master of the Rolls, in giving judgment, said that in all three cases the workmen suffered personal injuries by accidents arising out of and in the course of their employment, and the employers became liable to pay compensation upon the basis of partial incapacity for work. The facts of each case differed, but the three men had been found light employment and were thus able to secure wages by earning them in some suitable work. That fact was relevant to the amount of compensation payable to them under section 9, subsection 3, of the Workmen's Compensation Act, 1925. The question of *quantum*, however, was not for that Court, but for the Judge of the facts, as was said in *Ray v. Vickers, Limited* (16 B.W.C.C., 200). The County Court Judge had made awards in favour of the workmen, disregarding the wages that they had been earning, and the employers appealed. The employers contended that the employments of the workmen ceased when the strike or lock-out began on May 1, 1926 ; that but for that the men would have continued to earn substantial sums week by week ; and that the compensation awarded by the County Court Judge was excessive, as he had not taken into account what they were earning or could have earned had their employment not ceased on the outbreak of the strike or lock-out.

It was important to consider what sum a workman was entitled to apart from any question of a strike. He was entitled to compensation for the loss of power to earn owing to an accident. (*Ball v. William Hunt and Sons, Limited*, 28 *The Times* L.R., 428 ; [1912] A.C., 496 ; *Warwick Steamship Company v. Callaghan*, 5 B.W.C.C., 283 ; *Ling v. De Dion-Bouton, Limited*, 35 *The Times* L.R., 640 ; [1920]

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqs., Barristers-at-Law.

1 K.B., 88.) That right was not lost by a workman even if another cause supervened and prevented him from accepting alternative or light work (*Cory Brothers and Co., Limited v. Hughes*, 27 *The Times* L.R., 498 ; [1911] 2 K.B., 738). Nor could the employers discharge themselves from their liability when they had found the workman light employment which had come to an end owing to the cutting down of their staff (*Macdonald v. Wilsons and Clyde Coal Company*, 28 *The Times* L.R., 431 ; [1912] A.C., 513), or from slackness of work (*Ray v. Vickers, Limited, supra*).

The relief, if any, to the employers to be derived from their giving light alternative employment to a workman depended upon the employers' being able to prove that that opportunity was available to the workman. See the cases collected in Willis on Workmen's Compensation at page 193 of the last edition. After the employers had given evidence on that issue it lay upon the workman to show that he could not do or find any such light work as alleged, but the Judge might take into account his general knowledge of the labour market, so that actual evidence by the workman was not essential, and the Judge might be able to determine the matter without specific evidence (*Middleton v. Wharncliffe Woodmoor Colliery Company, Limited* (No. 2), 16 B.W.C.C., 125).

In all the present cases, therefore, when it was found that the light work failed, the workmen were entitled to an award of compensation. In none of the cases was a refusal to work proved, as there was in *McNamara and Co., Limited v. Burtt* (4 B.W.C.C., 151) ; for in Hamilton's case the Judge found that the workman had no wish to give up the work, and in Leigh's case and Timmis's case he found that the men always desired to return to work.

None the less, it was argued that the absence of work was due to the action of the workmen's colleagues and not to any act of volition on the part of the employers. The question therefore arose : Did the fact that it was the strike that caused the alternative work to cease avail the employers ? In *Hutchison v. Cadzow Coal Company* (17 B.W.C.C., 365) it was held that, where alternative work failed by reason of the employers' colliery not working, the workman was entitled to reopen the question of compensation for partial incapacity which, up to that time, had become not payable owing to his being given employment at an increased wage by his employers. At the same time, Lord Alness was careful to observe that defences were open to the employers. He said, at page 369 :—

"Now, compensation was suspended because employment was offered to the appellant at higher wages than he had earned before the accident. It is therefore clear that the only relevant change of circumstances which the appellant need aver . . . is that the offer in respect of which his compensation was suspended is no longer available to him."

And further on, at page 370 :—

"I will only add that it goes without saying that the defences of the respondents remain entire and unaffected by the decision which I suggest to your Lordships. They may, in the course of the inquiry which I propose we should allow, be able to prove that this was a strike and not a lock-out. They may prove that the offer of employment was not withdrawn but remained open and was rejected by the appellant. If they prove any or all of these things they may win their case. But it does not seem to me to be possible to exclude all defences in the appellant's averments, nor indeed is it, in my opinion, necessary to do so."

And Lord Hunter, at page 373, said :—

"The moment the man averred the works were not going he was *prima facie* entitled to something because he was then still incapacitated. It may be, however, because of the particular facts of this case he is not entitled to anything."

Lord Alness suggested, apparently, that proof of a strike would afford a defence to the employers, but that would only be if the facts proved that the work was refused. To come now to *Murray v. Portland Colliery Company, Limited* ([1923] S.C., 60), it seemed that the man in that case was treated as a striker and as refusing to work during the strike, but during the subsequent period, when work was not yet available in consequence of the strike and the pits were flooded, the Court held that incapacity caused by the accident was the dominant consideration. Lord Constable, at page 372, expressed the view that a supervening cause did not eliminate the right of the workman. That case was affirmed in the House of Lords (39 *The Times* L.R., 579 ; [1923] A.C., 566).

If the workman was a striker and refused work, the cases in which a refusal dominated the position would apply ; but, if not, the right to compensation remained, and the employers had no factor which could afford them relief. In *Williams v. Oakwood Colliery Company* (88 L.J., K.B., 878) the man lost his work owing to the compulsion exercised upon him by his trade union. That was treated as an act the responsibility for which fell on the workman. It was done contrary to, and in spite of, the willingness of the employers to employ him.

Lastly, to turn to *Bromley v. Staveley Coal and Iron Company* and *Drew v. Same* (129 L.T., 620), Lord Sterndale said that it was quite clear that Bromley could have earned the same amount that he had been earning before the strike but for his unwillingness to accept less than the union was standing out for. Bromley said so in his cross-examination quite distinctly, and it seemed to Lord Sterndale that it was a little unjust to the employers that during the time when Bromley might have had those wages the employers should be compelled to pay. The same inference was drawn in *Drew's* case (*supra*). Lord Justice Warrington (as he then was) emphasized that the material factor was the incapacity to earn wages occasioned by the injury ; hence he did not go beyond what was said in that case by Lord Sterndale or by Lord Justice Scrutton.

In all cases where it was found that there was a willingness to work, but the work had ceased to be available, the employer's liability was not reduced. The County Court Judge had found that that was so in the present cases. They were not cases of refusal to work, nor was there the entrance of a factor attributable to the workmen. They were cases where the supervening facts had prevented the employers from being able to mitigate the right to compensation given to the workmen by section 1 of the Workmen's Compensation Act, 1906. If in any case it was found, however, that there was unwillingness on the part of the workman to work, then the decision in *Bromley v. Staveley Coal and Iron Company* (*supra*) would bind the Court to hold the same as in that case.

The appeals therefore failed, and must be dismissed.

Lord Justice Atkin, after stating the facts, said that, if a man situated as the respondents in the present cases gave up his job on his own account and of his own free will, then he might not be able to demand compensation, but if the job in fact disappeared without his being in any way at fault, as by the insolvency of the employer, by fire, flood,

overwhelming disaster, or even by a strike, then the job was at an end, and the County Court Judge must determine whether the workman who had met with the accident was able to get work, and if so at what wages, and the Judge was entitled to take into account that where there was a subsisting injury there must be some incapacity. Here the Judge determined that there was some injury, that there was a loss of earning capacity, that the men were now less able to earn good wages. He also found that the employment had ceased. That being so, there was certainly no evidence that the employment had ceased through any fault of the workmen, because the evidence was that the workmen applied to go on with their work, and were willing to go on with their work, and so the award of so much a week was clearly justifiable. The Judge would not, of course, have been entitled to give compensation if the men had been able to earn full wages and had only been debarred from doing so by the state of the labour market; he should take that fact into account. But the Judge here had come to the conclusion, and it seemed a reasonable one, that the men were not able to earn full wages; they were incapacitated to the extent of a certain sum per week, and they were entitled to be compensated in that sum, unless they had themselves done something to deprive themselves of the work which had been given to them.

It was said that the Court was bound by the decisions in *Drew v. Staveley Coal and Iron Company* and *Bromley v. Staveley Coal and Iron Company* (129 L.T., 620), particularly by the former, but that was a case of the man himself giving up the employment; further, there was no evidence that during the strike the man could not earn as much as he had earned before. In *Murray v. Portland Colliery Company, Limited* ([1923] S.C., 60), which was affirmed in the House of Lords (39 *The Times* L.R., 579; [1923] A.C., 566), an injured man was working at light work when there came a strike, and the sheriff-substitute found that he was not entitled to compensation, and he deprived him of any compensation during the period of the strike. The Court said that that was wrong, and that the arbitrator could find that, as the man during the strike was partially incapacitated and able to earn less wages, he was entitled to compensation. In Hamilton's case, too, it certainly seemed reasonable that the Judge should take into account that the employment given to the workman had only lasted about a week. The three appeals must therefore be dismissed.

Lord Justice Sargant said that he was of the same opinion. In each of the three cases there was a diminution of earning capacity, and so a right to make a claim. When work which the workman could do was found for him he, for the time being, suffered no loss, or, in the event of the amount earned being less than before the accident, he received compensation to make up the difference. But, when the wages in the new employment ceased, then the loss of earning capacity ceased to be latent and became active, and the workman became again entitled to compensation. The workman in fact had suffered an *injuria cum damno*; the wages paid by the employers for the light work prevented, for the time, there being any *damnum*, but the *injuria* remained, and when the employment failed, then the *damnum* revived. The appellant had relied upon *Bromley v. Staveley Coal and Iron Company* and *Drew v. Staveley Coal and Iron Company* (129 L.T., 620), but it seemed to him (the Lord Justice) that the decisions in those cases had rested upon the particular facts, and in the inferences from those facts found by the Court of Appeal, and a decision founded upon those impressions would not be the standard in every case. He (Lord Justice Sargant) did not think that the Court of Appeal intended to lay down any view of the law different from that which had prevailed in other cases, and that was shown by the fact that the workman was held to be entitled to compensation for the period when he was unemployed after the strike had ended. Lord Sterndale's judgment did not seem to indicate the belief that he was deciding anything in a sense contrary to the decision in *Murray v. Portland Colliery Company* (39 *The Times* L.R., 579; [1923] A.C., 566), but, if so, the decision in the latter case in the House of Lords was to be preferred as a decision to the decisions in *Drew's* and *Bromley's* cases (*supra*).

[Solicitors—Mr. F. J. Berryman, for Mr. T. Haynes Duffell, Birmingham; Messrs. Stow, Preston, and Lyttelton, for Messrs. Hollinshead and Moody, Tunstall.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1926. Nov. 29.

ASTON COAL COMPANY, LIMITED v. STANCIL.*

Master and Servant—Compensation for injury by accident—Appeal—Notice—Judge's notes—Time for filing.

The Court, on this application to extend the time for entering an appeal, laid down an important point of practice in workmen's compensation cases.

Stancil, a workman, was injured while in the employment of the Aston Coal Company, Limited, and received compensation. The employers applied to diminish the sum payable, but the Judge at Rotherham County Court dismissed the application. The solicitor acting for them was instructed to enter an appeal, but he was under the impression that he could not do so without obtaining and filing a copy of the Judge's notes. According to his affidavit, he did not obtain a copy until November 5, 1926. He sent them at once to the printer, but could not get them back until November 11, one day after the time for entering the appeal had expired. The employers applied to the Court of Appeal to extend the time.

Mr. Edgar Dale appeared for the applicants; Mr. Shakespeare for the respondent.

The Master of the Rolls said that the Court had decided to grant the application to extend the time as there seemed to have been a genuine mistake. In future, however, he wished it to be clearly recognized that the appeal must be entered within the time allowed, and it was not necessary to obtain and file a copy of the Judge's notes when entering notice of appeal. These notes must, of course, be obtained and entered, but that was not a condition precedent. The notes should be obtained as soon as possible, but notice of the appeal might be given first.

Lord Justice Atkin and Lord Justice Lawrence gave short judgments to the like effect.

[Solicitors—Messrs. Jackson and Jackson, for Messrs. Gichard and Co., Rotherham; Messrs. Corbin, Greener, and Cook, for Messrs. Raley and Sons, Barnsley.]

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

Railway and Canal Commission. (Sankey, J., Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C.) } 1926. Nov. 29.

IN RE J. AND J. CHARLESWORTH, LIMITED, AND HENRY BRIGGS, SON, AND CO., LIMITED.*

Mines—Coal—Application for right to work—Rival application — Agreement between the parties for division of area.

Where rival applicants for the right to work coal in a certain area agree to divide the area between themselves, the Court will not make an order in the terms of the agreement unless it is expedient in the national interest so to make it, and the Court may specify matters in regard to which the agreement must be modified.

The Court gave judgment in respect of an agreement between the parties in these applications for rights to work an area of the Silkstone or Middleton main seam of coal, near Hunslet, in the West Riding of Yorkshire.

Mr. T. Terrell, K.C., and Mr. P. Gordon Bamber appeared for Messrs. J. and J. Charlesworth, Limited; Sir Leslie Scott, K.C., and Mr. H. V. Rabagliati for Messrs. Henry Briggs, Son, and Co., Limited.

Mr. Justice Sankey, in giving judgment, said that the applicants, Messrs. J. and J. Charlesworth, Limited, and Messrs. Henry Briggs, Son, and Co., Limited, sought rights to work a certain area of coalfield in Yorkshire and also applied for ancillary rights to facilitate that working. Originally each of the applicants claimed to be the one who should be allowed to work the minerals in the national interest. If the applications had remained rival ones he would have come to the conclusion on the grounds both of economy and expedition in working that Messrs. Henry Briggs, Son, and Co., Limited, had shown a better title to the right to work the coal in question. When the matter came before the Court, however, they were surprised to be told that the parties had entered into an agreement to divide the area between themselves.

That placed the Court in a very embarrassing position, because each of the applicants had alleged, in no measured terms, in their applications that it was quite impossible for the other to work the area properly, and each party had supported their allegations by statements on oath. He wished to remind the parties that statements on oath, whether of fact or of opinion, were to be regarded as true and ought to be made only with very great care. The Court felt that in coming to their agreement the parties had not troubled so much about the national interest as about their own, and he desired to enter a most emphatic protest against any such course of proceeding.

That Court had to consider the national interest, and the position with regard to agreements between parties was different from that which existed in ordinary Courts. An order to work coal would only be granted in any particular form if it were expedient in the national interest so to make it.

The national interest might differ from time to time, but, without giving an exhaustive definition, the Court would in any event pay attention to the following matters :—(1) The safety of the men who would have to work the coal; (2) by what means the largest amount of coal could be obtained; (3) economic, expeditious, and efficient working; (4) the number of men to be employed; and (5) where there was an application to let down surface, the comparative value of the minerals to be gotten and that of the buildings on the surface.

It was not wrong for parties to come to agreements, but the Court must be satisfied that the agreement was not only in the interests of the parties, but also for the benefit of the nation.

His Lordship went on to specify certain matters, regarding which the agreement between the applicants would have to be modified.

Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C., delivered judgments agreeing with that of his Lordship.

[Solicitors—Mr. A. E. Burton, for Messrs. Stewart and Chalker, Wakefield; Messrs. Blundell, Baker, and Co., for Messrs. Greaves, Atter, and Beaumont, Wakefield.]

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

K.B. Div. (Rowlatt, J.) } 1926. Nov. 30.

MITCHELL v. B. W. NOBLE, LIMITED.*

Revenue — Income-tax — Profits — Deductions —Business expense—Payment to retiring director.

The Court held that a payment by a company to a director in order to induce him to retire, in circumstances in which the other directors had come to the conclusion that it was essential in the interests of the company that he should retire, was a business expense deductible from the company's profits for purposes of income-tax.

This was an appeal by the Crown from a decision of the Special Commissioners of Income Tax.

Under an agreement of November 25, 1918, made between the respondent company and its directors, it was provided, *inter alia,* that the directors should be directors for life so long as they continued to hold a qualifying number of shares, subject to dismissal for misconduct as mentioned below. In the event of a director being so dismissed the remaining directors were empowered to require him to sell to them his shares in the company at par.

It was also provided that if any director should, *inter alia,* neglect his duties or be guilty of such misconduct towards the company or otherwise as would in the absence of any agreement to the contrary entitle a company summarily to dismiss him from his employment, the company should have power to dismiss him forthwith, paying to him such a proportion of his salary only as should then be due.

By a further agreement of April 29, 1920, made between the company, its directors, and Mr. Silver, a new director, the directors covenanted to alter the company's articles to enable the company to issue participating notes, and it was provided that as soon as that was done the company would create 2,000 of those notes and allot them to the directors in certain proportions. The notes were to confer certain rights to profits. It was provided that no persons other than a director, officer, servant, or employee of the

* Reported by J. W. Hall, Esq., Barrister-at-Law.

company should be entitled to hold or acquire participating notes. It was also provided that when a noteholder ceased to be a director, officer, servant, or employee of the company he should forthwith surrender his notes to the company to be cancelled. The necessary alterations in the articles were made and the notes were allotted as provided by the agreement.

During 1920 and 1921 considerable friction of a personal nature arose between one director of the company and his co-directors, and there was evidence before the Special Commissioners of conduct on the part of that director improper in a director of the company. The other directors desired to get rid of him and considered it necessary for the sake of the good name of the company to do so. It was admitted that the company might possibly have been justified by law in exercising its power of dismissal, in which case the dismissed director would have been entitled to no compensation. But the other directors were anxious that the matter should not become public, and they entered into negotiations with the director concerned for his retirement. He at first demanded £50,000, but a compromise was eventually arrived at, and on December 30, 1921. an agreement was entered into between the company, the remaining directors, and the retiring director, whereby the retiring director agreed (1) to retire from the company ; (2) to transfer his shares, which at that time were 300 £1 shares, at their face value of £1 per share, to the remaining directors ; and (3) to surrender his participating notes. The company agreed to pay him £19,200, and the directors to pay him £300, making together the sum of £19,500. He agreed to accept that sum in full and complete satisfaction of all claims which he had or might have against the company or the directors. (The £300 paid by the directors was expressed to be the consideration for his shares.)

The sum of £19,500 was payable in five annual instalments. The first instalment (which was duly paid) amounted to £5,500, and consisted of (*a*) the £300 payable by the directors for the retiring director's shares, and (*b*) £5,200 being part of the £19,200 payable by the company.

It was contended on behalf of the company that the sum of £19,200 was money wholly and exclusively laid out for the purposes of the business ; and that the instalments were admissible deductions from profits as and when they fell due.

It was contended on behalf of the Crown, *inter alia* :—

(1) That assuming (though it was denied) that the £19,200 or any part thereof represented commutation or compensation for loss of salary to which the retiring director would have continued to be entitled had he remained a director, and which would have continued to be an admissible deduction year by year in arriving at the company's profits for assessment, it was a capital sum and was not an expense proper to be set against the receipts of the company on revenue account for the purpose of computing the balance of its profits.

(2) That assuming (though it was denied) that the £19,200 or any part thereof represented compensation for loss of salary, it was a voluntary payment, inasmuch as in the circumstances the company was entitled to dismiss the retiring director without compensation of any kind, and was not under any obligation to continue to retain him in its service and pay him a salary. It was not therefore a commutation of any yearly sum which the company continued to be liable to pay.

(3) That the agreement to pay the £19,200 was a compromise of a claim for £50,000, and, if any part of the sum represented compensation for loss of salary (though this was denied), it was not only compensation for such loss but also, generally, compensation for loss of anticipated dividends as a shareholder and of surplus profits as a noteholder, neither of which matters could in any circumstances be the subject of deduction in arriving at the company's profits for assessment. The agreement of December 30, 1921, did not attempt to apportion the £19,200 as between compensation for loss of anticipated dividends and surplus profits, on the one hand, and loss of salary, on the other hand ; and there was no evidence upon which the Special Commissioners could find that any particular sum was in fact payable or paid as compensation for loss of salary or by way of commutation of any payment which, had it continued to be made year by year, would have been an admissible deduction in arriving at the company's profits for assessment.

(4) That, in essence, the £19,200 was domestic expenditure incurred for the purpose of buying out a director and shareholder for purely personal reasons and was not expenditure incurred for the purpose of earning profits of the company.

(5) That neither the £19,200 nor the instalment of £5,200, nor any other instalment thereof, was money wholly and exclusively laid out or expended for the purposes of the company's business, nor admissible as a deduction in computing the profits of the company for assessment to income-tax.

The Special Commissioners held that the instalment of £5,200 paid to the retiring director should be allowed as a business expense, and they reduced the assessments.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown ; Mr. Konstam, K.C., Mr. Le Quesne, K.C., and Mr. Merlin for the respondents.

Mr. Justice Rowlatt, in giving judgment, said that the question was whether there could be deduction from profits, or in arriving at profits there could be a deduction, as an expense incurred in carrying on the trade, of an instalment of a very large sum to be paid to the retiring director under the agreement under which he left.

It had often been said, but perhaps the clearest and most authoritative statement was in *British Insulated and Helsby Cables, Limited v. Atherton* (42 *The Times* L.R., 187 ; [1926] A.C., 205), that

"A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

It was on that basis that it was said that the payment in the present case was wholly and exclusively for the purpose of the trade. The question of deductibility had been glanced at in *Royal Insurance Company v. Watson* (13 *The Times* L.R., 37; [1897] A.C., 1), where it was suggested that wages paid to a dismissed servant, presumably to get rid of a claim for damages, were deductible.

He thought that in an ordinary case a payment to get rid of a particular servant for the interests of the trade was a deductible expense. (He left out the question of a payment to get rid of a servant because of some purely personal quarrel.) But a person must employ an efficient staff and one which

got on with the firm's customers, and must cease from employing an inefficient staff or one which did not get on with the customers. He saw no reason why expense incurred in doing that should not be a deductible expense, just as a payment on a servant's retirement at an age when his retirement was commercially expedient, might be. He thought that such a payment was distinguishable from that in *Strong and Co., of Romsey, Limited v. Woodifield* (22 *The Times* L.R., 754; [1906] A.C., 448), where the expense was collateral to the trade.

If this had been a case of monthly wages he would not have had much difficulty, but there were very special facts and very big figures. In ordinary circumstances the retiring director's damages would have been his salary, less something for the prospect of obtaining other employment. But in this case the director had to sell extraordinarily valuable shares and surrender profit-sharing notes. The company had to pay a much larger sum, and they paid it because, as the case found, it was essential for the good name of the company to get rid of him. They paid only to get rid of him, and these other sums in respect of the shares and notes came in only as enhancing the sum to be paid, though it was true that the agreement provided for the transfer of the shares and the surrender of the notes. But that clause was inserted to ensure that the retiring director should do his part, and, having been paid on the basis of giving up those things, that he should give them up. He thought, therefore, that the expense was a business one.

Was it capital expense? The cases of payment of a capital sum to get rid of a recurring business expense had in his view nothing to do with the present case. It was not a case of saying, "By an expenditure of capital we will get rid of this director and have his room instead of his company." He thought, in spite of the size of the figures, that this was a deductible business expense, and the appeal failed.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Ashley, Tee, and Sons.]

K.B. Div. (Rowlatt, J.) } 1926. Nov. 29.

B. W. NOBLE, LIMITED v. MITCHELL.*

Revenue — Income-tax—Company resident in England—Business carried on abroad—No foreign profits remitted to England—Power of control in England—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case I.

The appellants, who were insurance and reinsurance brokers and agents in London, had an office in Paris for the purpose of direct insurance on behalf of companies for which it acted as agents, and the appellants in some cases represented the same companies in London and in Paris. A resident director of the appellants had the sole conduct of the Paris business under a power of attorney. The results of the Paris business were incorporated in the appellants' balance-sheets, but no part of the French profits was remitted to London.

Held, that as the power of attorney did not, except as against third parties, divest the directors in London of their power of control over the French business, the appellants were assessable to income-tax under Case I. of Schedule D on the whole of their profits, including those of the Paris office.

This was a case stated by the Special Commissioners of Income Tax. The question was whether the Paris office of the appellants was controlled from England by the directors in London so as to make the company assessable under Case I of Schedule D of the Income Tax Act, 1918, in respect of the whole of its profits, including those of the Paris office. The Special Commissioners found that the control remained in London, and that the company was assessable under Case I.

The company was a private company incorporated in 1916 to carry on the business of an insurance and reinsurance broker and agent previously carried on by Major Noble in London; and to act as insurance or reinsurance brokers and agents for, and as the London managers of, the business of any British, Colonial, or foreign insurance or reinsurance company, and any other trade or business whatsoever which could, in the opinion of the board, be advantageously carried on by the company in connexion with or as ancillary to its business.

Since its incorporation the company had carried on business as insurance brokers and agents, the business being both a brokerage business and a reinsurance business for a limited number of companies.

Major Noble's business was begun about 1913, and in 1915 or 1916 he first obtained business from Paris, carrying out the work at his London office. It was entirely a brokerage business arising through French brokers sending risks to be placed in London. To extend that business M. Gabus, who had an important connexion in England and France, was made a director in April, 1919, and shortly afterwards a Paris office was opened with the intention of continuing there the French brokerage business hitherto carried on from London. But it was found that the conditions under which fire insurance was conducted in France did not permit of brokerage and direct insurance being conducted there by the same person, and during the material years the company's business in Paris was confined to direct insurance on behalf of the companies for which it acted as agents. During those years the company represented some of the same companies both in London and Paris.

The arrangements at first made for carrying on business in Paris through a manager proved unsatisfactory, and in January, 1920, M. Gabus went to reside permanently in Paris, where, since that date, he had the sole conduct of the Paris business under a power of attorney. He was appointed resident director in France and was relieved of attendance at board meetings in London. He had on a few occasions attended directors' meetings in London, and reports were received from him by the directors and occasionally he received their concurrence with his proposals.

From time to time, apart from the occasions when he attended directors' meetings in London, M. Gabus came over and interviewed representatives of the principal British companies for which the company acted as agents in Paris. From time to time Major Noble went over to Paris to see a French company for which the firm acted in London. On these occasions he called to see M. Gabus at the Paris office, but did not interfere with the work of that office. M. Gabus had special knowledge of insurance business in France, and the other directors were not

* Reported by J. W. Hall, Esq., Barrister-at-Law.

competent to interfere with his conduct of the Paris business, and did not do so. The Paris accounts were kept separately in Paris, but the results were incorporated in the company's balance-sheets. No part of the French profits was remitted to London.

Mr. E. M. Konstam, K.C., Mr. C. T. Le Quesne, K.C., and Mr. S. P. J. Merlin appeared for the appellants; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt, in giving judgment, said that the case raised a question as to the application of the principle laid down in *Egyptian Hotels Company, Limited v. Mitchell* (31 *The Times* L.R., 546; [1915] A.C., 1,022) to the present company. Two things might be stated to get them out of the way—(1) The division of profits was not part of the carrying on of the business (see the *Egyptian Hotels* case (*supra*), and particularly the judgment of Mr. Justice Channell in the Court of Appeal) (30 *The Times* L.R., 457; [1914] 3 K.B., 118.) (2) If it were a question what acts of control were done the acts to be relevant must be acts in the tax year concerned. There was a broad distinction between this case and the *Egyptian Hotels* case (*supra*), where the board was governed by the articles by which the board in London was divested of its powers which were given to the board in Egypt.

Mr. Konstam had said, and perhaps truly, that in that case the point was not so much the alteration of the articles as the form which they took. Whether that was so or not, the form of the altered articles was the element on which the case turned. At the material time there was an article overriding Article 71 of Table A, or its equivalent, and constituting a local board. The board in London had financial powers which might have interfered with the board in Egypt by undermining them, but the board in Egypt had full and exclusive powers.

In the present case there was a totally different position. Article 71 of Table A was in force subject to powers of delegation by a special article, number 15. But that did not overrule Article 71. The board retained full authority, and under them was M. Gabus, acting in Paris on a power of attorney from them. The fact that he made reports to the board in London showed that that was the position. His power of attorney did not divest the board in London of its powers, nor did it make him a plenipotentiary till the power of attorney was revoked. Except as against third parties the board retained the right to say: "Though your power of attorney authorizes you to do so and so we have decided that you should not do it."

There was also to be considered the element of the "head and brain" of the business. Mr. Konstam said that that did not necessarily mean the ultimate control, and this might be true, but neither did it merely mean a clever manager.

Another very important case was *Ogilvie v. Kitton* (5 Tax Cas., 338), where it was held that a Toronto business was carried on in Scotland, though the person with the right of control had never exercised it, and it was said by Lord Stormonth-Darling that it was a question of the right of control, not of actual control. At first sight Lord Parker's judgment in the *Egyptian Hotels* case (*supra*) seemed inconsistent with that view, but he never expressed disapproval of *Ogilvie v. Kitton* (*supra*), and he was dealing only with financial powers, and not with powers of trading, which the board in that case had not got.

The appeal failed, and must be dismissed.

[Solicitors—Messrs. Ashley, Tee, and Sons; the Solicitor of Inland Revenue.]

K.B. Div. (Roche, J.) } 1926. Dec. 2.

MANCOMUNIDAD DEL VAPOR FRUMIZ v. ROYAL EXCHANGE ASSURANCE.*

Insurance (Marine) — Policy — Construction — "Collision with an object" — Stranding — Bumping on rocks — Whether within the policy.

A policy of marine insurance on the hull and machinery of a steamer covered the ordinary perils of the sea and contained the following clause: "Subject to the Institute 'Free of Particular Average absolutely' time clauses as annexed, but this insurance to include damage received by collision with any object (ice included) other than water." The ship, having stranded, bumped on the rocks and damaged her bottom plates. In an action on the policy to recover the damage caused by the bumping,

Held, that the contact with the rocks was a "collision with an object" within the meaning of the policy, and the plaintiffs were entitled to recover.

The plaintiffs in this case claimed £106 1s. 8d. from the defendants as their proportion of a sum alleged to be due under a policy of marine insurance.

Mr. Dunlop, K.C., and Mr. Stranger appeared for the plaintiffs; Mr. Raeburn, K.C., and Mr. McNair for the defendants.

The plaintiffs, as owners, were interested to the full amount in a policy of marine insurance on hull and machinery of a steamer, the Frumiz, which, on September 22, 1924, stranded in Cuan Sound off the west coast of Scotland. The Frumiz remained on the rocks for some time, and while there she bumped and damaged her bottom plates. For the damage done by such bumping the plaintiffs now claimed under the policy.

The policy covered the ordinary perils of the sea, and contained, *inter alia*, a clause as follows:—

"Subject to the Institute 'Free of Particular Average absolutely' time clauses as annexed, but this insurance to include damage received by collision with any object (ice included) other than water."

Mr. Dunlop, in opening the case, submitted that on a true construction of the above clause the policy was one providing for total loss only, except that damage by collision was covered. The word "collision" meant an "accidental coming into contact with any object external to the ship." The clause excluded damage caused by a heavy sea striking the ship, but a blow from anything which was not water would be covered. The word "collision" had a wide signification and was not limited to a contact with something navigable. If a ship bumped on a wreck, a pile, or an anchor lying on the bottom of the sea, it would be a collision; and here the bumping on the rocks after the ship had stranded was also a collision. If the defendants had wished to exclude such a contingency they should have inserted in the policy some clause excluding stranding damage.

He referred to Arnould on Marine Insurance, Section 826; *Union Marine Insurance Company v. Borwick* (11 *The Times* L.R., 465; [1895] 2 Q.B.,

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

279); *The Munroe* [1893] P., 248; *Chandler v. Blogg* (14 *The Times* L.R., 66; [1898] 1 Q.B., 32); and a case of *Richardson v. Burrows* referred to in Note 1 to *The Normandy* (20 *The Times* L.R., 239; [1904] P., at p. 198).

Mr. Raeburn, for the defendants, submitted that the damage was particular average damage which, by the terms of the policy, was intended to be excluded. It was not damage caused by a collision with an object within the meaning of the word "collision" in marine insurance. To understand the warranty, free from particular average, it was necessary to remember its historical development. Gow on Marine Insurance (fourth edition), at page 183, traced its history from 1749. The word "collision" originally was confined to a meeting with something navigable, but it was then extended to cover various obstructions, as in *The Munroe* (*supra*) and *Union Marine Insurance Company v. Borwick* (*supra*). In the present case the use of the words "free of particular average absolutely" was intended to exclude the particular peril of stranding, and the subsequent provision for collision with any object was meant to provide for collision with any of the various objects which had been gradually added to those covered by the collision clause.

What happened here was clearly a stranding (*M'Dougle v. Royal Exchange Assurance*, 4 Campbell, 283). It would be ridiculous to say that the steamer had been in collision with the west coast of Scotland; that would be an unreasonable straining of language. He referred to *Reischer v. Borwick* (10 *The Times* L.R., 568; [1894] 2 Q.B., 548); *Hough and Co. v. Head* (5 Asp. M. C., 447); and an American case of *Lehigh and Wilkes-Barre Coal Company v. Globe and Rutgars Fire Insurance Company* (6 Fed. Rep., 2nd Series, 736), reprinted in 26 Ll. L., 82. Striking against something which was merely a natural feature of the bottom of the sea had never been held to be a collision.

Mr. Stranger replied for the plaintiffs. The effect of the clause was that the onus was shifted from the shipowner, who did not need to show what had been struck, to the underwriter, who had to show that the damage was done by water.

Mr. Justice Roche, in giving judgment, said that the case was a very difficult one, and depended on the construction of the policy. The ship was damaged during the currency of the policy owing to contact with rocky ground, and the question was whether that contact amounted to a "collision with an object" within the meaning of the policy. It was not enough to say that it amounted to a collision; it must be a "collision with an object" such as was contemplated.

By reason of the original coming into contact with the rocks the vessel suffered some damage. While she was lying stranded the weather became worse and she began to bump and suffered much more damage. The defendants contended that the case was one of particular average, which was excluded from the policy. They said that no collision within the meaning of the clause had occurred. It was admitted that if the original striking was within the clause the subsequent damage would also be within it, on the principle of *Reischer v. Borwick* (10 *The Times* L.R., 568; [1894] 2 Q.B., 548), and in his view the subsequent bumping did not constitute a fresh collision.

For many purposes the word "collision" was used in a sense too narrow to allow it to include a casualty of that nature in its ambit. The whole matter had been reviewed in the American case of *Lehigh and Wilkes-Barre Coal Company* (6 Fed. Rep., 2nd Series, 736), but the context in which a word was used might make all the difference. Here he could not limit the force and effect of the including words in the clause by reference to the supposed intention of the parties to exclude matters due to stranding or sinking. The ultimate question to be decided was whether contact with a natural feature—namely, rocks on the ground—was a collision with an object such as the policy contemplated. In his view it was. The words of the clause were very general, and he thought that the words "any object" meant "anything," and were not confined in the manner suggested by the defendants. That appeared from the last words dealing with collision with water; for a collision with water was not a collision with a natural object in its natural position.

There would be judgment for the plaintiffs.

[Solicitors—Messrs. Middleton, Lewis, and Clarke; Messrs. Parker, Garrett, and Co.]

K.B. Div. (Roche, J.) 1926. Nov. 30.

J. GORDON ALISON AND CO., LIMITED v. WALLSEND SLIPWAY AND ENGINEERING COMPANY, LIMITED.*

Contract—Sale of goods—Defect—Cylinder for ship's engines—Supply to ship repairers—Subject to "our usual" guarantee clause—Damages for detention of ship—Uncertainty as to clause indicated.

The plaintiffs, a ship-repairing company, requiring a new intermediate pressure cylinder for the engines of a steamer which they had contracted to repair, obtained a quotation from the defendants, who were marine engineers. At the head of the defendants' letter was a printed notice, "All offers are subject to our usual strike and guarantee clauses, accidents, &c." The plaintiffs ordered the cylinder, but after it had been delivered and fitted it was found to be defective. A new cylinder was subsequently supplied by the defendants, but owing to the delay the plaintiffs were not able to complete the repairs in accordance with their contract with the shipowners and had to pay them damages. In an action to recover the amount of the damages the defendants alleged that the contract for the supply of the cylinder was made subject to "our usual" guarantee clause and that their guarantee clause provided (*inter alia*) that "the contractors shall not in any case be liable for any detention of the vessel or other consequential damages howsoever arising."

Held, that as it was not clear what guarantee clause was incorporated, since the clause suggested by the defendants was the clause in their usual engine agreement which was drawn to meet the case of engines being supplied to a shipowner and not to meet such a case as the present, and as it was not proved that the defendants had made it clear that they intended to

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

limit their liability, the plaintiffs were entitled to recover.

The plaintiffs in this case, a ship repairing company at Birkenhead, claimed damages from the defendants, marine engineers on the Tyne, in respect of a defective cylinder.

Mr. Miller, K.C., and Mr. Probyn Jones appeared for the plaintiffs ; and Mr. Clement Davies, K.C., and Mr. Lilley appeared for the defendants.

Early in 1925 the plaintiffs were engaged in repairing a steamer, the Beechwood, and in the course of executing the repairs had to fit a new intermediate pressure cylinder in the steamer's engines. They ordered the cylinder and fittings from the defendants at a cost of £622, and the cylinder was delivered and fitted on board in due course. When tested under steam pressure it was found to be cracked and useless, and the plaintiffs returned it to the defendants. A new cylinder was subsequently supplied by the defendants, but owing to the delay the plaintiffs were not able to complete the repairs of the Beechwood in accordance with their contract, and they became liable to her owners in respect of the extra time involved. The plaintiffs compromised the claim of the owners by a payment of £4,000, and they now claimed from the defendants that sum together with a further sum of £281 in respect of expenses and other matters.

The defendants put in a general denial, and said that they only contracted to supply a cylinder which would satisfy the test of Lloyd's surveyor, and the cylinder now in question had passed the test. They also said that their contract with the plaintiffs was made subject to "our usual" strike and guarantee clauses, and that their guarantee clause, which was customary in the trade, was in the following words:—

"The contractors guarantee the machinery against all defects of material or workmanship that may be discovered within a period of six calendar months after completion of the machinery. The contractors will . . . supply and fit at their works new articles and/or materials to replace or make good such defective part or parts of the machinery arising within such period and due to such causes as aforesaid. . . . The contractors shall not be liable to the purchasers in respect of defects whether in original or substituted work or material except to the extent provided for in the last preceding clause, and the contractors shall not in any case be liable for any detention of the vessel or other consequential damages howsoever arising."

While the contract between the plaintiffs and the defendants was under negotiation the defendants wrote on April 25, 1925, quoting their price and specifying the time required for delivery and other matters, and at the head of that letter was a printed notice, "All offers are subject to our usual strike and guarantee clauses, accidents, &c." On April 29, 1925, the plaintiffs wrote to the defendants accepting their tender, but making no reference to the guarantee clause.

Mr. Miller submitted that there were two questions. (1) Did the notice printed on the defendants' notepaper constitute a sufficient notice that the contract was subject to the defendants' guarantee clause ? (2) If it did, what was the actual effect of that clause ? The notice, though in red ink, was in very small print and inconspicuous. And the guarantee clause relied on by the defendants as their usual clause was one which was taken from their common form of contract with a shipowner for the building of triple expansion engines, and was not applicable to the particular contract in this case. The clause really relied on by the defendants was the sentence at the end excluding liability for detention or consequential damages, which was a clause for the limitation of liability and could not be described as a "guarantee" clause at all.

Mr. Clement Davies submitted that the onus was on the plaintiffs to prove that the defect was due to bad material or workmanship at the defendants' works. Up to the time of the delivery of the cylinder at Birkenhead there was nothing whatever to show that it was defective. He submitted that the evidence suggested that the damage was done by the unskilful handling of the plaintiffs themselves.

The notice was sufficient. It was a notice calling attention to something that was familiar to all engaged in engineering. The guarantee and the limitation of liability were both part of the same provision and could not be separated. If the plaintiffs had had any doubt about what the notice covered they should have asked the defendants. As a matter of business the defendants would not be likely to accept a liability for over £4,000 on a contract for only £622.

Mr. Justice Roche, in giving judgment, said that the defendants had supplied the original engines of the Beechwood and the plaintiffs gave them the order for the new cylinder. When the new cylinder was tested cracks were discovered and the cylinder had to be condemned unreservedly. The Beechwood was kept waiting until another cylinder could be supplied, and the plaintiffs were obliged to pay damages for her detention. The main question in the case was whether the cylinder was defective when delivered. On the evidence, he had come to the conclusion that when delivered the cylinder was defective and unfit for the purpose for which it was supplied, although there was no foundation whatever for any suggestion of negligence or improper workmanship or want of skill on the part of the defendants. The reputation of the defendants as engine builders was very high, and, he had no doubt, was deservedly so. But on the evidence it appeared clear that the crack developed during cooling of the casting at the defendants' works. The defendants were urged to make the cylinder as quickly as possible, and the cooling appeared to have been too rapid and to have caused contraction cracks.

With regard to the defence of the guarantee clause, he held that the notice in red type at the top of the defendants' offer was a sufficient notice that guarantee and strike clauses were to be incorporated in the contract. But then the question arose what clauses were in fact incorporated. It was by no means clear. The guarantee clause suggested by the defendants was the clause in their usual engine agreement ; but that agreement was evidently drawn to meet the case of engines being supplied to a shipowner and did not seem applicable here. As to the suggested limitation of liability, he was by no means satisfied that the defendants made it clear to the plaintiffs that they intended to limit their liability, and he thought that the plaintiffs never accepted any such limitation of liability. At the least the notice was ambiguous, and an ambiguous document was no defence. (*Elderslie Steamship Company v. Borthwick*, 21 *The Times* L.R., 277 ; [1905] A.C., 93.)

There would be judgment for the plaintiffs for the sum claimed, less the price of the cylinder finally supplied.

A stay of execution was granted on terms.

[Solicitors—Messrs. Rawle, Johnstone, and Co., for Messrs. Laces and Co., Liverpool ; Messrs. Thomas Cooper and Co., for Messrs. Ingledew and Co., Newcastle-on-Tyne.]

Chan. Div. (Tomlin, J.) 1926. Dec. 3.

HUTTON AND OTHERS v. SECRETARY OF STATE FOR WAR.*

Crown—Official of Crown—Wrong—Purported exercise of statutory authority—Immunity from action.

An action will not lie against a Crown official, as such, for a wrong done in purported exercise of a statutory authority.

This motion was brought by the trustees and tenant for life of an estate near Richmond, Yorkshire, to restrain the Secretary of State for War, until trial of the action or further order, from taking or continuing any proceedings before an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, for the assessment of the compensation or purchase money to be paid for the compulsory acquisition by the defendant of some 2,460 acres of moorland belonging to the said estate, and also to restrain the defendant, his subordinates, servants, or agents from trespassing upon and damaging the said lands.

Mr. Schiller, K.C., and Mr. H. G. Robertson appeared for the plaintiffs; and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Dighton Pollock for the defendant.

Mr. Schiller, for the plaintiffs, said that the War Office had purported to acquire the lands in question under the Defence Act, 1842 (5 and 6 Vict., c. 94). Sections 9 and 16 of that Act gave power to the Ordnance officers to acquire land by agreement. Section 19 made provision for the case where the owners refused to treat or failed to agree terms. It provided for the Ordnance officers giving notice to treat, and, if within 14 days the owner refused to treat or to accept the purchase price offered, the Ordnance officers could obtain summary possession of the land from the Deputy Lieutenants or Justices of the Peace, and then might summon a jury to assess the purchase price.

There was, however, a condition precedent contained in section 23 that a certificate should be obtained from the tribunal therein mentioned. The powers of the Ordnance officers had been vested in the Secretary of State for War by section 1 of the Ordnance Board Transfer Act of 1855 (18 and 19 Vict., c. 117), and lastly, a new tribunal for assessing compensation was set up by the Acquisition of Land (Assessment of Compensation) Act, 1919.

The facts in this case were that notice to treat had been given in October, 1925, and there had been a failure to agree. But it was not till March, 1926, that the plaintiffs became aware that in August, 1925, a certificate had been obtained under section 23 of the Act of 1842. Their case was that the tribunal mentioned in section 23 had a quasi-judicial function, and that, the section having been inserted for the protection of the landowners, they were entitled to be heard before a certificate was granted, whereas the certificate had been obtained without their being informed. Since then military formations, accompanied by Airedale dogs, had trespassed on the moors and had done much to destroy their value as grouse moors. In the action the plaintiffs claimed a declaration that the certificate was null and void and that the declaration giving possession of the land was also null and void. But the interim relief sought was to prevent the defendant from proceeding with an arbitration under the Act of 1919, and to prevent trespass.

The Attorney-General said that he desired to take the preliminary point that an action against the Secretary of State for War, as such, would not lie. The only remedy was by petition of right unless the existing Secretary of State had acted wrongfully, and then he could be sued personally, but not as Secretary of State.

The Act of 1842 had given the Ordnance officers, and therefore the Secretary of State, power to sue but not to be sued. The Crown could not be made a party to an action, *The Mogileff* (No. 2) (38 *The Times* L.R., 279; [1922] P., 122), and no action would lie against servants of the Crown in their official capacity. So far as a tort was concerned, that point was decided by *Raleigh v. Goschen* (14 *The Times* L.R., 36; [1898] 1 Ch., 73). See also Robertson's Civil Proceedings by and against the Crown, p. 30 *et seq.* The only case at all inconsistent with that doctrine was *Kirk v. The Queen* (L.R., 14 Eq., 558), but there the statement adverse to the contention now being advanced was a mere *dictum*. *Nireaha Tamaki v. Baker* (17 *The Times* L.R., 496; [1901] A.C., 561, at p. 576) really supported the Crown's contention here; for in that case the New Zealand Commissioner of Crown Lands was sued personally and not in his official capacity.

Mr. Justice Tomlin said that he would hear the plaintiffs on this point.

Mr. Schiller submitted that the authorities cited had no bearing on this case, except as regarded the claim to prevent trespass. The plaintiffs contended that the Secretary of State for War had exceeded his statutory power, although purporting to act as Secretary of State. That being so, the action would lie.

Mr. Justice Tomlin suggested that in such a case the remedy would be against the existing Secretary of State in his personal capacity.

Mr. Schiller contended that the action would lie against the Secretary of State as such, and he referred to *Nireaha Tamaki v. Baker* (*supra*), where Lord Davey, in delivering the judgment of the Privy Council, said:—

"Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority."

Mr. Justice Tomlin said that this was a motion for certain injunctions in an action in which the plaintiffs were the tenants for life and trustees of certain estates in Yorkshire and the defendant was his Majesty's Secretary of State for the War Department, sued as such.

His Lordship then stated the facts, and, continuing, said that, in order to give interim relief of the kind asked for, it would be necessary for the Court to be satisfied that the plaintiffs had made out a *prima facie* case. But, apart altogether from the merits of the case, he had to consider the preliminary point raised by the Attorney-General, and only if he was satisfied that the preliminary point was not well founded should he be justified in granting any relief on this application; for the preliminary point, if well founded, struck at the whole basis of the action.

The preliminary objection was that there was no right at all to sue the Secretary of State in his official

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

capacity. First, it was said by the Attorney-General, and, indeed, not disputed by Mr. Schiller, that an action against the Crown would not lie. There were methods by which relief might be obtained against the Crown but not by action. Secondly, it was said by the Attorney-General that an officer of the Crown could not be sued as such, and, in support of that, reference had been made to *Raleigh v. Goschen* (14 *The Times* L.R., 36; [1898] 1 Ch., 73). The judgment in that case seemed to make it perfectly clear that an officer of the Crown could not be sued as such, although he might be sued as an individual for any wrongful act proved to have been done or authorized by him. In the latter case, it was no answer to say that the act was done by virtue of his authority as a Crown official, if, in fact, the act was wrongful.

Mr. Schiller had, however, sought to draw a distinction based on a passage in the judgment in *Nireaha Tamaki v. Baker* (17 *The Times* L.R., 496; [1901] A.C., 561, at p. 576). The plaintiffs' contention really received no support from the passage referred to when it was read in its context. What Lord Davey was really saying was that in a case where an official was sued as an individual for a wrongful act it was no defence to say that the wrongful act was done by him as an officer of the Crown. The argument that an action would lie against a Crown official, as such, when a wrong had been done which purported to be an exercise of a statutory authority, entirely failed. It was sufficient for the present purposes for him to say that, *prima facie*, this action would not lie, and, that being so, the application must be refused.

[Solicitors—Messrs. Maxwell, Simpson, and Batley, for Messrs. Simpson, Peckover, Curtis, and Batley, Leeds; the Treasury Solicitor.]

Court of Appeal. (Bankes, Scrutton, and Sargant, L.JJ.) 1926. Dec. 6.

MERCHANTS' MARINE INSURANCE COMPANY, LIMITED v. NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION.*

Ship—Definition—Pontoon with crane—Adaptability for navigation.

The Court held that a pontoon with a crane fixed on it was not a "ship or vessel" within the rules of an indemnity association, on the ground that the quality of adaptability for navigation was not sufficiently present to bring it within the meaning of these words in the rules.

Decision of Roche, J. (42 *The Times* L.R., 724) affirmed.

This was an appeal by the defendants from a decision of Mr. Justice Roche (42 *The Times* L.R., 724).

The question was whether the defendant association was liable to pay the damages caused by a collision with a floating crane, on the footing that such floating crane was a "ship or vessel" within the meaning of the association's rules.

The Llewellyn Steamship Company, the owners of a steamer, the Fernhill, were at all material times members of the defendant association. On March 13, 1924, the Fernhill, while proceeding through the harbour of Rochefort in charge of a pilot, came into collision with a pontoon crane belonging to the French Admiralty. As the result of the collision the pontoon heeled over. On the pontoon was a large crane, built to lift 100 tons, and also a quantity of stores belonging to the French Admiralty.

The French Ministry of Marine took proceedings in the French Courts against the owners of the Fernhill, and in the result it was held that the collision was due to the negligence of the pilot in charge of the Fernhill. The owners under French law were liable for the negligence of their pilot, and the owners and their underwriters accepted the position.

The question then arose whether the defendant association was liable to indemnify the owners of the Fernhill for the whole amount of the damages recovered by the French Admiralty, or whether the owners' claim fell within the running-down clause of a Lloyd's policy, in which case the liability of the defendants would be restricted to one-fourth of the damages. In the latter event the owners' marine underwriters, the present plaintiffs, would have to bear the remaining three-fourths under the running-down clause of the policy, three-fourths being the total liability of the underwriters under that clause.

The owners of the Fernhill assigned to the present plaintiffs all moneys which should be found due from the defendant association in respect of the collision, and under that assignment the plaintiffs brought the action.

The case turned on the construction of certain rules of the association.

It was stated that the crane in question was situated at Rochefort, in France. It was placed on a pontoon, which had no rudder and no engine except the engine which worked the crane, and was permanently fastened by chains to a staging and to some old warships. Communication with the pontoon was obtained by a gangway from the shore staging, the gangway allowing the pontoon to rise and fall with the tide. The pontoon with the crane on it had been in its present position for years and could only have been moved away by the employment of four tugs, two fore and two aft.

At the time of the collision damage was done not only to the pontoon but also to the staging behind it. So far as concerned the staging, the defendants had admitted liability in full, and no question as to the staging arose in the action.

The material rules were as follow:—

"2. A member or owner shall be protected against any of the following liabilities incurred by him in respect of a steamship entered in this class when the same have been incurred without actual fault or privity of the member or owner. . . .

"(*b*) The damages which a member may in consequence of collision become liable to pay and shall pay in respect of loss or damage caused by a steamship entered by him to any other ship or vessel, or to the freight thereof, or to any goods, merchandise, or other things whatsoever on board such other ship or vessel to the extent of one-fourth part of such loss or damage, and of the costs, charges, and expenses incidental thereto, such damage not being covered by the ordinary form of policy with collision clause attached. . . .

"(*e*) The damages which the member or owner may become liable to pay and shall pay in respect of damage done by the steamship . . . to any harbour, dock, or pier, or quays, or works connected therewith, or to jetties, erections, or any fixed or movable things other than ships or vessels."

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

Mr. Justice Roche held that the pontoon with a crane fixed on it was not a "ship or vessel" within the rules of the defendant association, on the ground that the quality or adaptability for navigation was not sufficiently present to bring it within the meaning of these words in the rules, and he entered judgment for the plaintiffs.

The defendants appealed.

Mr. A. T. Miller, K.C., and Mr. Pritt appeared for the appellants; and Mr. Porter, K.C., and Mr. C. P. Miller for the respondents.

Lord Justice Bankes, in giving judgment, said that in his opinion the appeal failed, and practically for the same reasons as those given by the Judge in the Court below. The Court of Appeal had been referred to the authorities decided under the Merchant Shipping Acts as to whether a particular object was a "ship or vessel" within the meaning of those Acts. He thought that it was easier to decide that question under the Merchant Shipping Acts than under the rules of the defendant association, because section 742 of the Merchant Shipping Act, 1894, defined a vessel as something used in navigation. Rule 2 (*e*) of the rules of the association defined the damages which the member or owner might become liable to pay as being in respect of "damage to any harbour, dock, or pier, or quays, or works connected therewith, or to jetties, erections, or any fixed or movable things other than ships or vessels." Thus it excluded ships or vessels from the things, some of which were specifically described, others being included under "fixed or movable things," in respect of which an owner might become liable to pay damages. The question here was whether a floating crane came within the rule. He thought that the pontoon might be most accurately described as a platform for a crane constructed to be able to float. To decide whether it was a ship or vessel it was material to consider not only its structure, but also the purposes for which it was capable of being, and had, in fact, been, used, and then to come to a conclusion upon an inference drawn from the facts.

The plans and photographs showed that it was constructed in the shape of a vessel to float on the water and to provide a platform for a crane to be used on the water. It was also necessary to construct it so that it might be moved, for it was not intended to be permanently moored. The pontoon, on the platform of which a crane was built, had no motive power of its own, no rudder (that was only an incident, but he thought that it was rather an important one), and, though it was capable of being moved, it was so unseaworthy that it could only go a short distance, and that only in fair weather. It was also most unwieldy. From the information given, it had only been moved very occasionally since 1914. The conclusion to be arrived at was that the object was more accurately described as a floating platform than as a ship or vessel. He thought that it was impossible to frame an exhaustive definition, or to lay down an exhaustive test as to what constituted a ship or vessel, but in his judgment the appeal failed.

Lord Justice Scrutton said that the question was whether the pontoon was a movable thing other than a ship or vessel. He would like to have given a definition of the words "ship or vessel," because they were very usual ones in policies of that kind, but the discussion which had taken place had convinced him that it was of no use to attempt to do so, and that the matter resolved itself into a question of fact. All that he would say was that he was not convinced that the Judge in the Court below was wrong and that the judgments in this case had no effect upon any other case that had been decided. He agreed that the appeal must be dismissed.

Lord Justice Sargant said that he agreed, and for the same reasons as those stated by the learned Judge in the Court below. He thought that the structure must be regarded as an integer composed of two parts welded together. Having regard to the purpose for which it was constructed and the use to which it was put, he was satisfied that this was a fixed or movable thing other than a ship or vessel.

[Solicitors—Messrs. Ince, Colt, Ince, and Roscoe, for Messrs. Ingledew and Co., Newcastle-on-Tyne; Messrs. Downing, Middleton, and Lewis.]

House of Lords.
(Viscount Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Carson.)

1926.
Dec. 3.

OCEAN COAL COMPANY, LIMITED v. DAVIES.*

Master and Servant — Compensation for injury by accident—Complete recovery of workman—Weekly payments—Continuance till arbitration—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 14.

By s. 14 of the Workmen's Compensation Act, 1923, "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except" in certain cases.

Held (Viscount Dunedin dissenting), that an employer is not liable *de jure* to pay compensation after the termination of incapacity, and, though he must continue weekly payments *de facto* until it has been determined in an arbitration that the incapacity has ceased, he is entitled on such determination to recover back the payments made during incapacity.

This was an appeal from a decision of the Court of Appeal affirming an award of the County Court Judge of Glamorgan made under the Workmen's Compensation Acts, 1906 to 1923.

The question raised by the appeal was whether on the true construction of section 14 of the Workmen's Compensation Act, 1923, an employer, who was paying compensation to a workman under the Act of 1906, was liable to pay compensation up to the date of an award releasing him, notwithstanding that the workman had completely recovered at an earlier date.

The respondent was a coalminer in the employment of the appellants, and during the course of his employment he contracted the disease of nystagmus. The appellants admitted liability, and paid him full compensation from October 17, 1923, until November 26, 1924, when the compensation was reduced by oral agreement to £1 per week. From September 3, 1925, the appellants stopped the weekly payment, and on September 21 served on the respondent an application for arbitration on the footing that he had completely recovered.

The respondent, by his answer, contended that he was still incapacitated, but, on October 24, before the

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

arbitration came on for hearing, his solicitors wrote to the appellants' solicitors :—"You may take this letter as an admission that our client is no longer suffering from nystagmus." It was admitted before the County Court Judge that the respondent had recovered on September 3, 1925.

By section 14 of the Act of 1923—

"An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in the following cases. . . ."

Stated shortly, those cases were (*a*) where the workman had actually returned to work ; (*b*) where his weekly earnings had actually been increased ; and (*c*) where a medical man had certified recovery. It was admitted that the respondent did not come within those exceptions.

The County Court Judge held, following *Davies v. Glyncorrwg Colliery Company* ([1925] 2 K.B., 339), that the respondent was entitled to compensation up to the date of the award, and the Court of Appeal—Lord Justice Bankes, Lord Justice Scrutton, and Lord Justice Atkin—affirmed his award.

Mr. E. W. Cave, K.C., and Mr. William Shakespeare appeared for the appellants ; and Mr. Montgomery, K.C., and Mr. Lincoln Reed for the respondent.

Viscount Dunedin.—My Lords : I have found it more than ordinarily difficult to come to a determination in this case, and I frankly confess I have not had the assistance from the Courts below to which I think I was entitled. Two of the learned Lords Justices considered that the case was ruled for them by the case of *Davies v. Glyncorrwg Colliery Company* ([1925] 2 K.B., 339), decided by another division of the Court of Appeal. One of them thinks a distinction can be drawn between that case and this, but forbears to draw it. The other learned Judges speak in distrustful terms of the decision, but absolutely refuse to state what is their own opinion, and all three concur in saying that the case must come to your Lordships' House and they will not let your Lordships' minds be darkened by any counsel they can give.

The case raises an exceedingly difficult question on section 14 of the Workmen's Compensation Act, 1923. The only redeeming feature is that the facts disclose with what I may term a brutal frankness the extent of the workman's demand and what it may lead to in other cases.

The facts are these. The workman contracted the disease known as miner's nystagmus, while in the service of the employers. The result was total incapacity, and accordingly, on and after October 17, 1923, he was paid full compensation at the rate of £1 15s. per week. This was done by voluntary agreement. There was no recorded memorandum and no arbitration. On November 26, 1924, the compensation was reduced, again by agreement, to £1 a week. On September 3, 1925, the employers ceased to pay, alleging that the workman had completely recovered. The workman denied the allegation. Upon this the employers commenced arbitration proceedings by way of review. The workman filed his answer on October 13, 1925, denying capacity. On October 24, 1925, on the eve of the case being heard by the arbitrator, the workman's solicitors wrote to this effect :—

"Ocean Coal Co. v. Daniel Davies.

"We are prepared to admit that our client has recovered from nystagmus. We intend, however, to argue that under the new Act you are not entitled to stop his compensation until an order of the Court is actually obtained. No medical evidence is necessary and you may take this letter as an admission that our client is no longer suffering from nystagmus."

On October 27 the arbitrator pronounced the following award :—

"1. I order that the applicants, the Ocean Coal Company, Limited, do pay to the respondent, Daniel Davies, the weekly sum of £1 as compensation for personal injury caused to the said Daniel Davies on October 17, 1923, by accident arising out of and in the course of his employment as a workman employed by the said applicants, such weekly payments to commence as from September 3, 1925, and to continue until October 27, 1925.

"2. And I order that the said weekly payment be and the same is hereby ended as from October 27, 1925," and he at the same time made available the following very clear note :—

"Note.—The only point in this case was whether the respondent was entitled to compensation from September 3, 1925 (when it was admitted he had recovered), up to the date of the award, or if not up to that date, up to the date of the filing of the application for arbitration. I came to the conclusion that a weekly payment could not be said to be ended pursuant to an arbitration within the meaning of section 14 of the Act of 1923 till after the award had been given, and that the workman was accordingly entitled to compensation up to the date of the award. I called attention to the judgments in the Court of Appeal in *Davies v. Glyncorrwg Colliery Company, Limited* (*supra*)."

An appeal was taken to the Court of Appeal and the order of the arbitrator was affirmed. The way in which the learned Judges dealt with the question I have already mentioned.

I now recall what was the state of the law at the time of the passing of the Act of 1923. The law is all contained and expounded in the case in this House of *Gibson and Co. v. Wishart* (30 *The Times* L.R., 540 ; [1915] A.C., 18). That case pointed out how the Scotch Courts had originally decided that the compensation being *de facto* paid could only be ended in an arbitration as at the date of the decree in the arbitration, and had subsequently, in the case of *Donaldson Brothers v. Cowan* ([1909] S.C., 1292), taken the view that the proper date was the date of the application for review, while the English Courts had held that the award when made might be retrospective to the date when the employers alleged and the arbitrator found that incapacity had ceased. It then adhered to the view of the English Courts.

It may now be as well to set out the section of the Act of 1923, which is said to alter that law. Section 14 is as follows :—

"Restrictions on Ending or Diminishing Weekly Payments.

"An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in the following cases :—

"(*a*) where a workman in receipt of a weekly payment in respect of total incapacity has actually returned to work ;

"(*b*) where the weekly earnings of a workman in receipt of a weekly payment in respect of partial incapacity have actually been increased ;

"(*c*) where the medical practitioner who has examined the workman under paragraph (14) of the first Schedule to the principal Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate

(which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman.

"Provided that—

"(i) in the last mentioned case, if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by a medical referee in pursuance of paragraph (15) of the said Schedule as amended by this Act; and

"(ii) where an application has been made in pursuance of the said paragraph (15) as so amended to refer the dispute to a medical referee it shall be lawful for the employer pending the settlement of the dispute to pay into Court—

"(*a*) where the notice was a notice to end the weekly payment, the whole of each weekly payment becoming payable in the meantime;

"(*b*) where the notice was a notice to diminish the weekly payment, so much of each weekly payment so payable as is in dispute;

"and the sums so paid into Court shall, on the settlement of the dispute, be paid to the employer or to the workman according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed, as in default of agreement may be determined by the Registrar or on appeal the Judge;

"(iii) nothing in this section shall be construed as authorizing an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so."

Before I turn to the section itself let me say a word as to the *Glyncorrwg* case (*supra*), though, of course, that case does not bind your Lordships. I do not say that that case actually decided the point, but I agree with those Lords Justices who thought that the judgment involved the point. The distinction between that case and this was that there the employers began proceedings under subsection (*c*) of section 14. There was then a counter-notice. Then the proceedings stuck, for neither party would move, and then the workman went to arbitration. But when the arbitrator came to pronounce his award he ended compensation as at the date of the actual recovery, which he found to be the date that the employers had alleged, and this was altered by the Court, who held that the workman, notwithstanding his recovery, was entitled to payment up to the date of the award. That seems to me absolutely to involve the point; for, if the argument of the appellants here, the employers, is right, inasmuch as the arbitrator came to the conclusion that there was recovery, he was entitled, as he did, to make his award retrospective.

I now come to the section. When I analyse it, I find that its first and leading provision is to prevent the employer from doing what otherwise he would be entitled to do. He shall *not* be entitled to end or diminish. Now, it has been sought to say that the words will receive adequate effect if we refer them to a stopping of payment at his own hand; but that would not help the workman. If on proceeding to arbitration to find out whether the stoppage was arbitrary or not the award was entitled to be, as *Gibson and Co. v. Wishart* (*supra*) had held it, retrospective, the workman was exactly where he was before the Act. Therefore I come, I must say, clearly to the conclusion that this section was to bestow a new privilege on the workman, and that privilege, I have no shadow of doubt, was meant to be that of keeping payment going until it was ended, either by agreement or award or by the procedure under subsection (*c*). My difficulty does not arise on what I think is the intendment of the statute. It arises on the consideration of the question whether the words used are adequate to carry out the intention of the statute and, I confess after much hesitation, I have come to be of the opinion that they are.

I have said before that I think that in interpreting a statute a Court must take it that the statute is meant to work, and that it should not allow the statute to be defeated unless the words used are quite inadequate to have the desired effect. Now, I think the scheme of section 14 is this: payment which is being *de facto* made must be continued until it is ended in any one of five ways:—

(1) Agreement;

(2) Award;

(3) and (4) The circumstances under subsections (*a*) and (*b*), and

(5) The procedure under subsection (*c*).

The whole difficulty, to my view, has been in the words "In pursuance of an arbitration." Why should not that be an arbitration invoked after the dispute has arisen and the compensation *de facto* stopped, and then under *Gibson and Co. v. Wishart* (*supra*) the award may be retrospective? I think the only and in the end to my mind compelling answer is that, if so, the section did nothing for the workman at all. Subsection (*c*) is a provision for the employer alone, so that if *Gibson and Co. v. Wishart* (*supra*) stands the workman gets nothing by the section. But if "in pursuance of an arbitration" only means if the arbitration is a thing of the past, then *Gibson and Co. v. Wishart* (*supra*) is displaced; the *de facto* payment must go on till the award ends it. It is obvious that in some cases the arbitration might be prolonged for a long time, and it is therefore, as I think, as a rider in favour of the employer that subsection (*c*) comes in.

My Lords, I am not insensitive to the fact that *de facto* payment for complete recovery is travestied by the word "compensation," which properly means compensation during incapacity, while here there is capacity. I confess that the section is badly framed, but I think its object is clear and that it is not so badly framed that it cannot be carried out.

My Lords, I think that this was clearly the opinion of the Master of the Rolls in the *Glyncorrwg* case (*supra*). I wish the matter had been more developed, but the attention of the Court was too much directed to what was to be done, while the proceedings under subsection (*c*) had been initiated and then allowed to collapse. It is clear that the point was in the mind of the learned Master of the Rolls, for in the report he is said to have asked: "Can there be an award operating retrospectively within the meaning of the commencing paragraph of section 14?" To this the learned counsel made an answer quite beside the point: "I know of no award which has been retrospective." With deference to him, it is not a question of his experience, it is a question of what is permissible under the statute.

While, therefore, I do not conceal that it has been a matter of great difficulty to me, and while it is the fact that no case on the point has been decided which

binds your Lordships, I think it is only right to say that this view has the support of a great deal of judicial opinion. There are at least two of the learned Judges in the *Glyncorrwg* case (*supra*) ; there are the four Judges in the case of *Niddrie and Benhar Coal Company v. Dee,* which we are about to dispose of, and I think there must be added those of Lords Skerrington and Cullen in the case of *O'Hare v. Bent Colliery Company* ([1924] S.C., 807), in which there is a very clear opinion of Lord Sands. I am therefore of the opinion that the appeal should be dismissed.

Lord Atkinson.—My Lords,—The facts of this case are simple. The respective contentions of the parties are clear. The respondent, Daniel Davies, a workman of the appellants, was admittedly rendered totally incapacitated from doing his appointed work for his employers by an attack of miner's nystagmus. By an agreement, not in writing, his employers paid him for a substantial period a certain weekly sum on the footing of that total incapacity. On September 3, 1925, the appellants ceased to make this payment or any payment to the respondent, and an application or request for arbitration under the Workmen's Compensation Act of 1906 was made to the County Court at Bridgend in Glamorgan for the review, termination, or determination of this weekly payment made in respect of the personal injury which the respondent had suffered, on the ground that since September 3, 1925, his incapacity had wholly ceased. The respondent on October 13, 1925, served a notice in answer, to the effect that since September 3 he had been incapacitated from performing his ordinary work. The learned County Court Judge then, despite the provisions of the first section of the Act of 1906, and of rule 1 of the first Schedule thereto, providing between them, first, that this weekly sum is compensation paid to the workman for the injury caused to him by an accident arising out of and in the course of his employment, and, second, that that compensation must take the shape of a weekly payment during the incapacity, held that the weekly payment should continue to be made up to October 27, 1925, the date of his award, though it was admitted that the respondent had since September 3 completely recovered. The learned Judges give no definition of the character of this weekly payment as paid for nearly seven weeks. It is not compensation for incapacity, for the incapacity has ceased. I thought that Mr. Montgomery almost suggested that it was something like alms which the Legislature designed, out of tenderness for working men, to secure to them at the employers' expense. It would be well to examine how closely the Act of 1906 and the schedule of rules are knit with the Act of 1923 and how vital is the connexion.

Before the arbitration came on for hearing the solicitors for the respondent wrote a letter to the solicitors for the appellants to the following effect :—

"Dear Sirs,

"Ocean Coal Company v. Daniel Davies.

"We are prepared to admit that our client has recovered from nystagmus. We intend, however, to argue that under the new Act you are not entitled to stop his compensation until an order of the Court is actually obtained. No medical evidence is necessary and you may take this letter as an admission that our client is no longer suffering from nystagmus."

In the Workmen's Compensation Act of 1923, the Workmen's Compensation Act of 1906 is referred to as the principal Act. By section 3 of the Act of 1923, paragraph (1) of the first Schedule to the principal Act is modified by the substitution therein of the sum of £200 for £150. By section 4 (1) of the Act of 1923 it is enacted that in paragraph (1) (*b*) of the first Schedule £1 10s. shall be substituted for £1, as the maximum amount of the weekly payment, and by subsection (2) it is enacted that, where the maximum weekly payment payable under the principal Act (as amended by the foregoing subsection) to a workman who is totally incapacitated is less than £1 5s., the workman shall be entitled *during such incapacity* to a weekly addition equal to one-half the difference between such maximum weekly payment and the sum of £1 5s., or his average weekly earnings, whichever is the less, and such addition shall, for *all the purposes of the principal Act, be treated as if it were part of the weekly payment ;* but, notwithstanding that this addition is for the purpose of the principal Act to be so treated, it is expressly provided that the workman is only to be entitled to it during incapacity, and that qualification is thereby introduced into the principal Act.

By the first section of the Act of 1906 it is enacted that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as thereinafter mentioned, be liable to pay compensation in accordance with the first Schedule to the Act. And subhead (*b*) of rule 1 of that Schedule provides that where total or partial incapacity for work results from the injury sustained by the workman, there shall be a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer, provided that if this incapacity last less than two weeks no compensation shall be payable in respect of the first week, and as respects the weekly payments during total incapacity of a workman who is under 21 years of age at the date of the injury, and whose average weekly earnings are less than £1, 100 per cent. shall be substituted for 50 per cent. of his average weekly earnings, but the weekly payment shall in no case exceed 10s. Now such is the basis, and such are the limits, of the employers' liability fixed by the above-mentioned provisions of the Act of 1906, the principal Act.

The provisions of the Act of 1923 above set out, engrafted as it were upon the principal Act, are comparatively trifling. They are quite consistent with the principle embodied in the earlier statute, and do not substantially divert or limit or alter its operation and effect. If the workman should not be paid by the employers the weekly payment to which he may be entitled while total or partial incapacity continues, he can of course enforce his remedy at law.

But I can find nothing in either statute authorizing a distribution of doles among workmen after their incapacity has ceased, though those doles should be ticketed as weekly payments. If there be found in either of these statutes clear, direct, and unequivocal provisions requiring legal tribunals to decide in favour of a claim which is of this nature, of course the statute must be obeyed ; but if there should be no such express and coercive provisions in them, then I think it is a mischievous and unfortunate practice to award to a workman, after his incapacity has ended, money that he neither by work nor by suffering has earned.

In *Gibson and Co. v. Wishart* (30 *The Times* L.R.,

540 ; [1915] A.C., 18) it was held that the jurisdiction to award weekly compensation is limited to the existence of the incapacity. That case no doubt came within the Act of 1906.

Now, the coercive legislation which, despite the provisions of the Act of 1906 and its schedule of rules, entitled the arbitrator to make such an award as he has made, is to be found, it is contended, in section 14 of the Act of 1923. That latter section is very ill-drawn. If obscurity was the object sought after, it has been attained. If the repeal of the cardinal provision of the Workmen's Compensation Act, 1906, namely, the payment of the stipulated compensation for injury only while incapacity lasts, was aimed at, one would think that it might have been effected with courage and clearness. That method, however, apparently has had no attraction for the framers of section 14, and accordingly by a somewhat stealthy kind of method, mild and harmless in appearance, there is introduced something which, if interpreted as it has been in this case, is, it appears to me, opposed to the cardinal principles of the statutes dealing with workmen's compensation, and to the principles of common honesty in addition.

Subsection (*a*) of this section indicates, so far as it goes, that a workman who was totally incapacitated, but who gives the best proof that his incapacity has ended, and has returned to work, is not to get at the same time the weekly payment and the wages which he presumably earns at his work. Proviso (ii) enacts, in effect, that where an issue has been knit between the medical practitioner of the employer and the medical practitioner of the workman, and the matter in dispute between them is referred, as it may be, to a medical referee, the employer may, pending the settlement, pay into Court (where the notice that he served was a notice to end the weekly payment) the whole of each weekly payment becoming payable in the meantime ; and, where the notice was a notice to diminish the weekly payment, so much of each weekly payment as is in dispute, and the sums so paid into Court shall, on the settlement of the dispute, be paid to the employers or the workman according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed, as in default of agreement may be determined by the Registrar or, on appeal, by the Judge.

This seems to be a most reasonable provision, protecting both the employers and the workman alike till their dispute is settled, if not by the medical referee, by the Registrar or Judge. The amount to be paid into Court would, where the notice was to end the weekly payment, be the whole of those payments payable in the meantime up to the ending of the dispute.

The main reliance of the respondent was, it appeared to me, on the first four and a half lines of this 14th section. I think it is clear that the object of this provision was to deprive the employer of the power or right, to which he was theretofore entitled, arbitrarily at his own will and pleasure, to end or diminish the weekly payment. Under this section he may still terminate the weekly payment if, in the doing of that, he acts "in pursuance of an agreement or arbitration." If anything is clear I should think it is that the words "pursuance of an agreement or arbitration" mean in this connexion simply the doing of what an agreement or an arbitration authorizes and entitles the employer to do. A tenant pays his rent in pursuance of his lease. If an arbitrator awards that A.B. shall do a certain thing, in the doing of that thing A.B. is acting in pursuance of the arbitration in which the award was made ; so construed, this section would effect the object that it was, I think, really designed to effect—namely, to deprive the employer of the arbitrary right and power at his own unfettered will to end or diminish the workman's weekly payment.

But section 14, so interpreted, leaves the first section of the Act of 1906 and the rules of the first Schedule to it unrepealed and in full force and effect. The workman does not in truth lose his weekly payment by any act of his employer. He loses, and must in justice lose it, by the operation of the statutory enactment on his own admission that his incapacity had terminated. In my view, the learned Judge had no jurisdiction whatever to make the decree that he made, any more than he would, if, in a suit brought by a creditor to recover a debt from a debtor, the creditor before the hearing began served notice on the debtor that he admitted that the debt had been paid before the suit commenced. I think that the decision appealed from was erroneous and should be reversed and this appeal be allowed, with costs here and in the Court of Appeal.

Lord Shaw of Dunfermline.—My Lords : The respondent was a coalminer in the employment of the appellants. During the course of his employment he contracted the disease of nystagmus. The appellant company admitted liability for compensation. Davies was paid for over a year full compensation at the rate of £1 15s. By agreement of parties that was then limited, there having been partial recovery from the disease, to £1 per week. On September 3, 1925, the fact is that Davies had entirely recovered. That is the cardinal fact in the case.

His incapacity ceased. It was admitted that he was then capable of performing his ordinary work at his ordinary rate of wages. On that date, or a week thereafter, namely, on September 10, the appellants stopped payment to him, and on September 21 they made a request for arbitration, stating plainly the reason, namely, the respondent's recovery. The respondent, however, denied this fact ; but before the arbitration came on for hearing before the Judge, namely, on October 24, 1925, the solicitors for the respondent wrote to those for the appellants "we are prepared to admit that our client has recovered from nystagmus. We intend, however, to argue that under the new Act (that is, the Workmen's Compensation Act, 1923) you are not entitled to stop his compensation until an order of the Court is actually obtained. No medical evidence is necessary, and you may take this letter as an admission that our client is no longer suffering from nystagmus." It was further admitted that that recovery had taken place by the date from which the weekly payment was stopped, namely, September 3.

Reduced accordingly to its elements, and apart from all questions of procedure, the proposition is that a workman is entitled to recover from his employer compensation in respect of incapacity for a period after that incapacity has ceased. This is said to be the result of the language employed in the statute of 1923.

My Lords, I am of opinion that, complicated as are the questions which arise in the construction of that statute, it was not intended by it, nor does it provide, that that peculiar result should follow. But in view of various decisions which have been pronounced, the tendency of which, in my humble opinion, has been to obscure and fail to give effect to the fundamental principle and provision of the statute of 1906, it is necessary to begin at the

beginning, to see what is the nature and scope of the compensation under the Act named.

The liability is imposed by section 1—a liability "to pay compensation in accordance with the first Schedule." Under that Schedule, by paragraph (1) (*b*), where "total or partial incapacity for work results from the injury a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings" is to be made to the workman, and in paragraph (3) it is prescribed that in fixing the amount of the weekly payment "regard shall be had to any payment, allowance or benefit which the workman may receive from the employer during the period of his incapacity."

It is really unnecessary to insist on the essentiality of this condition of liability. As has been pointed out in previous cases, it is not the award which creates the liability; an award is merely part of the machinery for determining its amount and for having it enforced. But the liability is imposed by the statute itself, and the statute uses no doubtful language as to the period and purpose of compensation. Where an accident has occurred arising out of and in the course of a workman's employment the statute says that the workman is to receive compensation during the period of the incapacity resultant from that accident. It is most necessary, in view of the numerous questions which have arisen in applying the machinery and procedure prescribed by the Act to effectuate the payment of this compensation, to reaffirm that unless it is impossible to avoid such a result the Act should not be made the instrument of recovering payment for a period during which that incapacity had ceased, which incapacity was the fundamental reason and condition upon which compensation was given.

I refrain from citing at length the decisions upon these points under the Act of 1906. These decisions mark the stages of (1) ending compensation only from the date of an arbitrative award and (2) from the date of beginning the proceedings of the arbitration. These decisions were dealt with in the case of *Gibson and Co. v. Wishart* (30 *The Times* L.R., 540; [1915] A.C., 18), and (3) the final stage was reached and it was definitely decided that when incapacity ceased the period of liability in compensation under the statute ceased.

There can be no dubiety as to the pronouncements made in that case. Said Lord Haldane, "I do not see how" (it being an application for review), "this being a judicial review of the state of health subsequent to the previous decision, and the result of that decision having been limited to the period of incapacity, the workman can claim that payments should be made to him after he must be taken to have ceased to be incapable."

Lord Atkinson puts the matter thus: "For myself I may say that I utterly fail to see upon what principle of justice a workman is, under a decision awarding to him weekly payments during his incapacity, entitled to receive a single payment after his incapacity has ceased, or that when proceedings for review have been properly instituted the employer is not entitled to have the weekly payments ended from the time the incapacity is proved to have ended."

And, if I may be allowed to quote my own judgment: "In Scotland the effect of the recording of the award—an effect making it by the Act 'enforceable' as a decree arbitral—appears to some extent to have been emphasized at the expense of the consideration that the weekly payment was to be made during the continuance of the incapacity." I added this further general observation, to which, after all the experience of these years, I still venture to adhere, "I humbly look upon all the provisions as to procedure for review of the award to be provisions to enable Courts and arbitrators to get back to that cardinal point, to prevent compensation during incapacity being turned into compensation during capacity, and so to readjust awards of total or partial incapacity as to square with the facts."

The question in the present appeal is whether the employer—for it is simplified down to that—has been made liable not only for compensation during the workman's incapacity but, in addition, for compensation during a period of capacity. It is admitted in this case that on September 3, 1925, when the compensation was stopped, the nystagmus had gone and the workman's capacity for all his ordinary work had returned. In my opinion, the Legislature in the Act of 1923 did not intend that compensation should be so continued.

What happened in point of procedure has been seen. The payment is stopped, say, on September 10. Eleven days thereafter the application for review is made; and, before it is heard, it is admitted to be the fact that the incapacity had gone when the payment was stopped. The solicitors' letter raises the point for determination: "You are not entitled to stop his compensation until an order of the Court is actually obtained."

This point depends upon the construction of section 14, which provides that "an employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end . . . a weekly payment," except in three cases which follow; namely, (1) where the workman returns to work; (2) where his weekly earnings have actually increased; and (3) where a medical man has certified recovery. It is provided that in the last case, if there be a conflict between the medical men employed by the parties respectively, a medical referee should be brought in and, pending the settlement of the dispute, the weekly payments unpaid shall be paid into Court.

There is a last proviso, which is not unimportant, to the following effect: "Nothing in this section shall be construed as authorizing an employer to end or diminish a weekly payment in any case in which, or to the extent to which, apart from this section, he would not be entitled to do so." The assumption of that subsection is that there are cases, apart from the section altogether, where the employer would be entitled to end the payments.

The present is not one of the three cases specified in section 14. If it had been a medical reference case, the employer's rights would have been safeguarded, as well as those of the workman, by a payment into Court, and in the result, to use my own language, the payment would have been made to square with the incapacity. The disability of section 14, that an employer shall not be entitled, "otherwise than in pursuance of an agreement or arbitration," to end the payment, seems to me to point clearly to the fact that he is entitled in pursuance of an arbitration to do so. For that reason no doubt, when it was clear that an agreement was not to be come to, a request for an arbitration for review was properly made.

But, says the respondent, he could only be entitled to end payments of compensation "in pursuance of an arbitration," and "in pursuance of an arbitration" means that the arbitration must have been begun, continued, and ended before the compensation could

be stopped. Therefore, proceeds the workman, the injustice so clearly pointed out in *Gibson and Co. v. Wishart* (*supra*), of compensation being paid for a period of incapacity, must be an injustice now legalized by statute.

My Lords, I cannot acquiesce in this reasoning. I think it involves a strain upon the words "in pursuance." I think those words mean simply that when an arbitration takes place the ending of payment must be in accordance with it and with the arbitrator's determination of the date when incapacity ceased. We shall assume that in the present case the unfounded contention on the facts had been persisted in, and at the end, it may be, of protracted proceedings lasting for months, the arbitrator concluded his review of all the facts by affirming that the man had completely recovered on September 3, 1925. My construction of the words "in pursuance of an arbitration," is that, when once the arbitrator determined that fact, then liability under the principal Act, that of 1906, evaporated.

It is quite manifest also from the illustration just given that if this were not so the workman might be in receipt of compensation during long periods of incapacity, and he would have managed to secure these essentially improper allowances by the simple device of denying patent facts and causing great delay till they were proved. It must be finally noted that, when the arbitration is entered upon, it is open to, and indeed the duty of, the arbitrator to say when the workman's incapacity ceased. After that, the statute fits the compensation to that fact. There is nothing in the Act of 1923 which disables an arbitrator from finding out the truth and stating it on this point, nor do I read the Act, which is said to have been passed in contemplation of *Gibson and Co. v. Wishart* (*supra*), as going a single step in the direction of using language from which it would be clear that not until an arbitration came to a close could the anomaly of paying compensation to a completely recovered workman come to an end. If words to that effect had been used it might, of course, be a question whether the proposers of a measure plainly showing that could have secured its passage. With that, however, we have here nothing to to. The case manifestly was one which demanded, if the view taken by the Court below is right, in clear and unambiguous words an extension of compensation to cases where the reason for it had disappeared. I think there are no such words.

Two of the learned Judges held that the decision of *Davies v. Glyncorrwg Colliery Company* ([1925] 2 K.B., 339) was one to which they must bow as substantially deciding the point. Frankly, I think it did. Lord Justice Scrutton did not think so, but formulated opinions which are in accord with the judgments now delivered in this House. In accordance with these opinions, the case of *Davies* (*supra*) and recent Scotch cases in a similar sense must be held to have been wrongly decided. I am humbly of opinion that this appeal must be sustained.

Lord Wrenbury.—My Lords: In this case the workman began to suffer from miner's nystagmus on October 17, 1923. By agreement the appellants made him a weekly payment from October 17, 1923, until September 3, 1925, by way of compensation for the incapacity.

On September 3, 1925, the appellants stopped the weekly payment, and on September 21 served on the respondent an application for arbitration under the Act, asking for termination of the weekly payment as from September 3 on the footing that at that date he had completely recovered. The respondent, by answer on October 13, 1925, contended that he was still incapacitated, but on October 24, before the arbitration came on for hearing, his solicitors wrote to the appellants' solicitors a letter saying, "You may take this letter as an admission that our client is no longer suffering from nystagmus." It was admitted further before the County Court Judge that on September 3 also the respondent had recovered.

The respondent contends that nevertheless the appellants were not entitled to stop his compensation until an order of the Court was actually obtained. The arbitration took place on October 27, 1925. The Judge held that payment was due until October 27, 1925—the date of the order. The Court of Appeal dismissed the employers' appeal.

The question turns upon section 14 of the Act of 1923. It is undoubtedly a very difficult section, but it is much easier to arrive at its true meaning if two points are borne in mind—viz., (1) that the basis of the workman's claim is found in Schedule I. (1) (*b*) to the Act of 1906, in the words "a weekly payment during the incapacity," and (2) that payment *de facto* and liability to make payment are distinct things.

As regards the former there is nowhere to be found in the Act of 1906 or the amending Acts anything to control that phrase "a weekly payment during the incapacity." Wherever I find subsequently in the Acts the words "weekly payment" I am entitled to supply the words "during the incapacity" as if they were there repeated. If the matter goes to arbitration, the arbitrator can give no more than a weekly payment *during the incapacity*. He cannot award a payment to be made after incapacity has ceased. At the moment at which incapacity ceases the weekly payment which he has awarded *ipso facto* comes to an end. There is no adjudication of any payment due in respect of the next week. The arbitrator has no power to award any payment for that week. He cannot by his award create a debt for a weekly payment to be made after incapacity ceased.

As regards the latter a statutory provision that the employer shall not be entitled to end or diminish a weekly payment is a provision that the employer shall *de facto* continue to pay but not necessarily that his liability to pay is thereby enlarged. It may be nothing more than an enactment that until the question whether his liability to pay is a continuing liability or not is decided he shall go on paying *de facto*, and that if it shall be decided that he was not under a continuing liability he shall be left entitled to recover. In my opinion, this is the effect of the section.

I may draw attention in the first instance to an extraordinary result that would ensue in one case mentioned in section 14 if this is not the effect. Assume that the workman has entirely recovered and has "actually returned to work," the employer may stop payment, section 14 (*a*). Suppose, however, that he does not return to work, but (although he is perfectly capable of work) he ostentatiously announces that he is not going to work, that he prefers to be idle and to draw his weekly payment. It follows, if the respondent's contention is right, that the employer would be compelled to go on paying until an arbitration which might not be completed for weeks or months had resulted in an order, and could not even then recover the payments which *de facto* he had continued to make.

The opinion which I hold in the case of *Niddrie*

and Benhar Coal Company v. Dee, about to be delivered, goes a long way towards the decision which must be reached in the present case. It will repay investigation if the alternative of a medical referee under section 14 (*c*) is further considered upon the lines on which I have discussed it in that case. Assume that the employer has opened the ball by serving on the workman a notice of his intention to end the weekly payment; the first possible event is that the workman takes no action. In that case the employer can stop payment at the end of the ten days. The second possible event is that the workman within the ten days sends to the employer a medical report that he has not recovered or has only partially recovered. In that case the employer can only end or diminish the weekly payment in accordance with the report which the workman has obtained or such modification as the employer can obtain from a medical referee in pursuance of rule (15) of Schedule I. to the Act of 1906. But here again two alternatives arise. The matter may (*a*) go on as a medical reference, or (*b*) it may not. The Court may, under section 11 (1) of the Act of 1923, send the matter to arbitration and refuse to allow the medical reference if it finds exceptional difficulty or other sufficient reason for doing so. In case (*a*) certainly, and, as I think, in case (*b*) also, the employer may pay into Court instead of paying the workman, but only in case (*a*) does the Act provide that the money in Court shall be paid out to the winning party. Here, then, are only two possible views. The first is that in case (*b*) the employer cannot pay into Court but must continue to pay the workman. The second is that, although he can pay into Court, the money in any event must be paid out ultimately to the workman because there is nothing to intercept the veto in the opening words of section 14 of the Act of 1923 about ending or diminishing the weekly payment. My Lords, a construction of the section which leads to that result is, in my opinion, impossible. It cannot be that in one event the employer is and in the other is not entitled to be relieved of liability as from the date when incapacity ceases.

All these difficulties disappear if the two points which I stated at the outset are well founded and are observed. Read section 14 as follows: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish *de facto* a weekly payment *during the incapacity* under the principal Act except, &c." If that is the meaning it leaves the right *de jure* unaffected. It decides nothing as to whether the payment "during the incapacity" is due *de jure* or not. It creates in the employer an obligation to pay *de facto* whether he is *de jure* liable or not until the liability *de jure* is determined. This is, of course, a new enactment in favour of the workman, but is not an enactment that, if on the result of an application to recover it is decided that the incapacity had ceased at the date at which the employer alleged that it had ceased, then the award on the original application which could only be an award of payment during the incapacity is extended to an award of payment in respect of a subsequent week when there was no incapacity.

We heard much during the argument of the words "otherwise than in pursuance of an agreement or arbitration." They do not, to my mind, assist the matter much one way or the other. They only provide that the veto upon the discontinuance of payment may be lifted in pursuance of an agreement or by the action of an arbitration.

In *Gibson and Co. v. Wishart* (30 *The Times* L.R., 540; [1915] A.C., 18) this House in 1914 decided that if an employer has *de facto* ceased to pay at a date which he alleged to be and which was subsequently found to be the date of recovery, the arbitrator can, on an application to review, terminate the weekly payments retrospectively as at the date of recovery. I find nothing in the Act of 1923 which affects that decision.

Section 14 of the Act of 1923 does no more, I think, than provide in favour of the workman that in some cases he shall continue to receive *de facto* the weekly payment which (if the employer is right) ceased to be payable under the agreement or award when the condition imposed by the words "during the incapacity" was no longer satisfied. It fails to work this out properly in the several events which it mentions. But it remains that it has not granted to the workman a weekly payment after incapacity ceased. When the question at issue—viz., has incapacity ceased or not and when?—has been answered it leaves untouched the rights of the parties to have any payments made *de facto* readjusted in accordance with the payments which were payable *de jure*. This is, in my opinion, the true construction of the section.

For these reasons this appeal, in my judgment, succeeds, and the matter must be referred back and an award made terminating the weekly payment as and from September 3, 1925, and ordering repayment of any weekly payments made since that date. The appellants must have their costs in the County Court and in the Court of Appeal and in this House.

Lord Carson.—My Lords: I am conscious of the fact that whatever decision is arrived at can be easily criticized as creating anomalies, but that is due to the difficulties created by the terms of section 14 of the Act of 1923. I think it is worth while to glance at the preliminary proceedings before the County Court Judge in the matter of the arbitration which led to the order appealed against. The request for arbitration is in the usual form with respect to the review and termination of the weekly payment payable to the respondent under the Workmen's Compensation Act, 1906, and on the particulars the grounds on which determination is claimed are stated to be "(i) That the respondent on September 3, 1925, had recovered from his said nystagmus; (ii) that the respondent has not since September 3, 1925, been incapacitated by reason of his said nystagmus from performing his ordinary work at his ordinary rates of wages"; and the answer of the respondent was that the applicants were not entitled to the relief sought, and that the grounds of his contention were that he had not recovered as alleged in the applicants' particulars. The only issue therefore raised to be determined in the arbitration was whether the respondent had or had not recovered as alleged. This was all strictly in accordance with the provision of the Act of 1906 and the rules made thereunder from which alone the County Court Judge derived jurisdiction. By the admission of the respondent, as found by the County Court Judge, the issue was found in favour of the appellants, but the County Court Judge, notwithstanding, by his award dated October 27, 1925, ordered the appellants to pay "the weekly sum of £1 *as compensation* for personal injury caused to the respondent by accident arising out of and in the course of his employment" from September 3, 1925, up to October 27, 1925, the day on which he gave his award.

The very terms of the award are self-contradictory, as whatever may be the construction of section 14 of the Act of 1923 it is impossible to describe the payments ordered as "compensation for personal injury," where admittedly the respondent had recovered on September 3, 1925. From what statute did the arbitrator derive authority to give such "compensation" under such circumstances? The only Act granting compensation—viz., the Act of 1906—specifically limits the weekly payments to the duration of incapacity and makes no provision for any payments to be made after incapacity has ceased. We are therefore up against the question whether upon the true construction of section 14 of the Act power is conferred upon the arbitrator in such a proceeding as that under review, having determined that upon a certain date incapacity had ceased, to order payment of compensation, not on the ground of "incapacity," but notwithstanding the complete and admitted recovery of the respondent. My Lords, I can find nothing in section 14 of the Act of 1923 enlarging by inference the power of the arbitrator, nor indeed in any wise altering or changing the power of the arbitrator or the object or result of the proceedings in such arbitration. It is said that unless you so construe section 14 of the said Act you give no meaning to it, but on the other hand one can hardly conceive that, if the basis of compensation for incapacity was intended to be altered by the Legislature, so drastic a change would have been carried out by asking the Courts to draw such an inference from the terms of the said section. My Lords, I am of opinion that section 14 has nothing to do with the arbitrator at all. I think it is an enactment that, pending an agreement or an arbitration, an employer is not entitled to end weekly payments under the Act of 1906, and probably if the employer, contrary to the section, did end such payments, the workman would be entitled to put the law in motion to recover such payments, and the Courts would have power to insist upon such payments, either to the workman or, if the interests of justice so required, into Court pending the determination of the arbitration. But I cannot understand how such payments are to be considered as compensation for incapacity, or confer any right upon the workman to retain them when once it has been decided that the payments were made after the incapacity had ceased. Lord Wrenbury has already pointed out some of the extraordinary results that would follow upon any other construction than that which I have indicated. May I also add one other—viz., that if the contention of the respondent was allowed to prevail the liability of the employer would depend, not on the duration of the incapacity, but on the length of time that elapsed in carrying out the necessary proceedings for the determination of the arbitration, a matter which might be considerably protracted through various causes over which the employer would have no control?

My Lords, as I indicated at the outset, I do not for a moment profess that I am entirely satisfied with the conclusion at which I have arrived, but, in the absence of clear statutory enactment, I am unable to find any reasons for enlarging the periods of payment of compensation beyond the date when incapacity has ceased. I am of opinion, therefore, that this appeal succeeds.

[Solicitors—Messrs. Bell, Brodrick, and Gray, for Messrs. Kensholes and Prosser, Aberdare; Messrs. Smith, Rundell, Dods, and Bockett, for Messrs. Morgan, Bruce, and Nicholas, Pontypridd.]

House of Lords.
(Viscount Cave, L.C., Lord Atkinson, Lord Shaw of Dunfermline, Lord Sumner, and Lord Carson.)

1926. Dec. 7.

MARTIN v. LOWRY.

SAME v. INLAND REVENUE COMMISSIONERS.*

Revenue — Income-tax — Profits of trade—Gigantic deal in linen—Completion of transaction within a year—"Annual" profits—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Cases I. and VI.

The appellant, who was an agricultural machinery merchant, bought a gigantic consignment of linen and set to work to make people buy it, and he succeeded in selling it within a year by organizing a vast activity for that purpose. He was assessed to income-tax under Schedule D on his profits on the sale of the linen, and on appeal to the Special Commissioners he contended that he did not carry on any trade in connexion with linen, that the transaction was an isolated one, and that the profit was not an annual profit chargeable to income-tax. The Special Commissioners held that in exercising these activities the appellant was for the time being carrying on a trade the profits of which were chargeable to income-tax.

Held, that there was evidence on which the Special Commissioners could find the transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year of assessment was enough to make the profits "annual" within Case VI. of Schedule D, and the decision of the Special Commissioners must be affirmed.

Decision of the Court of Appeal (42 *The Times* L.R., 233; [1926] 1 K.B., 550) affirmed.

These were appeals from a decision of the Court of Appeal (42 *The Times* L.R., 233; [1926] 1 K.B., 550) affirming a decision of Mr. Justice Rowlatt (41 *The Times* L.R., 574) on a case stated by the Special Commissioners of Income Tax.

The appellant, who was an agricultural machinery merchant, bought a gigantic consignment of unbleached linen, which had been acquired by the Government for aeroplanes, and he succeeded in selling it within six months from the date of his purchase by organizing a vast activity for that purpose. He was assessed to income-tax under Schedule D, and to excess profits duty in respect of his profits on the sale of the linen.

On appeal to the Special Commissioners he contended that he did not carry on any trade in connexion with linen; that the transaction was an isolated speculation; and that the profits were not annual profits chargeable to income-tax.

The Special Commissioners held that, in exercising those activities, the appellant was for the time being carrying on a trade the profits of which were chargeable to income-tax and to excess profits duty.

Mr. Justice Rowlatt held that there was evidence upon which the Special Commissioners could find the

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year of assessment was enough to make the profits "annual" within Case VI. of Schedule D. He therefore affirmed the determination of the Special Commissioners.

The Court of Appeal (the Master of the Rolls, Lord Justice Atkin, and Lord Justice Sargant) affirmed the decision of Mr. Justice Rowlatt.

Mr. Latter, K.C., and Mr. R. W. Needham appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills, for the Crown, were not called upon to argue.

The Lord Chancellor.—My Lords: It is unnecessary to state all the facts of this extraordinary transaction, which are set out in the case stated by the Special Commissioners for the opinion of the High Court. It is enough to read the finding with which the case concludes, and which is in these terms: "Mr. Martin"—that is, the appellant, who is not usually engaged in the purchase or sale of linen—"purchased a large quantity of linen with the sole intention of selling it again at a profit, and he proceeded to sell it piecemeal by an extensive series of transactions spread over a period of seven months, using for the purpose an organization and methods such as are ordinarily adopted by traders in selling the articles in which they deal. We consider that in exercising these activities Mr. Martin was for the time being carrying on a trade, the profits of which are chargeable to income-tax and excess profits duty." By means of the transactions so described the appellant made a profit of something like £1,600.000, and upon that sum he has been held assessable to income-tax and excess profits duty. The question is whether he was rightly so held, and, if not, why not?

Counsel for the appellant have taken two points. First, they say that the appellant did not carry on a trade or business, but only engaged in a single adventure not involving trading operations. My Lords, the Special Commissioners have found as a fact that he did carry on a trade, and they set out in the case ample material upon which they could come to that conclusion. Indeed, having regard to the methods adopted for the resale of the linen, to the number of operations into which the appellant entered, and to the time occupied by the resale, I do not myself see how they could have come to any other conclusion. That disposes of the appeal as to excess profits duty, which therefore fails.

With regard to the claim for income-tax, the appellant takes another point. He says that at all events these profits did not come within the description of "annual profits or gains" arising or accruing in respect of a trade—those words being quoted from the first paragraph under Schedule D to the Income Tax Act, 1918. He says they did not come within those words because they were not recurrent profits or capable of recurrence from year to year. My Lords, there are, no doubt, passages in the Act in which the word "annual" or the word "yearly" has an implication of recurrence; but one must have regard to the context in which the words are found, and, having regard to the context, I do not think that there is any such implication in the words "annual profits or gains" as applying to the profits or gains arising in respect of a trade which are taxable under Schedule D of the Act. It appears to me that in that context the words bear the construction put upon them by Mr. Justice Rowlatt in the case of *Ryall v. Hoare* (39 *The Times* L.R., 475; [1923] 2 K.B., 447), where he said that the words meant "profits or gains in any one year or in any year as the succession of years comes round." He pointed out that in fact the tax is imposed for one year only, and, having regard to that fact and to the context which accompanies the particular words which he was called upon to construe, he held that those words meant simply the profits or gains accruing in the year in question. I agree with that interpretation as applied to this case, and accordingly I think that the profits which are now in question come within the words of charge, and that this appeal fails. I move your Lordships that it be dismissed with costs.

Lord Atkinson.—My Lords: I concur.

Lord Shaw of Dunfermline.—My Lords: I agree.

Lord Sumner.—My Lords: I agree that there was abundance of evidence to justify the Special Commissioners in holding that the appellant carried on a trade.

With regard to the argument raised on the word "annual," I would point out that the nature of the trade, as described in the case stated, was such as to show that there was at the outset every possibility of repeated trading operations and a considerable chance of their lasting over a protracted period, and I do not question that the word "annual," in connexion with the profits of that trade, would be satisfied by there being profits falling within the year of charge, upon which the system of the Income Tax Acts is based.

In so far as the judgment of Mr. Justice Rowlatt in *Ryall v. Hoare* (39 *The Times* L.R., 475; [1923] 2 K.B., 447) decided a similar point, as I think it did, I concur in his conclusion. In that case it is clear that the profits in question, whatever their other qualities may have been, had the quality of being repeated and of continuing over a considerable period; but I wish to guard myself against appearing to agree with all his instances and observations as reported in 8 Tax Cases, 521. I understand that your Lordships, like the Lords Justices in the Court of Appeal, affirm his decision only in regard to the exact question arising in that case and not in the full breadth of the illustrations that he gave. I would point out that the case on which he relied, which is *Wylie v. Eccott* ([1913] S.C., 16), was a case in which liability to the tax in respect of the letting of a furnished house was admitted, and the question in dispute was as to the right to a deduction. Accordingly, it is not authority, as the learned Judge would appear to have thought that it was, for some of the more extended cases that he mentioned. The whole subject is a difficult one, and as I hope some time, and perhaps before long, your Lordships may have the opportunity of considering it in full detail, I make no further observation about it, except that I should wish to reserve my judgment very fully on every aspect of it that goes beyond the facts of this particular case.

Lord Carson:—My Lords: I also concur with the motion which has been moved from the Woolsack, and I should like to limit the decision as regards *Ryall v. Hoare* (39 *The Times* L.R., 475; [1923] 2 K.B., 447) to what is necessary to be decided in this case. The learned Judge who decided that case introduced instances, where he thought income-tax would be payable, where there was in reality no trade being carried on and where it could hardly be alleged

that trade was being carried on, they being isolated transactions. My Lords, I desire, like my noble friend who has preceded me, to reserve my opinion upon that subject if it ever becomes necessary to decide it.

[Solicitors—Mr. Charles Wright ; the Solicitor of Inland Revenue.]

Court of Appeal. (Bankes, Scrutton, and Sargant, L.JJ.) 1926. Dec. 9.

THE STIKLESTAD.*

Ship—Salvage—Services rendered by request—No actual benefit resulting therefrom—Award—S.O.S. calls for assistance.

Wireless signals for assistance made by the defendants' steamship were picked up by the plaintiffs' steamship, which was then asked by wireless to give towage services for a daily rate of remuneration. The plaintiffs declined to assist except on a salvage basis, and finally the defendants' steamship wirelessed "Accept your offer for assistance." Thereupon the plaintiffs' steamship steamed some 120 miles to the defendants' steamship, deviating for the purpose from her own course, but, although she was after a time able to make fast, the tow-ropes soon parted, and the plaintiffs' vessel resumed her voyage by mutual arrangement without having rendered any really beneficial service. Subsequently the defendants' ship was towed into port by other salvors.

Held, that although merely responding to an S.O.S. call for assistance would not of itself necessarily give a claim to salvage remuneration, yet where a ship was definitely requested by wireless to come to the aid of a disabled vessel and do what she could to assist her, and she did go to the assistance of the disabled vessel, she was entitled to a salvage award, even although, as events turned out, she was not able to confer much, if any, benefit.

Decision of Bateson, J. (42 *The Times* L.R., 720 ; [1926] P., 205), affirmed.

This was an appeal by the owners of the Norwegian steamship Stiklestad from the decision of Mr. Justice Bateson (42 *The Times* L.R., 720 ; [1926] P., 205), in an action brought for salvage remuneration for services rendered to the Stiklestad.

Consolidated actions were brought by the owners, masters, and crews of the Dutch steam tug Zwarte Zee, the Norwegian steamships Dampfem and Flint, and the British steamship Geraldine Mary to recover salvage for services rendered to the steamship Stiklestad, of Oslo.

On October 3, 1925, the Stiklestad, a vessel of 6,350 tons, while bound from Rotterdam to Wabana, Newfoundland, in ballast, broke down in mid-Atlantic through injury to her propeller. Being fitted with wireless, she was able to communicate her position, and her owners made every effort to send out assistance. The Reindeer, a salvage steamer, was dispatched from St. John's, Newfoundland, but after several attempts to reach the disabled ship she was forced to return to port, damaged by the terrific gales which at that time prevailed, and which caused so many casualties among shipping. Vessels which were known to be passing through that part of the Atlantic were specially requested by wireless to keep a look-out for the Stiklestad, and on October 20 the Dempfem, which was bound from Rotterdam to Wabana, picked up the Stiklestad. On the following day, however, owing to the weather, she was forced to proceed on her voyage without having succeeded in taking the Stiklestad in tow.

On October 22 the Geraldine Mary fell in with the Stiklestad, which, being quite helpless and at the mercy of wind and current, was drifting more or less in a circle. The weather was still bad, and the Geraldine Mary was unable for several days to establish connexion. She stood by, and eventually succeeded in passing a tow-rope and making fast. On October 29, however, the tow-rope parted, and the Geraldine Mary resumed her voyage. By that time the Stiklestad was running short of provisions.

On October 30 the steamship Vittorio Emmanuel fell in with the Stiklestad, but left on the 31st, after trying, unsuccessfully, to supply the Stiklestad with provisions. Meanwhile, the owners of the Stiklestad had made arrangements for an American salvage steamship, the Relief, to be sent out, and on November 3 the Relief reached the Stiklestad and took her in tow for the Azores. The Flint, which came up shortly afterwards, kept the vessels company, by request, for several days.

Messrs. L. Smit and Co., of Rotterdam, although aware of the arrangements made to send out the Relief, and of the possibility that at any moment the Stiklestad might be picked up by some other vessel, dispatched their tug Zwarte Zee, a vessel of 600 tons gross, a distance of over 1,000 miles to the assistance of the Stiklestad. They had been asked to quote terms, but preferred to perform the service on a "no cure no pay" basis. While the Zwarte Zee was on her way, and still a long distance from the disabled vessel, information was received by wireless that the Relief had the Stiklestad in tow. Nevertheless, the Zwarte Zee was instructed to proceed. On November 5 the tow-rope connecting the Relief to the Stiklestad broke, and the vessels did not get connected again until the 8th. On November 9 the Zwarte Zee, which had been delayed by head gales, reached the Stiklestad and also made fast. By this time the weather had much improved, and, towed by the Relief and the Zwarte Zee, the Stiklestad arrived safely at the Azores on November 11. The value of the Stiklestad was agreed at £31,000.

Mr. Justice Bateson held that, although merely responding to an S O S call for assistance would not of itself necessarily give a claim to salvage remuneration, yet, where a ship was definitely requested by wireless to go to the aid of a disabled vessel and do what she could to assist her, and she did go to the assistance of the disabled vessel, she was entitled to a salvage award, even though, as events turned out, she was not able to confer much, if any, benefit.

In the result his Lordship awarded £4,000 to the Zwarte Zee, £2,400 to the Geraldine Mary, £800 to the Flint, and £400 to the Dampfem.

The owners of the Stiklestad appealed against so much of his Lordship's judgment as awarded £4,000 to the Zwarte Zee.

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

Mr. Dunlop, K.C., and Mr. B. B. Stenham appeared for the appellants; Mr. G. P. Langton, K.C., and Mr. H. C. S. Dumas, for the respondents, were not called upon.

Lord Justice Bankes, in giving judgment, said that the rule of that Court was well established that they ought not to interfere with an award made by a Judge in the Court below, even though they thought that the amount was rather more or rather less than they would themselves have given, unless they could come to the conclusion that an obvious mistake had been made—*e.g.*, by taking an exaggerated view of the facts or because there had been a misdirection in law. He thought that it was impossible to say that anything of that kind had happened here. He was of opinion, having read Mr. Justice Bateson's judgment, that that Judge had correctly appreciated all the circumstances; that he had not taken into account matters which he ought not; and that he had considered all the points which had been brought to his attention. The case did not fall within the class of cases in which the Court of Appeal would interfere, and the appeal, therefore, failed, and would be dismissed.

Lord Justice Scrutton and Lord Justice Sargant agreed.

[Solicitors—Messrs. Thomas Cooper and Co.; Messrs. William A. Crump and Son.]

Chan. Div. (Eve, J.). 1926. Nov. 17.

JOE LEE, LIMITED v. LORD DALMENY AND OTHERS.

SAME v. TATTERSALL'S COMMITTEE.*

Gaming—Betting disputes—Agreement to refer to arbitrator—Whether enforceable—Gaming Act, 1845 (8 and 9 Vict., c. 109), s. 18.

Where an agreement to refer betting disputes to a particular arbitrator is an integral part of the bargain by which the bets are made, the agreement to refer is itself a contract by way of gaming or wagering and is unenforceable.

These two actions, which were tried together, were brought by the plaintiffs, Joe Lee, Limited, turf commission agents, of Conduit-street, against Lord Dalmeny and others, forming Tattersall's Committee. The object of the actions was to obtain a decision on what was alleged to be a very serious question of principle with regard to bookmaking generally in this country—namely, whether the committee of Tattersalls were entitled to arrogate to themselves the right to give a decision upon any bet in dispute between bookmakers and their clients that might be brought before them, irrespectively of the consent of both parties, and, without any risk of restraint by the Court, to proceed therein contrary to the wishes of one of the parties or in his absence. The result of a decision given under those conditions, if hostile to the bookmaker, would inevitably result in his being reported to the Jockey Club and in his being warned off the Turf.

* Reported by A. W. Chaster, Esq., Barrister-at-Law.

The plaintiffs, who were bookmakers, claimed an injunction against Lord Dalmeny and others, forming Tattersall's Committee, to restrain them from adjudicating, without the consent of the plaintiffs, upon disputed debts between the plaintiffs and two of their clients, Mr. F. W. D. Pratt and Mrs. Frances, who had also been made defendants. The plaintiffs' two clients claimed to have won bets from the plaintiffs, and in both instances the plaintiffs disputed liability, and alleged that the bets were made on the basis of a binding contract that any dispute should be referred to an arbitrator by mutual agreement. Pratt referred the dispute to an arbitrator, but the arbitrator did not make an award in Pratt's favour, and Pratt subsequently applied to Tattersall's Committee to adjudicate upon his claim. Tattersall's Committee had, by their rules on betting, authority to settle all questions relating to bets, and to report defaulters to the Jockey Club. The committee summoned the plaintiffs to attend before them, and intimated that in the event of the plaintiffs' non-attendance the committee might proceed to adjudicate in their absence. The plaintiffs then brought the present actions.

Mr. Gover, K.C., and Mr. Herbert Jacobs appeared for the plaintiffs; Mr. Geoffrey Lawrence, K.C., and Mr. Wilfrid Hunt for the defendants.

Mr. Gover, in opening the case for the plaintiffs, after stating the question in issue, said that he would ask his Lordship to restrain the defendants from investigating and affecting to adjudicate on the dispute without first obtaining the consent of the person concerned. The effect of an adverse decision followed by a report to the Jockey Club would spell ruin to the bookmakers' business. There were two defendants who had not put in a defence. They were the persons with whom bets were said to have been made.

He then referred to the rules of the club and the committee which appeared in Ruff's "Guide to the Turf." The club was conventionally recognized as the supreme authority on all matters of racing, and therefore those rules were also recognized. He referred to the rules relating to the powers of the stewards and the power to warn off the course. The effect of warning a person off would be to exclude him from all enclosures and betting rings. Advertisements would not be accepted and he would be excluded from sporting clubs.

There were also rules of that club which provided that disputed bets were to be referred to certain members of the committee, and the committee were to adjudicate thereon. By the rules of betting the committee were to have authority to settle disputes and report to the club. The plaintiffs did not see eye to eye with them in those matters. The plaintiffs drew a distinction between betting on the course and betting off the course. As to the first, they thought that there was no more convenient way of dealing with the matter than through Tattersall's Committee. But with regard to the second, they thought that the committee was not entirely a satisfactory tribunal, and that they ought not to be compelled against their will to submit to the committee's decision. In the cases in question in this action there was an express agreement to the contrary if there was a dispute. It was provided that there should be a reference to a particular independent arbitrator. That was done in one of the cases but not in the other.

He submitted, first, that the agreement to refer to a particular arbitrator was perfectly valid ; secondly that, although the Court would not in that or any other case specifically enforce the contract, it would in a proper case restrain a breach of it ; thirdly, that the Court ought to, and would, restrain either party if asked to do so ; fourthly, that as regards Tattersalls, the Court would restrain them from affecting to adjudicate on the matters on two grounds—(*a*) because their act amounted to a wrongful inducing of another to break his contract ; and (*b*) because they threatened to combine, or technically to conspire, with the bettors and each other, first to break the contract, and, secondly, to intimidate the plaintiffs into a course of action in reference to their lawful business which they were not bound to adopt. As to the first point, there was nothing illegal in the business of a bookmaker or in making bets. The extent to which the law had interfered was prescribed by statute and went no farther than this, that bets and securities for them could not be enforced and were avoided.

It followed that a contract or agreement such as this, which was collateral, was enforceable. The bets themselves were perfectly lawful. He referred to *Goodson v. Grierson* (24 *The Times* L.R., 364 ; [1908] 1 K.B., 761) ; *Hyams v. Stuart King* (24 *The Times* L.R., 675 ; [1908] 2 K.B., 696) ; *Whiteman v. Newey* (28 *The Times* L.R., 240) ; *Hyde v. Tyler* (42 *The Times* L.R., 652) ; *Brimelow v. Casson* ([1924] 1 Ch., 302). The action of the defendants need not be malicious : *South Wales Miners' Federation v. Glamorgan Coal Company* (21 *The Times* L.R., 441 ; [1905] A.C., 239) ; *Larkin v. Long* (31 *The Times* L.R., 405 ; [1915] A.C., 814) ; *Pratt v. British Medical Association* (35 *The Times* L.R., 14 ; [1919] 1 K.B., 244).

Mr. Lawrence, for the defendants, submitted that the plaintiffs had not made out any case for their right to an injunction. Before dealing with the legal aspect he would state the facts on which he relied in support of that submission. Lord Penrhyn, the chairman of the Jockey Club, and Lord Dalmeny, the chairman of the committee of Tattersalls, were present if it were necessary for him to produce evidence in support of his case.

The Jockey Club did not take any official cognisance of betting disputes, but acted on the report of Tattersall's Committee. They nominated two members of that committee. The Jockey Club was the authority which had governed flat racing in this country since 1750. They owned Newmarket Heath, and no one could attend there who did not agree to be bound by their rules. One of such rules, for instance, was that no horse could be run there which had been run at an unrecognized meeting. That was a perfectly legitimate exercise of a right of property. In pursuance of that position they passed rules made for the purpose of seeing that persons who did not behave properly were not to come on Newmarket Heath.

Tattersall's Committee began in a room which Richard Tattersall used for the purpose of betting in 1795. About the same time a similar room was used at Newmarket. But it was not until 1881 that the Jockey Club, being consulted with reference to the hearing of disputes in the case of non-members, requested the Newmarket Committee to deal with them. In 1896 the same thing was done with reference to Tattersall's Committee. The result was that in 1899 they were amalgamated and became the present committee. They commanded the respect of the racing world and the bookmakers were represented on the committee—at present by Mr. Sloper. They decided a great many disputes—as many as 1,075 in 1925.

Having regard to the attitude of the Legislature towards betting debts, it was essential that there should be one tribunal for questions arising over bets. It would be impracticable for the matters to be referred to particular persons in every case. He referred to *Day v. Brownrigg* (10 Ch. D., 294) ; *North London Railway Company v. Great Northern Railway Company* (11 Q.B.D., 30). The defendants were not procuring the plaintiffs to take a course which they ought not to be asked to adopt. Moreover, in each case the contract to refer was not collateral to the bet. It was all one contract and was void under the Gaming Act of 1845 and could not be the subject of litigation. He referred also to *Société des Hôtels Réunis v. Hawker* (29 *The Times* L.R., 578). The Courts could not direct the reference to a particular arbitrator (*In re Smith and Service* (6 *The Times* L.R., 434 ; 25 Q.B.D., 545)) ; Russell on Arbitration (10 Ed., 323).

Here in one of the cases there was no agreement in writing to refer, and therefore no agreement could be enforced. The contract was void and the plaintiffs' claim should be dismissed.

Mr. Gover replied. The action was not against the Jockey Club, the proprietors of Newmarket Heath, but against Tattersall's Committee, which was another body altogether. The agreement on which the plaintiffs sued was not a betting transaction at all, but something which arose out of such a transaction. There was nothing illegal or voidable in it, *Hyde v. Tyler* (*supra*).

Mr. Justice Eve, after stating the facts, said that the first question which arose was whether the agreement to refer disputes to a particular arbitrator was a valid and legal agreement. It had been argued that it must be treated as a separate agreement not tainted with illegality. In his opinion it was not a separate agreement. It was an integral part of the bargain by which the bets were made. The result was that it was a contract by way of gaming or wagering, and was unenforceable. That was, in his view, a short answer to the action.

But even if it were otherwise there would not be a ground for the injunction asked for. On the agreement to refer there could be no claim such as that. It was also said that, even if there was no contract, the plaintiffs were in fact coerced into adopting a course in their business which they ought not to be forced to adopt. That was said to be a sort of conspiracy or combination to inflict damage on the plaintiffs unless they were prepared to submit to the arbitration of the committee. He could not take that view. The committee was the recognized tribunal in those matters, and it was for the plaintiffs to elect, if the customers elected, whether they would submit to that tribunal or whether they would allow it to proceed in their absence. It was impossible for him to hold that there was any attempt on the part of the committee or by the customers to coerce the plaintiffs into a course of conduct which they would not otherwise take. The actions failed and must be dismissed, with costs.

[Solicitors—Messrs. Geare and Son, for Messrs. Ross and Son, Horley ; Messrs. Gibson and Weldon, for Messrs. Rustons and Lloyd, Newmarket.]

K.B. Div.
Lord Hewart, C.J.,
Avory and Salter, JJ.
} 1926. Nov. 9.

NASH v. GILES.*

Highways — Repair — Two streets repaired together—One apportionment of total cost—Public Health Acts Amendment Act, 1907 (7 Edw. VII., c. 53), s. 19.

Two streets situated at right angles to one another but forming a continuous road surface were repaired by a local authority under s. 19 of the Public Health Acts Amendment Act, 1907. The local authority included the expenses in a single account, and made an apportionment of the total among the frontagers of both streets.

Held, that the apportionment was bad, and the local authority could not recover the amount ascertained by such an apportionment.

This was a case stated by Hampshire justices.

The appellant, Ernest Nash, on behalf of the Fleet Urban District Council (hereinafter called the local authority), preferred a complaint against the respondent, Colonel Frank Lucas Giles, of Thurlston, Victoria Hill-road, in the district of the local authority, for non-payment of the sum of £35 12s. 6d., being expenses incurred by the local authority in repairing Victoria Hill-road, which had been duly demanded from the respondent and not paid by him.

The following facts were admitted or proved :—

(1) On November 17, 1925, it was made to appear to the local authority that Victoria Hill-road, which was not a highway repairable by the inhabitants at large, was in a dangerous condition and in urgent need of repair.

(2) The respondent was the owner of premises known as "Thurlston," which abutted on the said road.

(3) The Public Health Acts Amendment Act, 1907, was in force in the district.

(4) On November 26, 1925, a notice under the Act was duly served upon the respondent requiring him to execute repairs.

(5) The respondent by his solicitor objected that the notice was not in order, as the work required to be done was more than was authorized by the statute.

(6) The respondent did not comply with the notice and the work was done by the local authority.

(7) Certain repairs were necessary to obviate and remove danger to passengers and vehicles in the said road, which was a street within the meaning of the Act.

(8) At the same time the local authority also did repairs to another street called Branksome Wood-road, which ran at right angles to Victoria Hill-road.

(9) The respondent's premises did not front, adjoin, or abut on Branksome Wood-road.

(10) The expense of the repairs to Victoria Hill-road and Branksome Wood-road was included in one account, and no separate account was kept of the expense of the repairs to each of the said roads.

(11) The expense of repairing both the said roads was charged upon the respective owners, including the respondent, in proportion to the extent of their frontages to the said roads.

The appellant contended :—

(*a*) That the work done was only sufficient to obviate or remove danger to passengers or vehicles.

(*b*) That the two roads were one continuous surface, and were a continuation of one another and formed one street.

(*c*) That the two roads were treated in the same manner, that there was very little difference in the condition of the two roads before the works were commenced, and that the cost to the owners, if the expense of each road had been calculated separately, would have been approximately the same to the respective frontagers.

(*d*) That the local authority were entitled to recover from the respondent his proportionate share of the expenses of the repairs required in order to obviate and remove danger to passengers in Victoria Hill-road.

The respondent contended (*inter alia*) that the apportionment was absolutely bad and the local authority could not recover any part of the expenses because Victoria Hill-road and Branksome Wood-road were separate streets, and the expense should have been separately apportioned.

The justices upheld this contention of the respondent, and found as a fact that Victoria Hill-road and Branksome Wood-road were two separate streets within the meaning of the Act. They held that separate accounts should have been kept and separate apportionments made, and that consequently the local authority's claim failed altogether.

The Public Health Acts Amendment Act, 1907, section 19, subsection 1, provides : "Where repairs are required in the case of any street, not being a highway repairable by the inhabitants at large, to obviate or remove danger to any passenger or vehicle in the street, the local authority may give notice in writing to the owners of the lands and premises fronting, adjoining, or abutting on the street, and may require the owners to execute, within a time to be specified in the notice, such repairs as are described in the notice."

By subsection 2 : "If, within the time specified in the notice, the repairs described in the notice are not executed, the local authority may execute the repairs, and may recover summarily, as a civil debt, the cost of the repairs so executed from the owners in default, and the amount recoverable from each owner shall be in the proportion which the extent of his lands and premises fronting, adjoining, or abutting on the street, bears to the total extent of all lands and premises so fronting, adjoining, or abutting. . . ."

Mr. G. R. Blanco White appeared for the appellant ; and Mr. W. H. Moresby for the respondent.

The Lord Chief Justice.—I think this is a perfectly clear case. The question arises out of a complaint preferred by the appellant against the respondent under section 19 of the Public Health Acts Amendment Act, 1907. To put the matter shortly, the repairs were required by the local authority to be done to a certain private street. The repairs were not done by the respondent, and the local authority thereupon proceeded to do repairs both to this street and to another street which ran at right angles to it. They did not keep separate accounts of the expenses of the repairs to each of the two streets, but mixed them up in one and the same account, and they called upon the respondent to pay a sum bearing to the total expenses of repairing both streets the same proportion as the

* Reported by J. W. Hall, Esq., Barrister-at-Law.

extent of his premises fronting, adjoining, or abutting on the one street bore to the total extent of all the lands and premises fronting, adjoining, or abutting on the two streets. The justices dismissed the complaint. It was not so much as suggested that the two roads were identical with regard to the nature of the repairs required to be done to them. The highest at which it was put was that "the two roads were treated in the same manner, and there was very little difference in the condition of the two roads before the works were commenced, and that the cost to the owners, if the expense of each road had been calculated separately, would have been approximately the same to the respective frontagers." That was how the case was presented to the justices, who were in effect told that the calculation of the amount due from the respondent had not been made on the proper basis, but that the sum claimed was approximately that which would be found to be due if the proper calculation were made. The justices upheld the contention of the respondent that the apportionment was bad, as separate accounts were not kept for the two roads. The argument which has been advanced before this Court is that the justices had mixed up in their minds what is required under section 19 of the Public Health Acts Amendment Act, 1907, with the more formal allocation of expenses, which is called an apportionment under section 150 of the Public Health Act, 1875. There is, however, no magic in the word "apportionment." What is referred to in section 19 of the Act of 1907 is a sort of apportionment. How can the proper figure be arrived at except by a sort of apportionment? It may not be the same apportionment as that under section 150 of the Act of 1875. The method may be different, but there must be an apportionment before it can be said that a particular person is liable to pay a particular sum. In the present case a sum was demanded, but that sum was a totally wrong sum arrived at on a wrong basis, because it was arrived at by mixing up the accounts of the two streets. If that method of calculation is right, why stop at two streets? Why not mix up the accounts of the repairs to twenty streets? It is further suggested that the justices, instead of dismissing the only case put before them, should themselves have proceeded by an examination of the local authority's books, with the help of their officers, to arrive at an apportionment on the right basis. The justices, however, were neither asked to do that, nor had they any power to do it. In my view, the justices took the only course that was open to them in dismissing a complaint demanding a sum which never ought to have been demanded, and which was arrived at by a confused and unjustifiable method. The appeal therefore fails.

MR. JUSTICE AVORY.—I am of the same opinion. It is plain that the amount which the local authority sought to recover was not the amount referred to in section 19 (2) of the Public Health Acts Amendment Act, 1907. The amount which the local authority sought to recover was not in the proportion which the frontage of the respondent's premises bore to the total extent of the lands and premises fronting, adjoining, or abutting on Victoria Hill-road, but in the proportion which the frontage of the respondent's premises bore to the total extent of the lands and premises fronting, adjoining, or abutting on Victoria Hill-road and Branksome Wood-road. The justices had no jurisdiction to award the amount which the local authority sought to recover.

I cannot accept the argument of the appellant's counsel that the justices ought not to have dismissed the complaint but ought themselves to have made a proper apportionment. The justices had no power to assess damages as if they were a jury. Their powers were strictly limited by the provisions of the statute: they could only order payment of the sum claimed, if found on the evidence to be payable.

MR. JUSTICE SALTER.—I also agree. The amount which the local authority were entitled to recover was never proved and therefore the claim failed. The amount which the respondent was called upon to pay was arrived at on a wrong basis, because it was partly in respect of the repairs of a road which he was not and could not be called on to repair.

[Solicitors—Mr. Ernest Nash, Fleet, Hants; Messrs. Tucker, Hussey, and Martin, for Messrs. Kempson and Wright, Farnham, Surrey.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.) } 1926. Oct. 25.

BALMFORTH v. CHADBURN.*

Rag Flock—New cloth—Excess of chlorine—Freedom from impurities — Offence — Rag Flock Act, 1911 (1 and 2 Geo. V., c. 52), s. 1—Rag Flock Regulations, 1912 (S.R. and O., 1912, No. 578), Art. 1.

The test of cleanliness of rag flock, provided by Art. 1 of the Rag Flock Regulations, 1912, is exclusive, and if the permitted amount of chlorine is exceeded an offence is committed whether the rag flock is otherwise pure or not, and whether it is made from new or old material.

This was a case stated by Mr. Horace Marshall, stipendiary police magistrate for the city of Leeds. On March 23, 1926, an information was duly laid by one Arthur Balmforth, of the Public Health Department of the Corporation of the City of Leeds, sanitary inspector (hereinafter called "the appellant"), against William Chadburn and John William Chadburn (hereinafter called "the respondents"), for that the respondents on February 17, 1926, in the city of Leeds, unlawfully did have in their possession for sale certain flock manufactured from rags, which flock did not conform to the standard of cleanliness prescribed by the Minister of Health, namely, to the Rag Flock Regulations, 1912, in that the said flock contained in 100,000 parts 70 parts of soluble chlorine. The information was heard on April 13, 1926, and was dismissed.

At the hearing of the information it was proved or admitted:—

(*a*) That the appellant was a sanitary inspector of the Leeds Corporation, duly authorized to institute and carry on proceedings herein.

(*b*) That the respondents jointly carried on the business of manufacturers of rag flock for sale at Tong-road in the city of Leeds.

(*c*) That on February 17, 1926, the appellant visited the premises of the respondents and took a sample of flock which he divided into two parts and placed in tins, one of which was given to one of the

* Reported by J. W. HALL, Esq., Barrister-at-Law.

respondents, and the other was forwarded in sealed condition to the city analyst.

(*d*) That the rags from which the flock was made consisted of small pieces of new unwashed material, being unused clippings of new cloth.

(*e*) That upon analysis one portion of the rag flock was found to contain 70 parts of soluble chlorine in every 100,000, and the other portion was found to contain 113 parts of chlorine in 100,000.

(*f*) That upon analysis the flock was found to be perfectly clean and free from all impurities, and was, in fact, suitable for the purpose for which it was used.

(*g*) That the chlorine test was not a test as to whether flock was dirty or impure or fit to be used.

(*h*) That the said test was merely a test as to whether flock, whether new and clean or not, had in fact been washed.

(*i*) That the additional cost of re-washing new cloth increased the price of flocks from £5 to £7 per ton.

The Rag Flock Act, 1911, provides by section 1 : "(1) It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags, or to have in his possession flock manufactured from rags intended to be used for any such purpose, unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government Board, and, if any person sells or uses or has in his possession flock in contravention of this Act, he shall be liable on summary conviction to a fine not exceeding in the case of a first offence ten pounds, or in the case of a second or subsequent offence, fifty pounds . . . (4) Where a person is charged with having flock in his possession in contravention of this Act any flock proved in the proceedings to have been found in his possession shall be deemed to be intended for sale or for use in the manufacture of such articles as aforesaid, unless the contrary is proved."

The Rag Flock Regulations, 1912, made under the Rag Flock Act, 1911, provide (*inter alia*) that it is expedient that the regulations hereinafter set forth be made in relation to flock manufactured from rags :—

Article 1.—"Flock shall be deemed to conform to the standard of cleanliness for the purposes of subsection (1) of section 1 of the Act when the amount of soluble chlorine in the form of chlorides, removed by thorough washing with distilled water at a temperature not exceeding 25 degrees Centigrade from not less than 40 grammes of a well mixed sample of flock, does not exceed 30 parts of chlorine in 100,000 parts of the flock."

Upon these facts it was contended by the respondents :—

(1) That the flock in question, being made from new and uncontaminated material, was not flock manufactured from "rags" and therefore did not come within the Act or regulations.

(2) That at the time of the passing of the Act and regulations the manufacture of flock from new material was unknown to the trade, and that the Act and regulations could not therefore have been intended to apply to such material.

(3) That the Act of 1911 was passed to deal with harmful or contaminated rags, rags worn, soiled, or polluted by human contact or otherwise, and possibly of an infectious nature, and that chlorine (*per se*) was not injurious or harmful, but that the presence of chlorine in rags of worn clothes, &c., usually denoted the presence of other harmful contamination arising from human contact, urine, or other forms of excretion.

(4) That, whilst the Act of Parliament forbade the possession of flock for sale which did not conform to the standard to be prescribed by regulations, the regulations did not prescribe a standard required in all cases, but merely prescribed one method by which the flock would be "deemed to conform" to that standard.

It was contended by the appellant :—

(1) That the regulations prescribed a definite standard of cleanliness, and that any rag flock which, when subjected to the test specified in the regulations, was found to contain a proportion of chlorine in excess of the proportion specified in the regulations, did not conform to the standard of cleanliness prescribed.

(2) That, although Article 1 of the regulations was worded in positive terms, so as specifically to refer to such flock as "shall be deemed to" conform to the necessary standard of cleanliness, the only reasonable interpretation which could be put on the Act and the regulations was that any flock which on testing showed results inconsistent with the result specified in the regulations did not conform to the standard required by the Act ; that the regulations were the only regulations which had been made by the Government Department under this Act, and the fact that that Department had named only one standard as a test of conformity would appear to justify the assumption that any rag flock other than that which on testing showed a proportion of chlorine not exceeding that stated in the regulations was not to be deemed to conform to the necessary standard of cleanliness.

(3) That the Act and regulations in no way referred to any other test of cleanliness, and that an informant was not entitled to give, nor was a court bound to hear, any evidence relating to any test other than that referred to in the regulations.

(4) That support for the above contentions was contained in the judgments in the case of *Cooper v. Swift* ([1914] 1 K.B., 253).

The magistrate was of opinion :—

(1) That the decision in *Cooper v. Swift* (*supra*), being a decision upon totally different facts and upon a specific construction put upon the word "rags" by the magistrate, namely, that "rags" must be either portions of a garment or some material which has been worn or used by a human being or animal, or portions of a material which after being detached have been used in that way, was not a decision binding in this case ; and that the said decision must be confined to a state of similar facts where actual pollution was shown on analysis. In that case Mr. Justice Avory said : "In my opinion an offence is proved to have been committed when it is shown that the flock has been manufactured from rags which are in that state of pollution, however caused, that they do not conform to the standard of cleanliness prescribed by the regulations."

(2) That where pollution was shown to exist the Act and regulations, reasonably construed, were wide enough to secure a conviction, but that the regulations did not purport and were not expressed to give an exclusive definition of the standard of cleanliness enacted, but were expressed to define a standard of cleanliness by washing only.

(3) That the words in Article 1 of the regulations : "Flock shall be deemed to conform to the standard of cleanliness for the purposes . . . of the Act when the amount of soluble chlorine removed by thorough washing . . . does not exceed 30 parts . . .

in 100,000" could not logically be read to mean: "No flock shall be deemed to conform to such standard when the chlorine removed by washing exceeds 30 parts in 100,000," and that a legal construction could not be based upon a logical fallacy.

(4) That, if the regulations had been intended to set up the washing test as the exclusive test of cleanliness, clear words to that effect would have been adopted.

(5) That the Act and regulations, being penal, must be construed strictly and reasonably, and that the construction sought to be placed upon them by the appellant was neither reasonable nor strict.

(6) That, whether the word "rag" could or could not include pieces of new clean material clipped from bulk, the regulations were not intended or expressed to apply to material which, being found clean on analysis, did not require washing.

The magistrate dismissed the information accordingly.

The question for the opinion of the Court was whether the magistrate was right in law in so doing.

Mr. Mortimer, K.C., and Mr. Oldroyd appeared for the appellant; Mr. Arthur Morley for the respondents.

The Lord Chief Justice.—This is a very clear case. It is not necessary to repeat the facts. If one looks at Article 1 of the Rag Flock Regulations, 1912, the mere form of it might suggest, apart from anything else, that one standard was being laid down, but Article 1 must be read closely in connexion with the section of the Act under which it is made. By section 1, subsection (1), of the Rag Flock Act, 1911, it is provided: "It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose, unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government Board. . . ." What, then, is the standard of cleanliness and what is conformity? Article 1 of the Rag Flock Regulations says: "Flock shall be deemed to conform to the standard of cleanliness for the purposes of subsection (1) of section 1 of the Act when the amount of soluble chlorine in the form of chlorides, removed by thorough washing with distilled water at a temperature not exceeding 25 degrees Centigrade from not less than 40 grammes of a well-mixed sample of flock, does not exceed 30 parts of chlorine in 100,000 parts of flock." That article, being read with the section, clearly means that flock shall be deemed to conform to the standard only when this test is satisfied. The finding of the learned stipendiary appears clearly to be in conflict with the decision of this Court in *Cooper v. Swift* ([1914] 1 K.B., 253). I think it is clear that the learned stipendiary magistrate misdirected himself in this case, and that this appeal ought to be allowed.

Mr. Justice Avory.—I agree, and I only wish to add that, as it appears that some words used by me at the conclusion of my judgment in *Cooper v. Swift* ([1914] 1 K.B., 253) have misled the learned stipendiary magistrate in this case, it is well that I should explain my meaning. I said in my judgment: "An offence is proved to have been committed when it is shown that the flock has been manufactured from rags which are in that state of pollution, however caused, that they do not conform to the standard of cleanliness prescribed by the regulations." I was not there referring to any active pollution of the material which had taken place, but I was using the expression only to describe the condition, and it would be better perhaps if I had used the words "rags which are in that condition, however caused, that they do not conform to the standard of cleanliness prescribed by the regulation." I observe with some satisfaction that my brother Atkin, now Lord Justice Atkin, in his judgment also used the expression "the degree of pollution" in the material; so that, if I was in error, it is some satisfaction to find that he fell into the same error.

Mr. Justice Salter.—I agree.

[Solicitors—Messrs. King, Wigg and Co., for Mr. T. Thornton, Town Clerk, Leeds; Messrs. Collyer-Bristow and Co., for Mr. Alfred Masser, Leeds.]

House of Lords.
(Viscount Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Carson.)

1926.
Nov. 26.

WESTMINSTER BANK, LIMITED v. HILTON.*

Bankers—Negligence—Cheque—Directions by customer to stop payment—Wrong number mentioned — Other particulars correct — Cheque honoured by bank.

The plaintiff, who had an account with the defendant bank, on July 31, 1924, drew a cheque, No. 117285, and post-dated it August 2. On August 1 he telegraphed to the defendants to stop payment of cheque No. 117283, mentioning the payee and the amount. These particulars were correct as to cheque No. 117285, but the number of the cheque was wrong. Cheque No. 117285 was presented on August 6, and the bank officials paid it, supposing that it had been drawn in place of the one that had been stopped. In an action for negligence,

Held, that as the one certain item of identification was the number the bank was not guilty of negligence, and the action failed.

Decision of the Court of Appeal (42 *The Times* L.R., 423) reversed.

This was an appeal from a decision of the Court of Appeal (42 *The Times* L.R., 423) reversing a judgment of Mr. Justice Horridge.

The action was brought by the respondent against the appellants, the Westminster Bank, Limited, to recover damages for breach of duty and negligence as bankers in paying a cheque drawn by him upon the Tottenham branch of the bank in favour of John Poate, and for refusing to pay a cheque which he drew in favour of J. Newman.

In March, 1921, the respondent, a turf commission agent, then residing at No. 45, Morrison-avenue, Stamford Hill, opened an account with the Tottenham branch of the appellant bank.

From May 4, 1923, to February 5, 1924, the respondent did not operate on that account, and the balance standing to the credit of the respondent was 8s. 2d. By August, 1924, he had begun again to operate on the current account, but he had, to the knowledge of the appellants, ceased to reside at

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

No. 45, Morrison-avenue, and had not furnished any other address to the appellants. On July 31, 1924, the respondent drew a cheque in favour of one John Poate, numbered 117285, for the sum of £8 1s. 6d., which was post-dated August 2, 1924. On August 1, 1924, the appellants received from the respondent a registered letter giving no address, but enclosing £8 in cash for the credit of the said account, and later on the same day a telegram in the following terms :— "Stop payment of cheque 117283 amount of £8 1s. 6d. to Poate.—STANLEY HILTON." The telegram did not give the date of the cheque. On receipt of that telegram the cashier, Fuller, following the usual practice in such circumstances, entered upon the stop card kept for the purpose the fact that the appellants were required by the respondent to stop payment of cheque 117283 for £8 1s. 6d. payable to Poate. Further, the ledger clerk made a note to the same effect on a red slip ticket which was kept in the ledger.

On August 2, 1924, the respondent rang up the branch on the telephone and had a conversation with the cashier Fuller, which the Judge at the trial found as a fact to have been in the following terms :— The respondent said, "Did you get my remittance of £8 ?" Fuller said, "Yes." The respondent said, "Did you get my wire stopping the cheque to Poate for £8 1s. 6d. ?" Fuller said, "Yes," and volunteered, "it has not been presented yet." The respondent said, "That is all right," and added either, "It is due for presentment to-day," or else, "It is not presentable till this morning." Fuller said, "All right," and the respondent said, "Then it will be stopped when it comes in," and Fuller said, "Yes." Neither the actual date of the cheque nor the fact that it was post-dated was mentioned by the respondent.

On August 6, 1924, a cheque for £8 1s. 6d., dated August 2, 1924, numbered 117285, drawn by the respondent upon the Tottenham branch and payable to John Poate was presented for payment through the country clearing house, being sent by the head office of the appellant bank to the branch office by post. Upon the receipt of that cheque the branch manager, Stokoe, and the cashier, Fuller, together discussed whether the cheque should be honoured, and decided to and did honour it for the reasons, (1) that the cheque did not bear the number of the cheque of which payment had been countermanded, and (2) that it bore a date subsequent to the instructions received from the respondent, and was therefore probably issued in substitution for the cheque payment of which had been countermanded by the telegram. It was a common occurrence in banking practice when a cheque was stopped that at a later date a cheque for a like amount was presented in substitution. After payment of the cheque the respondent's credit balance amounted to threepence.

On August 20, 1924, the respondent drew a cheque on the branch for £7 in favour of J. Newman, which was duly presented for payment. The appellants had no funds available to pay the same and returned it. It was in respect of these two cheques of August 2 and August 20, 1924, that the action was brought.

The action was first tried before Mr. Justice Branson and a common jury, when the jury disagreed. A second trial on the question of liability only was held before Mr. Justice Horridge, sitting without a jury, damages having been agreed at £75.

That Judge held that the instructions given to the appellants were not so clear and specific as to render them liable for negligence, and gave judgment in their favour.

The Court of Appeal (Lord Justice Bankes, Lord Justice Warrington, and Lord Justice Atkin) reversed that decision and entered judgment for the respondent.

Mr. Neilson, K.C., and Mr. Robert Fortune appeared for the appellants ; Mr. R. James Willis for the respondent.

VISCOUNT DUNEDIN.—My Lords : This is an action brought against a bank for improperly paying a cheque which had been stopped and as a sequel, the customer's account having been depleted, for improperly failing to honour a subsequent cheque which was presented.

The facts are in small compass. The plaintiff styles himself a turf commission agent, in other words, he is occupied with betting transactions. He had an account with the defendant bank at their Tottenham branch, and was in possession of one of the printed form cheque books of that bank. At the relevant date, his credit balance was about £2. On August 1, 1924, in the morning, a letter arrived at the office from the plaintiff enclosing £8 to be put to his credit. On the same morning a telegram marked as handed in at 9.43 a.m. and received at 10.48 a.m. was received in the following terms :—

"To Manager, Westminster Bank, 530, High-road, Tottenham, London, N.—Stop payment of cheque 117283 amount of eight pounds one and sixpence to Poate.—STANLEY HILTON."

On the next day the plaintiff, on his way to Alexandra Park races, rang up the cashier at the defendants' branch and the following conversation took place after mutual identification. "Did you get my cash remittance ?" "Yes." "£8 ?" "Yes." "Did you get my wire to stop cheque to Poate for £8 1s. 6d. ?" "Yes." Then the cashier added, "It has not been presented yet, Mr. Hilton," and Hilton replied, "Oh, that is all right. It is not due to be presented till to-day," or perhaps the words were, "not presentable until to-day." The cashier said, "All right." Then Hilton said, "It will be stopped when it comes in ?" The cashier said, "Yes," and then Hilton rang him off. This conversation is as sworn to by the plaintiff. The cashier quite corroborated the account except as to what was said about the cheque not being presented or presentable. His account of this is as follows :—

"499. Mr. FORTUNE : Mr. Hilton said that he said —he is not quite sure of the words which he used— either 'The cheque is not presentable till to-day,' or 'will not be presented, or is not due for presentment till to-day.' Do you remember anything of that, and if so, what ?—A. No.

"500. Mr. Justice HORRIDGE : 'I cannot remember anything about the date of presentment of the cheque.' That is not justice to you ; the question is not quite put in the form it should be put. He and the other man have both sworn to it. Are you prepared to swear no such conversation took place or that it may have escaped your memory ?—A. I do not think I can, after 18 months.

"501. Mr. FORTUNE : At any rate, whatever the conversation was, can you say whether he did convey to your mind anything as regards the actual date of the cheque ?—A. No such thing was conveyed to my mind.

"502. Q. Did anything that took place on the telephone convey to your mind the fact that this cheque was a post-dated cheque ?—A. I had no idea of it."

On August 6, a cheque for £8 1s. 6d., dated August 2, in favour of John Poate, but numbered 117285, was presented through the country clearing house. This cheque, after consultation between the cashier and manager, was honoured, being, in their view, a different cheque from cheque 117283 to which the stop notice applied. On August 20 a cheque for £7 in favour of J. Newman, signed by the plaintiff, was presented, but, his balance being at that time only 3d., was not honoured.

The case depended before Mr. Justice Horridge. The defendants put their manager in the box before the cashier. Mr. Justice Horridge recalled the manager after he had been examined and cross-examined, and then proceded to do what I cannot help thinking was an unfortunate form of procedure —namely, to examine the manager on the hypothesis of the cashier's account of what had happened, exactly tallying with what the plaintiff said. Then there ensued the following passage :—

"467. Q. If the cashier had said that that cheque was not presented till to-day, meaning August 2, because that was the day it was dated, you would have considered that ?—A. Yes, my Lord.

"468. Q. That would mean, would it not, that you would have considered the person to whom the cheque was payable, the amount for which it was drawn, and the date on which it was presented—you would have had all those particulars, would you not, if that had been communicated to you ?—A. I do not know whether that would actually convey the date of the cheque.

"469. Q. Would you mind telling me anything else it would convey ?—A. It might convey that that was the day on which he imagined the cheque would be presented by the clearing bank.

"470. Q. How could it be if he said it was not presentable, or if he said it was not due for presentation—either one or the other—how could that mean anything else ?—A. I suppose if he——

"471. Q. Keep to the question I am asking. If he said what he says he said—I am not saying whether he did or not ; that will be for me after hearing your cashier—but if he said what he said he did, must not that have conveyed to the cashier that the cheque was not dated till the 2nd ?—A. Yes, my Lord."

I cannot help thinking this very unsatisfactory. First the hypothesis is put in the manager's mouth that he is told that the cheque was post-dated. Then, when he explains that the expression "will not be presented," an expression used in the telephone communication, does not lead to the necessary inference that the date was August 2, he is suddenly peremptorily told to listen to the question. He is reverted to the question as originally put which introduces the date, and he, not unnaturally, answers that it would lead to the conclusion that the date was August 2. Notwithstanding all this, in the long run Mr. Justice Horridge exonerated the bank on the simple ground that 117283 was stopped and 117285 was cashed.

The Court of Appeal reversed Mr. Justice Horridge, and went entirely on the evidence of the bank manager. They considered that the expression "not presented" or "not presentable" necessarily led to the conclusion that the cheque was post-dated and that that ought to have been communicated by the cashier to the manager, and, if it had been so communicated, on the manager's own showing, further inquiry would then have been made.

My Lords, I have been unable to grasp how the expression "not to be presented till this day"—and that was all that might have been said—could lead to the view that the cheque was post-dated. I think, therefore, that the cashier was perfectly entitled to take, as he did, the telephonic conversation as a mere confirmation of the telegram, and, if so, there was nothing to communicate to the manager. I could not, therefore, agree with the grounds of judgment of the Court of Appeal.

It must always be remembered that a bank can be sued just as much for failing to honour a cheque as for cashing a cheque that had been stopped. Under the regulations the bank had to inform the clearing house by 3.30 p.m. whether they honoured the cheque or not. They did not know the plaintiff's address, and when it comes to a question of identification it must always be remembered that the number of a cheque is the one certain item of identification. There can be only one cheque bearing a printed number ; there may be many cheques in favour of the same drawee and for the same amount. I was at one time inclined to think that, inasmuch as both the cashier and the manager knew that there was a stop on a cheque they ought, on August 6, to have made certain investigations, but I find that they did do so. They followed the ordinary practice. They looked at the ledger, and the ledger showed that no cheque in favour of Poate had come in. I think, therefore, that the view of the officials was correct that the cheque presented being subsequent to the date of the stop instructions might be a duplicate cheque, and that they were bound to cash it.

I move that the appeal should be allowed, and the judgment of Mr. Justice Horridge be restored, the appellants to have their costs in this House and in the Court of Appeal.

Lord Atkinson.—My Lords : It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that *quoad* the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof. Difficulty arises when, as in this case, the principal's order to his agent is ambiguous in character capable of conveying a command bearing different or inconsistent meanings. A question of this kind arose in the case of *Ireland v. Livingston* (L.R., 5 H.L., 395). There was a considerable difference of judicial opinion in the lower Courts. There was ultimately an appeal to the House of Lords. In the House of Lords the question put by Lord Chelmsford (then Lord Chancellor) to the Judges who attended was : whether judgment ought to be entered for the plaintiffs or the defendant in error ? It was held that the judgment of the Exchequer Chamber was wrong and ought to be reversed and that the judgment ought to be as decided by the Court of Queen's Bench for the plaintiffs in error. The principle upon which the decision of the House of Lords was based is correctly stated in the head note in these words :—"Where a letter of orders which constitutes a contract from a merchant to his commission agent is so worded as to be capable of two interpretations, if the agent fairly and honestly assumes it to bear one of those interpretations and acts on that assumption, the merchant cannot be released from his contract on the ground that he

intended it to bear the other. As the error arose from his own indistinctness of expression, he must bear the loss."

Lord Chelmsford, in giving judgment, after stating that the transaction began in a contract of agency and that he would in that light consider it, said : "Now it appears to me that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms."

Lord Westbury concurred with this statement of the law.

In the case of *Curtice v. London City and Midland Bank* (24 *The Times* L.R., 176 ; [1908] 1 K.B., 293) a telegram was, on October 31, 1906, sent by a customer after business hours to his banker purporting to countermand the payment of a cheque this customer had drawn upon this bank, earlier in the day, in favour of the defendants. The telegram was delivered by the Post Office on the same day, October 31, but after office hours, and was therefore only placed in the letter box of the bank. By an oversight of the servants of the bank this telegram was not brought to the notice of the manager till November 2, 1906. On November 1 the cheque was presented and paid.

In an action for money had and received, it was decided that the cheque was not in fact countermanded, within the meaning of the 75th section of the Bills of Exchange Act of 1882, although it might well be that owing to the negligence of the bank officials the notice of the customer's desire to stop the cheque was not received in time.

Lord Justice Fletcher Moulton, as he then was, in delivering judgment, after stating that in matters such as this the banker was *prima facie* the agent of the principal, the customer, said : "It has long been held that an order must be unambiguous. If a master chooses to give an order to his servant that bears two meanings, he cannot find fault with his servant for having taken the meaning which it was not in fact intended to bear ; and that applies to a banker when receiving orders as much as to agents generally. Now that principle which applies to the duty of conveying the mandate in a form in which the meaning is unambiguous applies, in my opinion, *mutatis mutandis* to the question of its authenticity. If the mandate is sent in a form in which a servant, acting reasonably, has no security that the mandate comes from his employer, the employer cannot grumble that he did not act upon it." Now the cheque which the plaintiff in this case says he sought to countermand was one dated August 2, 1926, numbered A117285, drawn in favour of one John Poate, Esq., for the sum of £8 1s. 6d. The mandate intended to countermand the payment of this cheque was contained in the following telegram : "Stop payment cheque 117283 amount Eight pounds one shilling and sixpence to Poate."

It will be observed that in this telegram the date of the cheque is not given, nor is the address of the drawer or of the payee, while the number—which is the very best means of identifying a cheque—is not and cannot be right, since that was the number of a cheque dated July 25, 1924, drawn by the plaintiff in favour of one F. Hinchcliffe, Esq., for £1 10s., and paid on July 26, 1924. This telegram, of which the plaintiff was the author, became, by reason of the incorrect number mentioned in it, the cause of the ambiguity which has been introduced into this case. The plaintiff was examined at the trial touching a conversation which he had by telephone with a cashier of the bank (named Fuller) to which he had sent the above-mentioned telegram. Much depends upon this conversation, and it is better to quote it as it is printed at page 14 of the Appendix. It runs thus :—

"59. Q. Who spoke to you on the 'phone at the other end ?—A. The chief cashier.

"60. Q. Do you know his name ?—A. I think it is Fuller.

"Mr. FORTUNE : Fuller.

"61. Mr. WILLIS : Will you tell my Lord what you said to him ?—A. He identified me first.

"62. Q. Tell my Lord what you said to him and my Lord will see whether he identified you or not. What did you say to him ?—A. When I got through I asked if it was the number—I forget the exact number now—and I said 'Is that number so-and-so,' and a voice said 'Yes.' I recognized the chief cashier's voice. I said 'Mr. Hilton speaking.' He said something—I forget the exact words—I said '45, Morrison-avenue.' I then said 'Did you get my cash remittance ?' He said 'Yes.' I said '£8.' He said 'Yes.' I said 'Did you get my wire stopping cheque to Poate for £8 1s. 6d. ?' He said 'Yes.' Then he volunteered. He said 'It has not been presented yet, Mr. Hilton.' He volunteered that without my asking him. I said 'Oh, that is all right ; it is not due to be presented before to-day'—I forget the exact words, but it was either 'not presentable until to-day' or 'not to be presented until this morning.'

"63. MR. JUSTICE HORRIDGE : Give me that again ?—A. Either it was not to be presented until to-day or was not presentable until this morning.

"64. Mr. WILLIS : Did he say anything ?—A. Yes, he said 'All right, Mr. Hilton,' and I said 'It will be stopped when it comes in.' He said 'Yes.' I said 'All right, thank you,' and rang off."

A bookmaker's clerk named Hughes, in the employment of the plaintiff, was also examined on this point, and deposed as follows :—

"269. Mr. WILLIS : Did you hear Mr. Howard speak on the telephone ?—A. Yes. I went into the telephone box with him.

"270. Q. What did you hear Mr. Howard say ?—A. I heard him give a number and there was a pause. Then he said 'Mr. Hilton speaking. Did you receive my cash ?' Then there was another pause. He said 'No. 45, Morrison-avenue.' Then he said '£8 in notes in a registered envelope.' Then there was another pause. 'Did you receive my wire stopping cheque to Poate for £8 1s. 6d. ?' There was another pause, and then Mr. Hilton said 'It is not due for presentment until to-day.'"

Now it will be observed that the plaintiff's evidence and that of his clerk Hughes as to what took place when the telephone message was sent do not quite agree, but the more important matter is that the plaintiff himself states that he forgets the precise words used on that occasion, but that they were either "*not presentable until to-day*" or "not *to be* presented *till this morning.*" These two forms of expression have entirely different meanings—"Not presentable until to-day" means that the payee would not be entitled to obtain payment of the cheque until "to-day" and because of that the words may possibly suggest that the date of the cheque

was "to-day," I hardly think they do, but the words "not to be presented till to-day" might apply to any cheque whenever drawn and it does not suggest the date in the same way.

The manager of the bank, Mr. Stokoe, was examined for the defence. He was subjected to an examination by the presiding Judge closely resembling the cross-examination of a hostile counsel. He knew nothing of what had been said during the telephone conversation between the plaintiff and the cashier, Mr. Fuller. He was not told anything about it till long afterwards. But the learned Judge, instead of waiting till the cashier, who carried on the conversation by telephone, had been examined and given his account of what took place, put a number of hypothetical questions to the bank manager framed thus: "If you had heard what the plaintiff says was said, what would you have done?" &c. I think this was a most undesirable course to take because it was always possible that the cashier's evidence would conflict with that of the plaintiff, and cause the course which the manager might say he would take to be based on contradicted evidence.

Both the manager and the cashier stated, however, that when they saw this cheque with the date August 2 on it, they concluded it was a duplicate of the one countermanded, since it was dated after the telegram had been sent, and that they had no reason to doubt the number given on the telegram.

As the learned Lords Justices in the Court of Appeal seem to have given great weight to the manager's replies to the hypothetical questions put to him, I think it well to quote some of the most important of these replies.

The manager having been recalled, the learned Judge said to him, "Mr. Fortune asked you a question in re-examination, and you gave this answer: 'Looking at the date, I saw it was subsequent to the instructions, so we thought it was a duplicate.' I want you to consider that answer you gave carefully. You know that the plaintiff in this case says that he told your cashier and your cashier said, 'It has not been presented yet,' and he said, 'That is all right. It was not due till to-day, or it was not to be presented until this morning.' If the cashier had communicated that to you—I am not saying either way, but, supposing I find that that was the fact, and that he said that to your cashier—if your cashier had communicated that to you would it have been a matter that you would have considered?" The manager's answer is, "Yes, my Lord." If the cashier had said that that cheque was not due till to-day, meaning August 2 (because that was the day it was dated), would you have considered that? No witness has even suggested that the words in brackets "because that was the day it was dated" were ever spoken by anybody to anybody connected with the case.

He is then asked:

"That would mean, would it not, that you would have considered the person to whom the cheque was payable, the amount for which it was drawn, and the date on which it was presented—you would have had all those particulars, would you not, if that had been communicated to you?—A. I do not know whether that would actually convey the date of the cheque.

"469. Q. Would you mind telling me anything else it would convey?—A. It might convey that that was the day on which he imagined the cheque would be presented by the clearing bank.

"470. Q. How could it be if he said it was not presentable or if he said it was not due for presentation—either one or the other—how could that mean anything else?—A. I suppose if he . . .

"471. Q. Keep to the question I am asking. If he said what he says he said—I am not saying whether he did or not; that will be for me after hearing your cashier—but if he said what he said he did, must not that have conveyed to the cashier that the cheque was not dated till the 2nd?—A. Yes, my Lord.

"472. Q. Then if you had been told that, you would have had the person to whom the cheque was made payable, you would have had the amount of the cheque, which was an odd sum, £8 1s. 6d., and you would have had the date of the cheque. Therefore, you would not think it was a cheque drawn after your instructions had been received. Having all those materials before you, would you have paid the cheque without doing something else?—A. No, my Lord.

"473. Q. If you had had the communication before you, because you had the other material before you, from the cashier, 'I should not have paid it without doing something else,' what else would you have done? Would you have looked in the paid cheque drawer to see whether 117283 had been paid or not?—A. Yes, I think we should, my Lord.

"474. Q. To see if 117283 had passed too. That is what it amounts to, is it not?—A. Yes, my Lord."

Mr. Fuller, the cashier, was then examined.

My Lords, I cannot but think the way in which he was dealt with by the learned Judge was objectionable and not calculated to elicit the truth. The plaintiff had proved that a long conversation on the telephone had taken place between the cashier and himself, questions being asked and answered by both. Surely, it would have been better to have examined or cross-examined the cashier as to each particular individual statement alleged to have been made to him or by him. Instead of doing that immediately after his having said "I cannot remember anything about the date of presentation of the cheque," the learned Judge puts the whole conversation *in globo* to the witness, and asks him, "Are you prepared to swear that no such conversation took place, or that it may have escaped your memory?" And the cashier answers, "I do not think I can after 18 months." That means, of course, that he cannot swear that no such conversation took place, but he might well have not been able to recall the whole conversation and yet have been able to remember some particular expressions or expression used in the course of it. Many times a witness will truly state, "I cannot remember the whole of that conversation, but I can remember that I never made use of a certain word or expression that is alleged against me."

Mr. Fortune then proceeded with the examination of the witness, and the following questions were put to the cashier and answered:—

"501. Mr. Fortune: At any rate, whatever the conversation was, can you say whether he did convey to your mind anything as regards the actual date of the cheque?—A. No such thing was conveyed to my mind.

"502. Q. Did anything that took place on the telephone convey to your mind the fact that this cheque was a post-dated cheque?—A. I had no idea of it.

"506. Q. And when you got to this cheque to Poate for £8 1s. 6d., No. 117285, what did you do?—A. I took it in to the manager and referred it to him.

"507. Mr. Justice Horridge: Do you mean with the telegram?—A. Yes, the telegram."

In the further cross-examination of the manager there were other questions, but as my Lord on the Woolsack has already read those it is unnecessary for me to repeat them.

Mr. Justice Horridge, in delivering judgment, said he was not prepared to hold that the bank manager was guilty of negligence in the course he took. He held that the original mandate had been absolutely clear and specific. The plaintiff to succeed must show that the countermand was equally clear and specific, and he could not complain if the bank took a possible view of the transaction which was not the view that the plaintiff intended them to take. He rests his judgment upon this point on the cases of *Ireland v. Livingston* (L.R. 5 H.L., 395) and *Miles v. Haslehurst* (23 *The Times* L.R., 142; 12 Com. Cas., 83).

The Court of Appeal reversed this decision and the Lords Justices appear to have to a great extent based their judgment on the admission extracted from the bank manager during his cross-examination by the learned Judge.

The learned Lord Justice Bankes and Lord Justice Warrington (as he then was) seem to have based their judgments on the conclusions they drew from it. They in effect said there was no question about the authority of the telegram sent by the plaintiff. The plaintiff pledged himself to the substance of the telephone communication. The cashier did not. The substance of that conversation would have informed any reasonable person who paid sufficient attention to it, I think, that the cheque, which was referred to in the telegram, was a cheque dated August 2, and, in fact, a post-dated cheque. On August 2, therefore, a telegram was received which contained an important statement, the number of the cheque, 117283. There was a conversation on the telephone supplementing the telegram by adding the date of the cheque and the fact that it was post-dated, but not containing any reference to the number of the cheque or that the number, as given on the telegram, was wrong. That is the state of things on August 2, and this cheque was presented on the 6th.

I confess I am quite unable to arrive at the conclusion stated at page 78 of the Appendix, to the effect that the telephone gave the date of the cheque or that it was a post-dated one. I do not think it did anything so definite as that. The learned Lords Justices rely upon the fact that if the bank manager had known on August 2 that this cheque was dated August 2, and was a post-dated cheque, he would have jumped to the conclusion straight away that there had been a mistake in the number, and should not have paid the cheque. I do not think the evidence sustains this view. The whole of Lord Justice Bankes's judgment, in my view, rests upon this assumption, that the reasonable construction of the conversation by telephone was that the cheque which was to be stopped was dated August 2, and was a post-dated cheque. It is incredible, I think, that if specific and definite information of that kind had been conveyed to an official like the cashier of a bank, he would either have forgotten it, or failed to realize what was said to him, or omitted to inform his manager of these two facts when they consulted together.

It is, in my mind, the very ambiguity of this telephonic conversation, the omission from it of a clear statement of the two facts so much relied upon—namely, the date of the cheque and the fact that it was a post-dated cheque—which accounts for the cashier's action.

Lord Justice Atkin, at page 87 of the Appendix, states the ground of his decision with great clearness. He said:—

"The bank manager says in terms: 'If I had known of the communication that was made to the bank in the person of the cashier on August 2, I should have had recourse to the cheques which I had already paid. I should have examined them, and I should have found that 83 had already been paid on July 29, and if I had found that 83 had already been paid; I should have treated that as conclusive that the plaintiff intended to refer to this particular cheque which came forward on August 6.' In other words, he says, not 'There would have still been an ambiguity in my mind,' but 'If I had done that which the bank official's information would reasonably have led me to do, then there would have been no ambiguity at all; it would have been cleared up.' It appears to me that under those circumstances the bank are bound, and that the true conclusion is that here there was in fact no ambiguity, because if the bank had acted reasonably and had utilized the means of information that was in their possession—namely, the information of the bank cashier—there would have been no ambiguity left, and they would have construed the mandate in the sense in which the mandate undoubtedly was intended by the plaintiff—namely, as a mandate not to pay this particular cheque."

But no satisfactory explanation was given by the plaintiff of the fact which caused all the ambiguity, and for which the plaintiff is entirely responsible—the mentioning of the wrong number in the telegram. Again, the version of the evidence put to the bank manager, by means of which his statement so much relied upon was extracted, was itself ambiguous.

I am, therefore, unable to concur in the decision which puts so much weight on the manager's reply to this hypothetical question addressed to him. I think the appeal succeeds, that the decision appealed from should be reversed and the decision of Mr. Justice Horridge should be confirmed, with costs, here and in the Court of Appeal.

Lord Shaw of Dunfermline.—My Lords: I concur. The case has reference to the stoppage of a cheque of a particular number, name, date, and amount. When a banker is in possession of sufficient funds to meet such a cheque from a customer, the duty of the bank is to honour that cheque by payment, and failure in this duty may involve the bank in serious liability to its customer.

This duty is ended, and on the contrary when the cheque is stopped another duty arises—namely, to refuse payment. In a case of that character it rests upon the customer to prove that the order to stop reached the bank in time and was unequivocally referable to a cheque then in existence, and signed and issued by the customer before the notice to stop.

It would, of course, be intolerable in business to permit the form of stoppage to be applied to a non-existent and non-issued cheque. Further, in the ordinary course of trade a cheque is signed on the date it bears. This being so the notice of stoppage on reaching the bank will properly be treated as only applying to a cheque bearing a date the same as, or anterior to, the date of stoppage.

To carry the scope of stoppage further and to make it apply to the case (exceptional and out of the ordinary course of business transactions)—the case of cheques which though subsequent to stoppage in date were yet anterior to stoppage at the time of

signature and issue, namely, post-dated cheques—it is, in my view, necessary for the customer to prove and explain the post-dating, but further to prove that this fact was brought clearly home to the mind of the banker so as to bring the post-dated cheque within the order of stoppage.

If these last things are not clearly proved (and the onus of doing so is no light one), then the bank acts rightly in declining to dishonour a cheque which *ex facie* bears a date subsequent to the stoppage.

In the present case the customer has, I am humbly of opinion, failed to discharge this onus, and in particular has failed to show that there was brought home to the bank knowledge of post-dating as now alleged. The customer, however, pleads that the bank failed in its duty, because having been asked to stop a cheque numbered 117283, and this request having been made by telegram on the morning of August 1, the bank honoured a cheque bearing another number—namely, 117285—and dated August 2, that is, one day after the stoppage.

The perplexity arose from the fact that the cheque as presented was for the same sum and to the same payee. But this perplexity arose not from any act of the bank but was actually caused by the acts of the customer, and *Ireland v. Livingston* (L.R., 5 H.L., 395) clearly applies. In the circumstances stated, was the banker to enter into a conjecture that the stopped cheque was the same cheque as one bearing a different number and appearing to have come into existence after the date of stoppage? And did he fail in his duty by not coming to a conclusion of identity? I do not see my way so to affirm, and for myself, I should have thought it highly dangerous in business to act upon any conjecture of the kind, or to dishonour such a cheque except upon clear and unmistakable instructions.

I agree to the motion proposed from the Woolsack.

Lord Wrenbury.—My Lords: On July 31, 1924 (which was a Thursday), the respondent drew and gave to John Poate a cheque for £8 1s. 6d. He post-dated it to August 2 (which was a Saturday). The cheque bore the number 117285. It was drawn upon the appellants' branch at Tottenham. The amount of the cheque was a loan by the respondent to Poate. On the morning of Friday, August 1, the respondent wrote to the bank sending a cash sum of £8 to the credit of his account. This remittance brought the credit balance of the respondent's account up to a sum sufficient to meet the cheque for £8 1s. 6d. Later, upon the same August 1, having reason to believe that Poate would not repay the loan the respondent telegraphed to the bank "Stop payment of cheque 117283 amount of £8 1s. 6d. to Poate." The telegram, it will be observed, did not give the date of the cheque, said nothing about its being a post-dated cheque, and erroneously stated its number to be 117283, when in fact the cheque he had given to Poate bore the number 117285. On August 2 (which was Saturday) the respondent telephoned to Fuller, who was a cashier at the bank. The statement of what passed is given by Fuller at page 14 of the book and was accepted by the Judge. I do not set it out at length. The words relied on by the respondent are that the respondent said: "It (*i.e.*, the cheque) is not due to be presented before to-day," or "is not presentable before to-day," or is "not to be presented before this morning," and that Fuller said: "It will be stopped when it comes in."

The cheque was a country cheque and was crossed. It would have to be sent by Poate to his bankers or to some bankers. By the rubber stamp on the paid cheque it appears that it was in fact cleared through the Westminster Bank, Midhurst. It would have to pass through the County Clearing House and certainly would not have been presented at Tottenham before Saturday, August 2. All the respondent's statements as to its "not being presentable" or "not due to be presented", before to-day, *i.e.*, before August 2, were well founded, but they gave no information as to the date of the cheque or as to its being post-dated. August 3 was a Sunday and August 4 was Bank Holiday. The cheque did not in fact reach the Tottenham branch until August 6. When it came in the appellants paid it. The question is whether they were justified in doing so. In my opinion they were.

There were two facts relating to the cheque which they were directed to stop which in my opinion justified the bank's officers in concluding that the cheque which came in on August 6 was not the cheque they had been ordered to stop. The one is that they were ordered to stop cheque No. 117283. The cheque they paid was No. 117285—a subsequent number and therefore presumably a later cheque. The other is that the cheque they paid bore date August 2, a date later than the telegram of August 1. It might well be that owing to differences between the drawer and the drawee the drawer might have stopped a first cheque and then by reason of those differences being settled he might have given a second cheque for the same sum. Had those been the facts and had the bank dishonoured the second cheque they would have been liable to an action. Their conduct was, I think, completely justified.

In fact the cheque 117283 had been drawn in favour of one Hinchcliffe on July 25, had been cleared on July 28, and was in the bank's hands on August 6. It is extravagant, I think, to suggest that the bank ought to have searched the paid cheques in their possession to correct the misstatement which the respondent made when he named cheque 117283 as the cheque he ordered to be stopped. Moreover, if they had done so that would have led only to the knowledge that their customer had given an erroneous number and would not have indicated in any way that the cheque was a post-dated cheque.

Lord Justice Bankes in the course of his judgment says that the telephonic communication ought to have conveyed (1) that the cheque was in fact dated August 2, and (2) that it was in fact a post-dated cheque. He even goes further and says that "There was a conversation on the telephone supplementing the telegram by adding the date of the cheque and the fact that it was a post-dated cheque." There is nothing whatever in the evidence to support this statement, as a matter of fact, and nothing, in my opinion, to support it as a matter of inference. A misapprehension of this kind runs through all judgments. The learned Judges below went wrong, I think, in attaching to the words which were used over the telephone a meaning which certainly was not conveyed by express words, and which is not, in my opinion, a meaning which the bank ought in the circumstances to have attributed to them and, indeed, is scarcely one which they could reasonably attribute to them.

In my judgment the appeal must be allowed and the action dismissed with costs.

Lord Carson.—My Lords: I agree. The whole difficulty in the case has arisen through the learned Judge at the trial treating the manager of the bank as a kind of expert witness giving an opinion on a

series of hypotheses that were framed before the evidence of the cashier had been given, which, in my opinion, showed how unreliable the hypotheses were. The inferences so provided from the evidence of the manager permeated all the judgments in the Court of Appeal and are, in my opinion, unwarranted.

[Solicitors—Messrs. Donald McMillan and Mott; Messrs. Lawson and Lawson.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1926. Dec. 10.

KOKUSAI KISEN KAISHA v. LOUIS DREYFUS AND CO.*

Ship — Charterparty — Freight — Discount — Computation.

The plaintiffs, as owners, chartered a steamer to the defendants by a charterparty which, after providing for the rate of freight, contained the clause: "The said freight, less advances, if any, to be paid on unloading and right delivery of the cargo in cash, but if ordered outside the United Kingdom to discharge, in London concurrent with discharge, but, in any case, subject to two months' discount at 5 per cent. per annum." A further clause provided: "Money for steamer's ordinary disbursements, not exceeding one-fourth of estimated freight, to be advanced, if required by the captain, at the port of loading by the charterers . . . to be indorsed on bills of lading, if required, and deducted from the freight at settlement."

Held (Lord Hanworth, M.R., dissenting), that the 5 per cent. discount was to be calculated not on the whole amount of the freight but on that amount less advances for disbursements.

This was an appeal from a decision of Mr. Justice Rowlatt.

By a charterparty dated October 23, 1924, the plaintiffs, Kokusai Kisen Kaisha, as owners, chartered a steamer to the defendants, Louis Dreyfus and Co., to go to Australia and load a full and complete cargo of wheat, and carry it to the ports stated in the charterparty.

Clause 8 of the charterparty provided for the rate at which freight was to be paid, and the latter part of the clause was as follows:—

"The said freight, less advances, if any, to be paid on unloading and right delivery of the cargo in cash, but if ordered outside the United Kingdom to discharge, in London concurrent with discharge, but, in any case, subject to two months' discount at 5 per cent. per annum."

Clause 15 of the charterparty provided as follows:—

"Money for steamers' ordinary disbursements, not exceeding one-fourth of estimated freight, to be advanced, if required by the captain, at the port of loading by the charterers . . . to be indorsed on bills of lading, if required, and deducted from the freight at settlement."

Two and a half per cent. was to be added by way of commission for any advances made.

In the events which happened a dispute arose between the shipowners and the charterers about the amount of the discount to be allowed under the latter part of clause 8. The owners contended that it was to be calculated on the amount of the freight, less advances made under clause 15. The charterers contended that the discount was to be calculated on the whole amount of the freight.

The arbitrator held and awarded, subject to the opinion of the Court, that the discount was to be calculated on the whole amount of the freight.

Mr. Justice Rowlatt upheld the award.

The owners appealed.

Mr. James Dickinson appeared for the owners; Mr. Willink for the charterers.

The MASTER of the ROLLS said that, for his part, he thought that Mr. Justice Rowlatt was right, and that the words, "less advances, if any," in clause 8 should be put in parentheses. It was "the freight" which was to be the subject of the discount, and the 5 per cent. discount was to apply "in any case." Advances might or might not be made, but they were to be subject to the words, "if any," and it looked as if the freight, meaning the full freight, was to be the subject of the discount.

LORD JUSTICE ATKIN said that, applying the ordinary rules of discount, it would seem that what was subject to discount was the sum which was to be paid. The words indicated, in the ordinary commercial sense, that a certain sum was to be paid, and the sum which fell due to be paid was the actual sum from which discount could be deducted. If the charterers had got no benefit from the sums which they had advanced, a contrary intention might be indicated, but, in fact, they got 2½ per cent. for whatever period, long or short, the advances might cover. The appeal should, therefore, be allowed.

LORD JUSTICE LAWRENCE delivered judgment agreeing with Lord Justice Atkin.

[Solicitors—Messrs. W. and W. Stocken; Messrs. Richards and Butler.]

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926. Oct. 29.

LEONARD v. WESTERN SERVICES, LIMITED.*

Hackney Carriages—Omnibus—Plying for hire—Return ticket—Omnibuses of same proprietor—Town Police Clauses Act, 1847 (10 and 11 Vict., c. 89), s. 45—Town Police Clauses Act, 1889 (52 and 53 Vict., c. 14), ss. 1-4.

A company of omnibus proprietors which had no licence to ply for hire in the district of R. issued return tickets to R. from a point which was outside R., but was in a district where they were licensed to ply for hire. On the return journey they accepted as passengers from R. only persons holding return tickets issued on one of the company's omnibuses—not necessarily the same vehicle as the one on which the passenger proposed to return.

Held, that in these circumstances there was no plying for hire in the district of R.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

Sales v. Lake (38 *The Times* L.R., 336 ; [1922] 1 K.B., 553) followed.

Armstrong v. Ogle (42 *The Times* L.R., 553 ; [1926] 2 K.B., 438) distinguished.

This was a case stated by justices for the county of Monmouth.

At a Court of Summary Jurisdiction sitting at the Police Court, Pentonville, Newport, an information was laid under the Town Police Clauses Acts, 1847 and 1889 (10 and 11 Vict., c. 89, and 52 and 53 Vict., c. 14), by Norah Leonard (hereinafter called the appellant) against Western Services, Limited (hereinafter called the respondents), for that they, being the proprietors of a certain hackney carriage, to wit, a motor omnibus, did on June 13, 1926, unlawfully permit the said motor omnibus to be used as a hackney carriage plying for hire in the district of Risca without having obtained for the said carriage a licence to ply for hire in the said district as required by the Act in that behalf. The information was heard on July 3, 1926, and was dismissed.

By the Town Police Clauses Act, 1847 (10 and 11 Vict., c. 89), section 45, it is provided as follows :—

"If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage, or during the time that such licence is suspended as hereinafter provided, or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such licence as aforesaid has not been previously obtained . . . every such person so offending shall for every such offence be liable to a penalty not exceeding forty shillings."

The Town Police Clauses Act, 1889 (52 and 53 Vict., c. 14), provides as follows :—

Section 1.—"This Act may be cited as the 'Town Police Clauses Act, 1889,' and this Act and the Town Police Clauses Act, 1847, may be cited together as 'The Town Police Clauses Acts, 1847 and 1889.'"

Section 2 (1).—"This Act shall be construed as one with the principal Act, and the expression 'this Act' in the principal Act shall be construed to mean the principal Act as amended by this Act."

Section 3.—"The term 'omnibus,' where used in this Act, shall include—every omnibus, char-à-banc, waggonette, brake, stage-coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance ; but shall not include . . . any omnibus starting outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance."

Section 4 (1).—"The several terms 'hackney carriages,' 'hackney coach,' 'carriages,' and 'carriage,' whenever used in sections 37, 40 to 52 (both inclusive), 54, 58, and 60 to 67 (both inclusive) of the principal Act shall, notwithstanding anything contained in section 38 of that Act, be deemed to include every omnibus."

Upon the hearing of the said information the following facts were admitted or proved :—

(*a*) The respondents were a limited company, having their registered office at Tredegar, in the county of Monmouth, and were the owners of a number of motor omnibuses and ran a regular daily services of such omnibuses between Tredegar and Newport through Blackwood, Pontllanfraith, Ynysddu, Cwmfelinfach, Wattsville, Cross Keys, Risca, Pontymister, and Rogerstone. The said omnibuses were duly licensed to ply for hire in all these areas other than the Risca area.

(*b*) At 4 p.m. on June 13, 1926, the appellant entered a motor omnibus belonging to the respondents, and numbered 6, while it was standing at Mill-street, in the borough of Newport, and she booked a return ticket to Risca Station Approach and paid 1s. for it.

(*c*) The said motor omnibus No. 6 stopped at Risca Station Approach, which was within the prescribed distance of the area of the Risca Urban District Council, and the appellant got out.

(*d*) After waiting at the said Risca Station Approach and within the prescribed distance of the area of the Risca Urban District Council for a short while the appellant hailed a motor omnibus belonging to the respondents which was travelling in the direction of Newport.

(*e*) The said motor omnibus duly stopped and the appellant boarded the same, and was accepted and conveyed as a passenger in such omnibus to Newport.

(*f*) As the appellant boarded the said omnibus she was asked by the conductor if she had a return ticket, and she said "Yes," and at the same time another person who had not a return ticket and attempted to board the said omnibus was refused admission.

(*g*) The omnibus which the appellant boarded on the return journey was numbered 2, and was a different omnibus from the one which had conveyed her from Newport to Risca, but both omnibuses belonged to the same proprietors—namely, the respondents.

(*h*) The said return ticket issued to the appellant was available for return by any omnibus belonging to the respondents which had sufficient accommodation for her.

(*i*) No accommodation was specially reserved in the omnibus in which the passenger had made the outward journey or in any particular omnibus of the respondents for passengers to whom return tickets had been issued.

(*j*) No licence to ply for hire within the said prescribed distance of the area of the Risca Urban District Council had been obtained in respect of either of the said omnibuses as required by the statutes in that behalf.

On the part of the appellant it was contended that upon the facts as proved or admitted an offence had been committed by the respondents under the aforesaid statutes. The case of *Armstrong v. Ogle* (42 *The Times* L.R., 553 ; [1926] 2 K.B., 438) was cited as an authority in favour of the appellant's contention.

On the part of the respondents it was contended that, as the appellant had booked her ticket outside the prescribed distance and had returned in accordance with the contract made outside the prescribed area, the respondents were not plying for hire within the district of Risca within the meaning of the statutes, and that the decision in the case of *Armstrong v. Ogle* (*supra*) did not apply.

The justices were of opinion that there had not been a plying for hire by the respondents within the district of Risca within the meaning of the aforesaid Acts, and they dismissed the information.

The question upon which the opinion of the Court was desired was whether the justices upon the above statement of facts came to a correct determination

and decision in point of law, and, if not, what should be done in the premises.

Mr. E. W. Cave, K.C., and Mr. A. T. James appeared for the appellant; Mr. C. Paley Scott for the respondents.

The Lord Chief Justice.—In this case the justices were of opinion that there had not been a plying for hire by the respondents within the district referred to. The question for this Court is whether upon the facts stated in the special case the justices came to a correct determination and decision in point of law. In other words, the question is whether there was evidence upon which the justices were entitled to found this conclusion.

The argument on the other side was and is that the case is concluded by the decision in the case of *Armstrong v. Ogle* (42 *The Times* L.R., 553; [1926] 2 K.B., 438), but I am satisfied by the argument of Mr. Paley Scott that this case is distinguishable from that case. In the present case there is no such element as the pooling arrangement or plan which was an essential feature of the scheme of business in *Armstrong v. Ogle* (*supra*). The effect of that pooling arrangement was, amongst other things, that every owner in the association of owners was interested in attracting to his omnibus as many persons as he could with whom he had not himself made a contract, but who had made a contract with some other of the associated proprietors; and the result of his attracting these persons to his omnibus, if he succeeded, was that in the readjustment of accounts he collected money in respect of their fares. In the present case, so far as the facts are known to us, it appears that no person is taken aboard the respondents' omnibuses in the district referred to except persons with whom the respondents have previously themselves made a contract. There is, therefore, no occasion for soliciting, or picking up, or plying for hire; the hiring has already been done. It is not open to the omnibus driver by diligence or by skill to attract to his employers the customers of other employers. In these circumstances it seems to me that this case is distinguished from the case of *Armstrong v. Ogle* (*supra*), and that it comes very much nearer to the case of *Sales v. Lake* (38 *The Times* L.R., 336; [1922] 1 K.B., 553), which was so much discussed in that case.

In these circumstances I am not prepared to say that the justices came to a wrong conclusion, and I think that this appeal ought to be dismissed.

Mr. Justice Avory.—I agree that this case is distinguishable from the case of *Armstrong v. Ogle* (42 *The Times* L.R., 553; [1926] 2 K.B., 438) on the ground which my Lord has pointed out, and which certainly differs from the basis of his judgment in that case, and, if I may say so, from the basis of my own judgment in that case; and as soon as the present case is distinguished from *Armstrong v. Ogle* (*supra*) on that ground it seems to me to fall within the authority of the case of *Sales v. Lake* (38 *The Times* L.R., 336; [1922] 1 K.B., 553). In fact *Armstrong v. Ogle* (*supra*) was only distinguished from the case of *Sales v. Lake* (*supra*) on that very ground which has been mentioned by my Lord. That being so, it appears to me that this case falls within the authority of *Sales v. Lake* (*supra*), and I must follow that case, although, as I have previously said, I was a reluctant assenting member of the Court to that judgment.

Mr. Justice Salter.—I am of the same opinion. I think that to constitute "plying for hire" there must be, without attempting any exhaustive definition, a general invitation by the person in charge of the vehicle to make contracts with him for carriage in his vehicle. Here the person in charge of this omnibus No. 2 did not, so far as the evidence goes, solicit from any person contracts for carriage, and he certainly made no contract with the passenger mentioned in the case. She had already made a contract with his employers, and she was demanding (and she received) the performance of that contract. It therefore seems to me that the justices were right.

[Solicitors—Messrs. Smith, Rundell, Dods, and Bockett, for Messrs. T. S. Edwards and Son, Newport, Mon.; Messrs. Rhys Roberts and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1926. Dec. 9.

BROOME v. MINISTER OF LABOUR.*

Master and Servant—Compensation for injury by accident — Workman — Definition — Ex-Service man being trained in instructional factory—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), s. 13—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 9—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 3, 43.

An ex-Service man, working in a Government instructional factory and undergoing industrial training, is not a workman within the meaning of the Workmen's Compensation Acts.

This was an appeal from an award of his Honour Judge Farrant, sitting at the Luton County Court, holding that disabled ex-Service men, when working in a Government instructional factory under the Ministry of Labour and undergoing industrial training, were not "workmen" within the meaning of the definition contained in the Workmen's Compensation Acts, and were not entitled to compensation for injury by accident, or for disablement by an industrial disease, arising out of and in the course of the work which they were doing.

The applicant, Alfred Broome, enlisted in the Army on the outbreak of war and served in the R.A.S.C. until some time in 1918, when he was invalided out of the Service. He had been wounded in the head and suffered from neurasthenia, epileptic fits, and mental instability. He was in receipt of a disability pension of 40s. a week. He applied through the Employment Exchange at King's Cross for industrial training under the scheme for the employment of discharged and disabled ex-Service men and was accepted for training. For a short time he went for training to a tire company, then to the Mansions Motor Company, Limited, but he did not stay long in the motor trade, and eventually, on April 2, 1924, he went to the "Government Instructional Factory" near Luton for training in the making of furniture.

He had relinquished his pension, but received a maintenance allowance of 40s. a week for himself and 10s. a week for his wife, and daily travelling expenses between London and Luton. He had no children. If he was late for work or did not go he was fined at

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

the rate of 1s. for each hour of absence. On July 23, 1925, he was discharged from the factory, and in August, 1925, he obtained a certificate from the certifying surgeon employed under the Factory and Workshop Acts to the effect that he was suspended from his employment owing to his suffering from dermatitis, an industrial disease produced by dust or liquids.

The applicant claimed compensation for a disability caused by instruction and work on french polishing.

The County Court Judge held that the relation between the respondent and the applicant was merely that of teacher and pupil and not that of master and servant; that the applicant's allowances were purely subsistence allowances and not in the nature of wages; that there was no contract of service between the parties; and that the applicant was not a "workman" within the Workmen's Compensation Acts.

The applicant appealed.

Mr. Cave, K.C., and Mr. S. J. Duncan appeared for the appellant; Mr. Lilley for the respondent.

The case was partly heard on November 30, and was adjourned for inquiry into the authority of the certifying surgeon to grant the certificate.

The Court dismissed the appeal.

The Master of the Rolls, in giving judgment, said that the appeal was brought by a man who claimed to be a workman and to be entitled to compensation on the ground that he had been disabled by an industrial disease caused by his employment. His Lordship stated the facts, and said that the applicant entered the Instructional Factory on the terms set out in a form entitled MLT.23. On July 23, 1925, he was discharged without any reasons being given.

On August 14, 1925, he received a certificate of suspension saying that he was suffering from dermatitis. He thereupon made an application for compensation, and claimed that the dermatitis from which he was suffering was an industrial disease within section 43 of the Workmen's Compensation Act, 1925, and that he was entitled to receive compensation. The claim was disputed, and on April 1, 1926, he filed an application for compensation. The County Court Judge determined that the man was not a "workman" within the Workmen's Compensation Act, 1906, by section 13 of which a workman was defined as a person who worked under a contract of service or apprenticeship with an employer.

There were two points to be considered. The first was the one on which the County Court Judge had decided the case. But section 43 of the Workmen's Compensation Act, 1925, required attention. By section 43 (1) "where (ii.) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of his having contracted any such disease" as was mentioned in the Third Schedule to the Act of 1925 or as was added to that Schedule by the Secretary of State under s. 43 (3) of the Act of 1925, he was to be entitled, upon certain conditions, to compensation. The workman in the present case had produced a certificate of suspension. The nature of the training factory at Luton was not at all clear, but a workman, in order to recover compensation, must show that the Act had been complied with.

The Court was not clear, at the adjourned hearing on November 30, that there had been any rules or regulations made under the Factory and Workshop Act, 1901, which were applicable to the Instructional Factory, and which enabled a man being trained there to be suspended for dermatitis. It now appeared that, though there were certain rules and regulations, there were none made under the Factory and Workshop Act, 1901, which applied to the Instructional Factory. The suspension order which had been made could not therefore be sustained, and the appellant's claim must fail as the conditions did not permit of the order being made.

As at present advised he (his Lordship) would have come to the same conclusion as the County Court Judge that the applicant was not a workman within the Workmen's Compensation Acts. But the question whether a man was a workman or not was really a question of fact, and the County Court Judge had found that there was no contract of service. The payments made to the man were made in accord and satisfaction of his previous pension, and he was subject to rules under which money payable to him might, in certain circumstances, be stopped for fines.

On the other point the position was quite clear and the appeal would be dismissed, with costs.

Lord Justice Atkin and Lord Justice Lawrence delivered judgment to the same effect.

[Solicitors—Messrs. Kingsley Wood and Co.; the Solicitor to the Ministry of Labour.]

House of Lords.
(Viscount Cave, L.C., Lord Atkinson, Lord Shaw of Dunfermline, Lord Sumner, and Lord Carson.)

1926.
Dec. 17.

TATE AND LYLE, LIMITED v. LONDON AND NORTH-EASTERN RAILWAY COMPANY AND LONDON, MIDLAND, AND SCOTTISH RAILWAY COMPANY.*

Railways—Rates—Transitional period till appointed day—Power to reduce rates and then raise them within maximum—Railways Act, 1921 (11 and 12 Geo. V., c. 55), s. 60.

Under s. 60 of the Railways Act, 1921, which applies to the transitional period between August 15, 1921, and the day to be appointed by the Railway Rates Tribunal for the coming into force of the new rates to be approved by the Tribunal, the rates in existence on August 15, 1921, are maximum rates, and the railway companies are entitled to reduce them, and to raise them again, without applying to the Tribunal, if by so doing they do not exceed the maximum.

Decision of the Court of Appeal (43 *The Times* L.R., 49) affirmed.

This was an appeal from an order of the Court of Appeal (43 *The Times* L.R., 49), affirming an order of Mr. Justice Astbury (42 *The Times* L.R., 725).

The action was brought by the appellants, who were sugar refiners, to obtain a decision as to the validity of certain exceptional rates charged by the respondent companies, under the Railways Act, 1921, for the carriage of sugar from Silvertown to Leicester during what was known as the transitional period. The appellants contended that the respondents were not entitled to charge them, for sugar in four-ton lots, any rate in excess of the sum of 22s. 8d. per ton, or for sugar in five-ton lots any rate in excess of 22s. 6d. per

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

ton, without first obtaining the sanction of the Railway Rates Tribunal.

In June, 1926, the respondents gave notice of their intention to increase the four-ton rate to 24s. 1d. and the five-ton rate to 24s. Those increases were objected to by the appellants as being contrary to the provisions of section 60 of the Railways Act, 1921, and as a breach of certain agreements entered into by the respondent companies.

The action was brought as a test case to question the right of the railway companies to raise their rates in the manner proposed. The actual amount at stake in the action was 13s. 2d., but the amount involved by the decision was said to be about £25,000,000.

In September, 1920, the base rates previously charged were raised by the Minister of Transport by 100 per cent., together with a flat rate of a shilling per ton. That order affected not only the normal base rates, but also the "exceptional rates" which the companies charged to certain traders for carriage over certain distances, according to the particular mode of conveyance or the volume of traffic carried. Those exceptional rates formed about 80 per cent. of the rates charged, and amounted in number to about 80,000,000. By the Railways Act, 1921, the existing railway companies were amalgamated into four groups, and a new Court was formed called the Railway Rates Tribunal, which, as regards questions of rates, took the place of the Railway and Canal Commission. The control of the Minister of Transport over the railways was to cease on August 15, 1921, and the companies were to prepare a new classification of merchandise and new schedules of rates (to be called standard charges), which were to be approved by the Tribunal.

Those new standard charges were to come into force on a day to be fixed by the Tribunal called the "appointed day," but the preparation of the classification and schedules had proved a much longer task than was expected, and the "appointed day" had not yet been fixed. The Act contained stringent provisions as to existing exceptional rates, which were either to be agreed between the companies and the traders or to be fixed by the Tribunal, and provisions were made as to new exceptional rates.

Section 60, upon which this appeal really turned, contained the transitory provisions until the appointed day, under which the existing rates were to be continued as in force on August 15, 1921.

The material parts of section 60 were as follows:—

"A . . . railway company which is liable to have applied to it a schedule of standard charges shall, notwithstanding anything contained in any special or general Act or in any agreement, be entitled till the appointed day to make such charges . . . as were in force as respects the railway on the 15th day of August, 1921, or, where no such charges were in force on that date, then such reasonable charges as shall, in case of difference, be determined by the Rates Tribunal:

"Provided that at any time after the said 15th day of August, and before the appointed day,

"(i.) Any representative body of traders may apply to the Rates Tribunal to reduce the aforesaid charges or any of them . . ."

Sub-clause (ii.) gave a similar right to a single trader, and (iii.) a right to a railway company to apply for an increase.

Under that section the Federation of British Industries, a representative body of traders, in May, 1922, applied to the Rates Tribunal to reduce the rates, and an arrangement was made with the companies whereby the rates were reduced from 100 per cent. to 75 per cent. above the old base rates, and the flat rate per ton was reduced from 1s. to 6d. In May, 1923, the companies voluntarily reduced the rates to 60 per cent. above the base rates. In July, 1923, on a further application by the Federation of British Industries, an arrangement was made by which the rates were reduced to 50 per cent. above the base rates. On neither of these applications was any order made by the Tribunal, except that by consent the applications were dismissed.

One question which arose in the action was whether the arrangement made in July, 1923, constituted a binding legal agreement that the rates then fixed should continue until the appointed day unless varied by the Tribunal, as the appellants contended, or whether, as the companies contended, they were at liberty at any time to raise those rates provided that they did not exceed the rates in force on August 15, 1921.

On June 12, 1926, all the railway companies gave notice that as from June 29, 1926, the exceptional rates charged under the arrangement would be increased to the level of 60 per cent. above the base rates. To this the traders objected, and by arrangement the action was brought as a test case. The appellants contended that, apart from the question of the nature of the arrangement made in July, 1923, the companies had no power under section 60 of the Act of 1921 to raise any rate which had been reduced unless they had the consent of the Railway Rates Tribunal. The companies contended that the rates mentioned in the section were only maximum rates, and that they were entitled to raise any rate that had been reduced, without application to the Tribunal, provided that it did not exceed the maximum.

A further special question arose between the appellants and the respondent companies. Before July, 1923, the companies had charged the appellants for the conveyance of sugar from Silvertown to Leicester the same exceptional rate in whatever manner the goods were conveyed; but after that date they agreed to carry sugar, if sent in consignments of five tons or more on a truck, at a slightly lower rate, *i.e.*, 22s. 6d. per ton instead of 22s. 8d. The appellants claimed that that was a new exceptional rate which, under section 37 of the Act of 1921, could be varied only by the Railway Rates Tribunal. The respondent companies contended that there was a rate in existence on August 15, 1921, for the conveyance of sugar in five-ton trucks which was the same as in the case of other modes of conveyance, and that the reduced rate was only a favour granted and that they were entitled to raise it like any other rate.

Mr. Justice Astbury found for the respondents on both points. On the main question he thought that the companies were entitled to reduce their rates, and, having reduced them, to raise them again without applying to the Tribunal, provided that they did not exceed the maximum in force in August, 1921.

The Court of Appeal (the Master of the Rolls, Lord Justice Sargant, and Lord Justice Lawrence) affirmed the decision of the learned Judge.

Mr. W. A. Greene, K.C., and the Hon. Stafford Cripps appeared for the appellants; Sir John Simon, K.C., Mr. Macmillan, K.C. (of the Scottish Bar), and Mr. Bruce Thomas for the respondents.

The Lord Chancellor.—My Lords, the facts of this case and the effect of the statutes and orders which preceded the passing of the Railways Act, 1921, have been stated with admirable lucidity by Mr. Justice Astbury; and it is unnecessary to recapitulate them.

The first and principal question to be determined on this appeal is whether on the true construction of section 60 of the Railways Act, 1921, the respondent railway companies were entitled in the month of June, 1926, to increase the exceptional rate of 22s. 8d. per ton then chargeable by them for the carriage of sugar in lots of not less than 4 tons from Silvertown to Leicester, to 24s. 1d. per ton. The case is a test case and the decision of this question will affect a large number of rates.

Section 60 of the Act of 1921 provides in its first paragraph that "A constituent, subsidiary, or amalgamated company, or any railway company which is liable to have applied to it a schedule of standard charges"—a description which includes the two respondent companies—"shall, notwithstanding anything contained in any special or general Act or in any agreement, be entitled till the appointed day to make such charges in connexion with the carriage of merchandise and passengers or otherwise as were in force as respects the railway on the fifteenth day of August, nineteen hundred and twenty-one; or, where no such charges were in force on that date, then such reasonable charges as shall, in case of difference, be determined by the Rates Tribunal." Then follows a second paragraph containing a proviso to which I will refer later. If the paragraph which I have quoted stood alone, there could, I think, be no doubt as to the right of the railway companies to make the increase in question. That paragraph authorizes a railway company falling within its provisions to make, until the appointed day (which has not yet arrived), such charges in connexion with the carriage of merchandise as were in force on its railway on August 15, 1921; and it is unquestionable that this authority is sufficient to entitle a company to charge in respect of any class of merchandise a rate lower than the rate obtaining on that date. Nor, apart from the proviso to be mentioned later, could there be a doubt as to its authority to raise a rate so lowered to a higher sum so long as the rate in force on August 15, 1921, is not exceeded. A company which is declared to be entitled to charge a certain rate is not bound to charge the whole of that rate, but is at liberty to charge a lower rate and to vary that rate within the limits fixed. Now the rate in force on August 15, 1921, for the carriage of a 4-ton lot of sugar between the stations named was 30s. 6d. per ton, and that was the rate originally charged under the section. It was lowered by stages—first to 26s. 4d., then to 24s. 1d., and finally to 22s. 8d. per ton; and it was this last rate of 22s. 8d. which, in June, 1926, the companies raised to 24s. 1d. per ton. The last mentioned sum was, of course, well within the maximum, and apart from the effect to be given to the proviso, would unquestionably be within the power conferred by the section.

But the appellants contend that the proviso contained in the second paragraph of the section makes it necessary to put a different construction upon the first paragraph. That proviso is in the following terms: "Provided that at any time after the said fifteenth day of August, and before the appointed day, (i.) any representative body of traders may apply to the Rates Tribunal to reduce the aforesaid charges or any of them; (ii.) any trader interested in any particular charge may apply to the Rates Tribunal to reduce that charge; (iii.) any such company may apply to the Rates Tribunal to increase the aforesaid charges or any of them; any such application shall be published in such manner as the Rates Tribunal prescribe and the Tribunal after hearing all parties whom they consider entitled to be heard may make such modifications in the said charges or any of them as to the Tribunal may seem just, and shall fix a day upon which the modifications are to come into force." The contention of the appellants is that the expression "the aforesaid charges" which appears in headings (i.) and (iii.) of this proviso includes any charge made by a railway company under the authority of the first paragraph of the section, although such charge may be lower than the charge for the same service which was in force on August 15, 1921, and may not be a charge determined by the Rates Tribunal under the concluding words of the first paragraph; and that the provision under heading (iii.) that a company "may" apply to the Rates Tribunal to increase any of "the aforesaid charges" is imperative and means that a company must so apply before increasing any charge for the time being in force. This contention was supported by the argument that, if the expression "the aforesaid charges" is to be confined to the maximum charges referred to in the first part of the first paragraph and charges fixed by the Tribunal under the second part of that paragraph, then no direct application can be made for the reduction or increase of any lower charge whether voluntarily made by a railway company or fixed by an order of the Tribunal. It is absurd, it is said, that if traders desire to have a charge below the maximum reduced, they should be compelled to apply for a reduction of the maximum. Reference was also made to the provisions of section 1 of the Railway and Canal Traffic Act, 1894, which cast upon a railway company the burden of proving that an increase of a rate, if challenged, was reasonable, and to the construction put upon that section in the *North Staffordshire* case (23 *The Times* L.R., 418; [1907] 2 K.B., 191), and it was argued that the Legislature would never have allowed that section—which was wholly repealed by section 86 of the Act of 1921—to be so set aside without providing in its place some equivalent safeguard against an unreasonable increase of rates.

My Lords, these contentions—with others—were pressed upon your Lordships by Mr. Wilfrid Greene in a very able argument, and no doubt they have considerable force. But having carefully considered them more than once, I am not persuaded that the powers conferred upon the railway companies by section 60 of the Act are limited in the manner suggested. That section provides in clear and unequivocal terms that a company shall be entitled during the transition period before the appointed day to make such charges as were in force on August 15, 1921, that is to say, immediately before the passing of the Act—a power which authorizes the company to make any charges within that maximum; and there are no words in the proviso which expressly cut down the authority so given. The words "the aforesaid charges" in heading (iii.) of the proviso are no doubt somewhat ambiguous, and it may be a question whether they include a charge fixed by the Tribunal under the proviso itself. But that question does not arise in this case, and it is unnecessary now to determine it; for the words quoted have an adequate content if applied to the maximum

charges referred to in the first paragraph of the section, and I can see no sufficient justification for extending them to every charge which a railway company may voluntarily impose. If it had been the intention of the Legislature to forbid a railway company to raise any charge (though below the maximum) without the sanction of the Tribunal, an express provision to that effect would surely have been found in the section, and it would not have been left to the Courts to spell out such a prohibition from a clause which in terms only authorizes a company to apply for an increase of the maximum itself. The repeal of section 1 of the Act of 1894, even as to the transition period, appears to me to be an argument in favour of the freedom to fix rates during that period for which the railway companies contend. In my opinion the argument on the contruction of the section fails.

A separate point was raised as to the increase by the respondent companies of an exceptional rate for the carriage of not less than five tons of sugar loaded in one truck between Silvertown and Leicester, which was first entered in the rate books in the month of July, 1923, from 22s. 6d. to 24s. per ton. It was said that this five-ton truck rate, having affixed to it a new condition as to loading, was a new rate not in force on August 15, 1921, and accordingly fell within the second branch of the first paragraph of section 60, and could not be raised without the sanction of the Tribunal. In my opinion this contention was not made good. There was in force on August 15, 1921, a rate for the carriage of five tons of sugar between the stations mentioned—namely, the four-ton lot rate already referred to; and accordingly—whether the five-ton truck rate is regarded as a new rate or not—the words in section 60, "where no such charges were in force on that date," have no application to such a consignment.

Lastly, it was said that the respondent companies are precluded, by an agreement entered into in consideration of the withdrawal by the Federation of British Industries of an application for a revision of rates in or about August, 1923, from raising the rates as then settled; but for the reasons given by Mr. Justice Astbury and the Court of Appeal I am of opinion that there is no substance in this argument. In my view there is no evidence of any agreement at all having been entered into by the London and North-Eastern Railway Company, and while I am disposed to think that the London Midland and Scottish Railway Company did, in August, 1923, agree with the Federation of British Industries to reduce their rates to the level then specified—namely, 50 per cent. above the base rate, together with a flat rate—I am satisfied that they did not bind themselves to maintain the reduction until the appointed day. In any case I fail to see how the appellants, between whom and the Federation of British Industries the relation of principal and agent is not shown to have existed, can enforce any contract entered into by the respondents with the Federation.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

Mr. Macmillan.—Will your Lordship permit me to say that the parties are agreed that there shall be no order as to costs in this case, if it please the House?

The Lord Chancellor.—Then I move your Lordships that the appeal be dismissed.

Lord Atkinson.—My Lords: I concur.

Lord Shaw of Dunfermline.—My Lords: I concur. I reserve my opinion on one subsidiary point. I am not prepared to say that if a binding agreement had been made between the railway companies and the Federation, that could not be founded upon by individual traders composing the Federation as a ground of individual action and success thereon.

Lord Sumner.—My Lords: I agree that this appeal fails.

The right of the railway companies to make the charges in question ultimately depends on the construction of section 60 of the Railways Act, 1921. The section confers a power, and the enjoyment and exercise of that power are not subjected expressly to any supervision or control. The railway companies have made charges in connexion with the carriage of sugar which are within the amounts to which that power extends. They are within those in force on August 15, 1921. *Prima facie,* the companies were within their rights in doing so. Up to this point the words are quite clear.

In the rest of the section provision is made for the case where no such charges were in force on that date, and there is a triple proviso dealing with three cases, of which the first and third are material. Is the meaning of the earlier words cut down or modified thereby? I think not. Let it be that "the aforesaid charges" must have the same meaning throughout the proviso, and that the words mean all the aforesaid charges. I ask myself whether, so construed, there is anything in them so inconsistent with the earlier words as to control them. My Lords, I find nothing. Traders and companies can both go to the Tribunal to ask for alterations, down or up, in the maxima—namely, the charges of August 15, 1921, aforesaid. The working of this instead of a direct appeal against the actual charge may, so far as traders are concerned, seem cumbersome, though in practice it presents little difficulty, but it gives an adequate meaning to the words, grammatically natural and actually consistent with the earlier words in their ordinary meaning. The suggested anomalies in applying the proviso to others of the aforesaid charges do not, in my opinion, justify any implication which would go beyond that ordinary meaning or restrict it. As a matter of construction I think, as the Courts below thought, that your Lordships ought not to adopt it.

No doubt it is true that the policy of this section departs signally from the policy of the Act of 1894 in the matter of fixing charges, for what reasons (except that they were wise ones) I cannot tell, but unless there is real ambiguity in the section this consideration cannot be resorted to.

As regards the five-ton load rate, I do not think it falls within the second limb of the enabling section. It cannot be predicated of the subject matter of this charge—namely, the carriage of sugar from Silvertown to Leicester—that no charge was in force on August 15, 1921. Consignments of at least five tons and carriage of them in one truck are incidents conditioning this subject matter. It is admitted that a mere reduction in the money charge would not prevent it from being a "charge in force" on August 15, 1921, and, in my opinion, stipulations for these conditions as the price of the reduction have no greater effect. The appellants' real contention is that the words of the section mean, in the case of an exceptional rate, a specific rate duly entered and published in the rate book. The section, however, says nothing about this, nor, in my opinion, have the

statutory provisions for keeping rate books and publishing entries therein any such effect.

My Lords, it may be that the results of the interpretation of this section, which are thus arrived at, were not appreciated by the parties interested in 1921. They may be a surprise to the companies and a disappointment to the traders, but we have nothing to do with that. The Act is the thing.

As to the alleged agreement the appeal fails. The letters carefully avoid pledging the companies to any particular duration for the rates in question. The application to the Tribunal which dealt with duration was expressly withdrawn, and no corresponding stipulation was obtained from the companies themselves. Both sides, in my opinion, were alive to this, and took their chance of the result. Furthermore, there is no evidence that the Federation of British Industries had any authority to establish privity of contract between the appellants and the companies. They had a *locus standi* before the Tribunal to ask for orders which might have benefited the appellants, but that is quite a different thing from being agents authorized to bring about several contracts on which individual traders could sue in their own names. The fact that the appellants are subscribers to the Federation is as irrelevant as their position would have been if the Federation had been a limited company and they had held shares in it.

Lord Carson.—My Lords : I agree.

[Solicitors—Messrs. Neish, Howell, and Haldane ; Sir Francis Dunnell ; Mr. H. L. Thornhill.]

House of Lords.
(Viscount Dunedin, Lord Shaw of Dunfermline, Lord Sumner, Lord Wrenbury, and Lord Blanesburgh.)
1926. Dec. 10.

GEORGE BANHAM AND CO., LIMITED, AND OTHERS v. F. REDDAWAY AND CO., LIMITED, AND ANOTHER.*

Trade Marks — Registration — Distinctiveness—Red lines woven into canvas fire hose—Goods manufactured for export only—Trade Marks Act, 1905 (5 Edw. VII., c. 15), s. 9 (5)—Trade Marks Act, 1919 (9 and 10 Geo. V., c. 79), s. 7.

Application was made to register as a trade mark for canvas fire hose three red lines or stripes woven into the hose. The mark had been used by the applicants for many years in connexion with woven fire hose which they manufactured and marked in this country for export, but they had never used, and did not intend to use, the mark in this country otherwise than by attaching it to goods manufactured for export, the applicants' reason for desiring registration here being to facilitate registration in other countries, and the grounds of their application being that the mark was in itself distinctive and that it had not been used by others. The applicants called evidence to show that the mark had come to be identified with their goods in America and Germany, and they offered at the hearing to submit to a limitation confining the use of the mark to goods for export to the United States and Canada. The Registrar refused the application on the ground that, though the identical arrangement of coloured lines had not been used in this country, the mark was not adapted to distinguish the applicants' goods, in view of the use of one or more lines by other manufacturers in the same trade in this country to denote quality or ownership, as distinguished from origin.

Held, that there was no ground for interfering with the discretion of the Registrar on the question of distinctiveness and that therefore the registration of the mark, if for use in this country, was rightly refused, and that it did not become registrable by reason of the applicants' having consented to a condition that they would use it only in certain countries abroad.

Decision of the Court of Appeal (41 *The Times* L.R., 527 ; [1925] Ch., 693) reversed.

This was an appeal from an order of the Court of Appeal (41 *The Times* L.R., 527 ; [1925] Ch., 693), reversing an order of Mr. Justice Tomlin (41 *The Times* L.R., 337).

In October, 1921, the respondents, who were manufacturers of belting and canvas fire hose, applied to have registered as a trade mark for canvas fire hose in class 50 a mark consisting of three parallel red stripes of a particular width and form extending throughout the whole length of the hose. The application was opposed by several firms of rival manufacturers, most of whom were the present appellants, on the grounds, (1) that registration of the trade mark would interfere with the use, by the opponents, of similar arrangements of parallel red stripes which they were lawfully using ; (2) that the trade mark was common to the trade ; and (3) that the trade mark was not, in fact, distinctive.

The mark in question was adopted by the respondents mainly for the purposes of their export trade to the United States and Canada. It had been used on the hose which had been exported on a large scale to those countries for 40 years, and had also been used to a considerable extent on hose exported to Germany. It had not been used in the United Kingdom. At the hearing of the opposition the respondents offered to submit to a limitation confining the use of the mark to goods for export to the United States and Canada.

The Registrar refused the application on the ground that the mark was not adapted to distinguish the applicants' goods, in view of the use of one or more red lines in the same trade for the purposes of denoting quality or ownership, as distinguished from origin, and his decision was affirmed by Mr. Justice Tomlin.

The Court of Appeal (the Master of the Rolls, Lord Justice Warrington, and Lord Justice Sargant) reversed Mr. Justice Tomlin's decision. They were of opinion that the evidence of the user in the United States and Canada was relevant to the question whether the mark was adapted to distinguish the applicants' goods ; that the mark was adapted to distinguish the applicants' goods in the export market for which it was desired to register it ; and that no confusion would result from the registration.

Mr. Whitehead, K.C., and Mr. Trevor Watson appeared for the appellants ; Sir Duncan Kerly,

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

K.C., and Mr. Moritz, K.C., for the respondents; and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Dighton Pollock for the Registrar of Trade Marks.

VISCOUNT DUNEDIN.—My Lords: On October 29, 1921, the respondents (Reddaway and Co.) applied for registration of a trade mark. The mark was to be used in connexion with hose for conveying water, and consisted of three parallel red stripes or lines extending the whole length of the hose. The application was opposed by the appellants, who are also manufacturers of hose, as they alleged that in the circumstances the mark was not distinctive and ought not to be registered. The Registrar refused to register the mark. Appeal was taken and his decree was confirmed by Mr. Justice Tomlin. Appeal was taken to the Court of Appeal, who reversed the decree of Mr. Justice Tomlin, and remitted the case to the Registrar to proceed to register the mark, with a note based on a concession of the respondents that it should only be used in Canada and the United States. Appeal has been taken to your Lordships' House, and the Attorney-General has intervened, wishing that the original determination of the Registrar should be confirmed. Evidence was led before the Registrar at great length, and additional evidence was led before Mr. Justice Tomlin.

For the purposes of this judgment it is, I think, only necessary to state five points, which the evidence, as I read it, disclosed:—

(1) There had been no use of the mark by the applicants on goods sold in this country. It was, therefore, an application based on the view that the mark in itself was distinctive, that it had not, as the applicants alleged, been used by others, and that it ought to be registered.

(2) The applicants are already the registered holders of a trade mark used in the same class of goods. It consists of two blue lines with a red one between them parallel and running the whole length of the hose. This registration was granted by Mr. Justice Warrington in 1914 upon evidence that this mark had been used by the applicants in this country and had become, by user, identified in the market with their goods.

(3) It was proved that the use of lines and stripes running the length of the hose was prevalent among many users of hose, and that they were in some cases put on hose at the order of the customer, either to indicate the ownership of the hose or to distinguish one set of hose from another. Instances of the former case are supplied by the Admiralty, who order hose to be supplied to them with a line of a particular colour showing a different colour for different manufacturers, and instances of the latter by some fire authorities, who have a distinguishing set of lines to discriminate the hose belonging to one fire engine from hose belonging to another.

(4) The applicants led evidence to show that the mark for which registration was asked had been used by them in America, Canada, and Germany and had come to be identified with their goods in those countries.

(5) Though three red lines had not been used by any manufacturers in this country, two and four red lines had so been used.

My Lords, the registration of a proposed trade mark is not an absolute right. It is a privilege, a privilege which, in certain circumstances, so far approximates to an absolute right that it must be granted. But, in cases where there is at least a question whether the proposed trade mark fulfils the conditions laid down by the Act, it is not an absolute right. This was laid down in this House very clearly so long ago as 1890 in the case of *Eno v. Dunn* (6 *The Times* L.R., 379; 15 App. Cas., 252). No doubt that case was decided upon the Patents, Designs, and Trade Marks Act of 1883, but the provisions as to the position of the Comptroller are really identical with the provisions as to the position of the Registrar under the Trade Marks Act of 1905. There was in that case a divergence of opinion on the merits, but on the point for which I cite it there was unanimity. Thus, Lord Halsbury, Lord Chancellor, who was in the minority, says (page 254):—

"While I agree that no absolute right to the registration of a trade mark is given to an applicant for registration, the meaning and intent of the statute itself is that, unless for some of the reasons contemplated by the statute there is an objection to the registration, the trade mark ought to be registered."

Lord Watson, who was in the majority, said (page 256):—

"The statute nowhere confers an absolute right to register a trade mark."

Lord Herschell says (page 261):—

"The case was argued on behalf of the respondent as if he had an absolute right to have any trade mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act" [these were the "calculated to deceive" sections]. "I do not so read the statute. Those sections prohibit the registration of a trade mark in certain specified cases; but there is no duty cast upon the Comptroller of registering every other trade mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised."

Lord Macnaghten (page 263) speaks of the Comptroller "to whom in the first instance is committed the 'discretionary power,' as it is termed in the Act (section 94), of registering a trade mark." Section 94 is the section corresponding to section 53 in the present Act.

Now, it is true that an appeal lies from the decision of the Registrar, but, in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with. The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case. I look upon the word "distinctive" in the Act not as a scientific definition which may be explained and commented on by Judges, but rather as the indication of a practical standard to which the Registrar is bound to conform. I quote the words used by Lord Shaw in *Registrar of Trade Marks v. W. and G. Du Cros, Limited* (29 *The Times* L.R., 772; [1913] A.C., at p. 631):—

"I should describe the duty of the Registrar as this: that examining the particular facts, he has also to survey the possible confusions or difficulties which might arise in consequence of the grant of the trade mark, or the possible impairment of the rights of innocent traders to do that which, apart from the grant, would be their natural mode of conducting their business."

And Lord Parker, in the same case, at page 634, says this:—

"The question, therefore, is whether the mark

itself, if used as a trade mark, is likely to become actually distinctive of the goods of the person so using it. The applicant for registration in effect says, 'I intend to use this mark as a trade mark, *i.e.*, for the purpose of distinguishing my goods from the goods of other persons,' and the Registrar or the Court has to determine before the mark be admitted to registration whether it is of such a kind that the applicant, quite apart from the effects of registration, is likely or unlikely to attain the object he has in view. The applicant's chance of success in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connexion with their own goods."

The fact which influenced the Registrar here was the clearly proved use, by other traders, of lines running the length of the hose. He treated it, as I think he should have treated it, as a practical question. Lord Justice Sargant says that the marks so used were not trade marks, but the relevancy of them, to my mind, is not whether they were trade marks, but that they were marks, and, as they were ordinarily used as such, the Registrar came to be of opinion that there would not be distinctiveness in the mark sought to be registered by the applicants.

My Lords, the cause of my disagreement with the Court of Appeal lies, (1) in the fact that they did not look at the question from what I think was the right point of view, *i.e.*, whether the Registrar had really gone so wrong as to make it necessary to interfere with his discretion; and (2) in the fact that they considered the matter exclusively from the point of view of whether it could be said that the mark was calculated to deceive, leaving out the further question as explained by Lord Herschell in the passage above quoted.

Now, if the mark is one to which registration has been rightly refused if for use in this country, does it become registrable because the applicant consents to a condition that he will only use it in certain other specified places? I think Mr. Justice Tomlin was right when he said: "I think, first, that 'adapted to distinguish' means 'adapted to distinguish in this country,' having regard to the practice and conditions of trade here." It is one thing to limit the use, if desired, of a trade mark registered in this country by declaring that it is only to be used in certain countries besides this; it is quite another to try to make a mark, *ex hypothesi* unregisterable here, effective as a trade mark elsewhere by saying that its use would be confined to certain other specified countries. The whole idea of a trade mark register is for use in this country, and I cannot think that merely affixing the mark in this country when *ex hypothesi* that mark when affixed cannot be used in this country at all meets the intendment of the Act.

One word as to the evidence led that the mark had by user the significance of denoting the appellants' goods in other countries. Here, again, I agree with Mr. Justice Tomlin, who says: "Though evidence of user in another country may be some evidence of an inherent quality of distinctiveness, it cannot be evidence that the mark is adapted to distinguish in the market of this country."

I am therefore of the opinion that the appeal should be allowed and the judgment of Mr. Justice Tomlin and the Registrar restored.

The other noble and learned Lords concurred.

[Solicitors—Messrs. Bristows, Cooke, and Carpmael; Messrs. W. J. and E. H. Tremellen, for Messrs. Blair and Seddon, Manchester; the Solicitor to the Board of Trade.]

K.B. Div. } 1926.
(Horridge and MacKinnon, JJ.) } Dec. 16.

DOULIN v. PARCELL.*

Landlord and Tenant—Restrictions—Decontrol — Lessee in possession — Part of dwelling-house lawfully sublet—Sublease after July 31, 1923—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

Section 2 of the Rent and Mortgage Interest Restrictions Act, 1923, subsection 1, provides: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act . . . then from and after the passing of this Act . . . the principal Act [*i.e.*, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] shall cease to apply to the dwelling-house: Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part. . . ."

Held, that the words in this proviso, "where part of a dwelling-house . . . is lawfully sublet" refer to the time at which the question arises whether the part of the dwelling-house is decontrolled, and not to the date of the passing of the Act.

Where, therefore, a tenant who was in possession of the whole of a dwelling-house on July 31, 1923, the date of the passing of the Act, and subsequently sublet four rooms in the house at a rent within the Rent Restrictions Acts, those four rooms were "sublet" within the meaning of the proviso and were protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

This was an appeal from an order of Judge Hargreaves, sitting at Bow County Court, directing that certain rooms let by the appellant landlord, Mr. F. Parcell, to the respondent tenant, Mr. Ernest Doulin, in the landlord's house, 52, Queen's-road, Hoe-street, Walthamstow, came within the Rent Restrictions Acts, so that the rent agreed to be paid by the respondent to the appellant was liable to be readjusted by apportionment.

By an agreement in writing dated November 24, 1922, Mr. Parcell took the whole of the premises, 52, Queen's-road, a six-roomed house, on a three years' agreement, under which he paid a rent which, with rates and insurance, amounted to £2 12s. 6d. a week. In November, 1924, he sublet four of the rooms in

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

the house to Mr. Doulin at a rent of 25s. a week, and in March, 1925, he bought the freehold of the house. In August, 1926, Mr. Doulin applied to the Registrar of the County Court to apportion the rent of the whole premises, so as to determine the rent of the rooms which he occupied. The Registrar accepted the contention made on behalf of Mr. Parcell, that the four rooms in question had never come within the Rent Restrictions Acts, and he dismissed the application. On appeal, Judge Hargreaves reversed the Registrar's decision and remitted the matter to him to make an apportionment. No part of the house had been let as a separate dwelling before November, 1924.

Mr. H. C. Leon appeared for the appellant; Mr. John Duncan for the respondent.

After argument on behalf of the appellant, the following judgments were delivered.

Mr. Justice Horridge.—I do not feel any doubt about the meaning of the first proviso to section 2, subsection 1, of the Rent and Mortgage Interest Restrictions Act, 1923. When that Act came into force on July 31, 1923, the whole of the premises were in the possession of the appellant who was then the tenant of them under an agreement. After the passing of the Act the appellant let the four rooms now in dispute to the respondent and it was contended in the Court below that those four rooms did not constitute a dwelling-house within the meaning of the Rent Restrictions Acts.

It has been argued that, on the true construction of section 2, subsection 1, and the first proviso to it, the rooms occupied by the respondent were "decontrolled" owing to the fact that the appellant was in possession of the whole of the premises at the date of the passing of the Act of 1923. The appellant was clearly in possession of the whole of the premises at that date and, therefore, if the first part of the section stood alone, the premises would obviously have become "decontrolled." But then comes the first proviso. Mr. Leon has argued that the words in the proviso "is lawfully sublet" mean "is, or has been, at the time of the passing of this Act lawfully sublet," and, therefore, that the four rooms occupied by the respondent, not having been sublet at the time of the passing of the Act, did not fall within the proviso.

To my mind the words "is lawfully sublet" are merely a description of the position at the time when the question arises. In other words, the proviso might have begun in the following terms: "Provided that, where there is part of a dwelling-house to which the principal Act applies lawfully sublet. . . ." That being so the question is whether the dwelling-house consisting of the rooms occupied by the respondent was sublet at the time when the question involved in the present proceedings arose. It was so sublet and, in my opinion, therefore, it was not "decontrolled," but still came within the Rent Restrictions Acts. This appeal fails and must be dismissed with costs.

Mr. Justice MacKinnon.—I agree. There is a small point which distinguishes this case from *Catto v. Curry* (42 *The Times* L.R., 243; [1926] 1 K.B., 460). That distinction is that in *Catto v. Curry* (*supra*) there was a subsisting subletting on July 31, 1923, the date when the Act of 1923 came into force, whereas in this case, though the appellant was in possession of the premises on July 31, 1923, the rooms in question were sublet for the first time in November, 1924. In the circumstances a point which did not arise in *Catto v. Curry* (*supra*) arises here—namely, what is the proper meaning of the word "is" in the first part of the first proviso to section 2, subsection 1, of the Act of 1923?

Mr. Leon argues that that "is" means "is, or has been, at the date of the passing of this Act." The counter proposition is that it means "is or shall be." I think that the natural meaning of the word in this Act of Parliament is the latter and that the proviso should be read as if it were: "Provided that, where part of a dwelling-house to which the principal Act applies is, or shall be, lawfully sublet. . . ."

If there is any doubt on the point I think that it is removed by the later use in the proviso of the words "shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part." "Being in" seems to refer to the date of the passing of the Act and, therefore, to indicate that the subletting contemplated by the proviso may begin after that date.

For these reasons I think that the decision in this case must be on the same principle as that in *Catto v. Curry* (*supra*)—namely, that the rooms occupied by the respondent were within the proviso and that the Rent Restrictions Acts still applied to them. This appeal fails and must be dismissed.

[Solicitors—Messrs. R. Voss and Son; Messrs. W. Drake and Co.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) — 1926. Dec. 17.

GIFFORD v. GIFFORD AND FREEMAN.*

Divorce — Connivance — Husband's petition — Collusive agreement between husband and co-respondent—Dismissal of suit—Second petition naming same co-respondent—Charges of adultery subsequent to first petition—Effect of agreement—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 178.

The petitioner filed a petition for divorce on the ground of his wife's adultery with the co-respondent, and it was disclosed to the Court that the petitioner and the co-respondent had agreed (1) that the co-respondent should pay the petitioner £2,500 damages, of which £1,750 was to be paid down and the rest later, and (2) that the petitioner should claim no further damages from the co-respondent and should put no obstacles in the way of a decree *nisi* being made absolute. The petition was therefore dismissed on the ground that the suit was collusive. After the dismissal the respondent and the co-respondent continued to live in adultery, and the petitioner, who had received the £1,750, presented a second petition against them, complaining of the adultery since the date of the former petition.

Held, that the petitioner had by the agreement prevented himself from complaining of any adultery whether past or future, and that therefore he had connived at the adultery of which in his second petition he complained, and the second petition must be dismissed.

* Reported by Clifford Mortimer, Esq., Barrister-at-Law.

Alan Cecil Gifford, an estate agent, of Boundary-road, St. John's Wood, prayed in this undefended case for the dissolution of his marriage with Phyllis Kenward Gifford, on the ground of her adultery with Leonard George Freeman.

After hearing the evidence, his LORDSHIP dismissed the petition.

Mr. Noel Middleton appeared for the petitioner.

The PRESIDENT said :—This is a husband's petition for divorce, in which he alleges acts of adultery by his wife with the co-respondent, Freeman, on various dates in the years 1925 and 1926. In the main, his petition is based on a charge that from the month of March, 1926, until the date of the petition, *i.e.*, July 28, 1926, the respondent and co-respondent have lived and cohabited as man and wife at an address in East Sheen. This is the second time that the petitioner has approached this Court in respect of the alleged adultery of his wife with Freeman.

On April 30, 1925, he filed a petition, in which he alleged that in the early part of that month his wife and Freeman had committed adultery together at an hotel. On the hearing of that petition it appeared that the petitioner and Freeman had been in communication while the petition was pending, and that they had made an agreement with regard to the conduct of the case, and that as part of that agreement a sum of £1,750 was paid to the petitioner, and arrangements were made for the payment of a further sum of £750 by the co-respondent. That fact came to the knowledge of the petitioner's solicitors, whose duty was then to disclose it to the Court, and, that fact being disclosed, it was obvious that of necessity the petition must be dismissed, because the suit was collusive.

The present petition was then filed, alleging further adultery by the respondent with the co-respondent.

In considering this case it is the duty of the Court, under the provisions formerly contained in the Matrimonial Causes Act, 1857, and now contained in section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, to satisfy itself both as to the facts alleged and also that the petitioner has not been accessory to, or connived at, the respondent's adultery, and if, on the evidence, the Court finds that he has been an accessory or conniving, then the Court is bound to dismiss the petition. I have to determine here whether the agreement itself and the conduct of the parties make it manifest that the petitioner has been accessory to and connived at the adultery committed by his wife since the date of his former petition. I recognize that the duty of the Court may be a cause of disappointment and vexation to a suitor, but the law stands as I have stated it.

The respondent and co-respondent were desperately anxious that the past of the respondent, as regards illicit sexual relations, should not become matter of public knowledge. There has been some discussion recently of the effect of public knowledge of the proceedings of this Court, and I am proceeding in this case in such a manner that the facts may come to public knowledge.

The petitioner, it is said, resisted vehemently for a time the approaches of the co-respondent, but eventually an interview took place and a conversation occurred, the effect of which he has stated. The co-respondent said that he was anxious that the public should not become aware of the respondent's past, and said that he wanted to find out what amount of damages the petitioner ought to receive. The petitioner said that £5,000 would not be too much, but, before he left, that demand was reduced by one-half. In order that there should be no doubt as to the position of the petitioner and co-respondent, a letter was typed out by the petitioner's typist. That letter has been put in evidence, and shows that, in order to agree damages, the figure of such damages was put at £2,500, £1,750 of which was to be paid down, and the remaining £750 to be paid on or before a date five months in advance. Then came the passage : "Of course this is subject to your not claiming any further damages from me, and to your putting no obstacles in the way of a decree *nisi* being made absolute."

After the dismissal of the former petition the respondent and co-respondent continued to live in adultery, and it is of the adultery since the date of the former petition that the petitioner now complains. It is obvious that by the agreement he had prevented himself from complaining any more of adultery, whether that adultery was past or future. He had received £1,750 and he has spent it. In that state of things, can it be said that the petitioner has not connived at the adultery of which he complains ? Once and for all he has bargained away his claims, and they have been met by an agreement and payment of a sum of money. It is impossible to say that he did not connive, and his petition must be dismissed.

It is said that it is not generally known by the public that a man who deals with his marital relations as this petitioner has done is disabled from obtaining relief from this Court. If people do not know that, they ought to know it, and the means of publicity which are still available for proceedings in this Court should be used for the necessary purpose of dispelling that ignorance, if it exists. For my own part, I confess that I do not believe that the average English citizen, whether he possesses a pound or a penny, is in any doubt as to the effect of behaviour of this kind.

[Solicitor—Mr. Shirley W. Woolmer.]

Chan. Div. (Astbury, J.) } 1926. Dec. 20.

WHYTE, RIDSDALE AND CO., LIMITED v. ATTORNEY-GENERAL.*

Safeguarding of Industries — Dyestuffs — Synthetic organic colouring matter—Prohibition of import—Artists' colours—Small proportion of prohibited matter—Commercial impossibility of use for other purposes—Whether within the prohibition—Dyestuffs (Import Regulation) Act, 1920 (10 and 11 Geo. V., c. 77), ss. 1, 2 (1).

Section 1 of the Dyestuffs (Import Regulation) Act, 1920, which prohibits the importation, except under a licence granted in accordance with s. 2 (1), of "all synthetic organic dyestuffs, colours and colouring matters," includes in the prohibition artists' colours which are enclosed in toy paint-boxes and which contain a proportion of synthetic organic colouring matter, even though the proportion is so small that it would not pay to extract it and use it for any other purpose.

* Reported by E. K. CORRIE, Esq., Barrister-at-Law.

This was an action by the plaintiffs, Whyte, Ridsdale and Co., Limited, against the Attorney-General for a declaration that two notices issued by the Board of Trade on October 1, 1925, and January 21, 1926, under the Dyestuffs (Import Regulation) Act, 1920, were unauthorized and illegal.

By section 1 of the Act of 1920 it was provided :—

"(1) With a view to the safeguarding of the dye-making industry, the importation into the United Kingdom of the following goods, that is to say, all synthetic organic dyestuffs, colours and colouring matters, and all organic intermediate products used in the manufacture of any such dyestuffs, colours, or colouring matters shall be prohibited.

"(2) Goods prohibited to be imported by virtue of this Act shall be deemed to be included among the goods enumerated and described in the Table of Prohibitions and Restrictions Inwards contained in section 42 of the Customs Consolidation Act, 1876, and the provisions of that Act and of any Act amending or extending that Act shall apply accordingly."

By section 2 (1) the Board of Trade have power, by licence, to authorize, either generally or in any particular case, the importation of any of the goods, or any class or description of the goods, prohibited to be imported by virtue of the Act of 1920.

The Board of Trade published in the *Board of Trade Journal* of October 1, 1925, the following notice to importers :—

"Dyestuffs (Import Regulation) Act.

"Licences for Artists' Colours and Materials.

"The Board of Trade desire to draw the attention of importers to the fact that the open general licence which was in force under the above Act in respect of the importation of artists' colours and materials of synthetic organic origin when fully made up and ready for use as such (including paint-boxes) has now been revoked, and consequently individual licences will be required in connexion with each consignment of these materials which it is desired to import.

"Applications for licences, which must in all cases be obtained before the shipment of the goods to this country, should be made on the prescribed form to the Dyestuffs Advisory Licensing Committee, 53, Spring-gardens, Manchester.

"Similar individual licences will in future be required in respect of the importation of copying ink pencils and other coloured pencils in which the colouring matter concerned is of synthetic organic origin."

The Board of Trade published in the *Board of Trade Journal* of January 21, 1926, an amending notice purporting to be issued under the Act of 1920.

"Dyestuffs (Import Regulation) Act.

"Licences for Artists' Colours and Materials.

"The Board of Trade announce that as a result of consideration which has been given to certain representations which have been made to them in connexion with the importation of copying ink pencils, and other coloured pencils of synthetic organic origin, a notice regarding which appeared in the *Journal* of October 1 last, it has been decided that for the present licences will not be required under the Dyestuffs (Import Regulation) Act, 1920, in respect of these materials.

"Similarly, an open general licence has been issued under the above Act covering the importation of all paint-boxes containing paints of synthetic organic origin provided that the value of each box proposed to be imported does not exceed 6d. Consequently individual licences for specific consignments will not in future be required for paint-boxes (complete and ready for use) not exceeding a maximum value of 6s. a dozen. Licences will, however, continue to be necessary for all consignments of these paint-boxes which exceed the maximum value referred to above, and applications for licences should be made in the prescribed form to the Dyestuffs Advisory Licensing Committee . . . before the goods are shipped to this country."

The plaintiffs, who were importers of artists' materials, claimed that these notices were not authorized by the Act of 1920, because the amount of synthetic organic dye in the articles mentioned in the notices was very small and impossible to use for any purposes in the dyeing trade. The fact of having to obtain licences for each individual importation would seriously hamper them in their business. Even though the second notice rendered licences unnecessary for copying ink pencils and cheap paint-boxes, the fact that they were once included in the substances for which a licence was necessary would unsettle and disturb trade.

Mr. Comyns Carr, K.C., and Mr. W. M. R. Pringle appeared for the plaintiffs ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Dighton Pollock for the defendant.

It was contended for the plaintiffs that the Act was not intended to apply to articles which contained a very small quantity of synthetic organic dye which could not be extracted and used for any other purpose. The notices went beyond what the Board of Trade were entitled to direct.

Mr. Ernest John Parry, B.Sc., an analytical chemist and a member of the Bar, said that he had specialized in the chemistry of pigments. Nearly all the colours used were synthetic except carmine and non-synthetic indigo. The essence of dyeing was that it permeated stuff and formed a chemical combination. To recover the dye from paints in the boxes in question would not be a commercial proposition. Synthetic organic dyes were used for textile purposes and for staining and colouring foodstuffs where permanence of colouring was required. The synthetic organic colouring matter in paints had practically lost its identity owing to the difficulty in recovering it.

Mr. Kiley, a member of the plaintiff company, said that the plaintiffs imported a large quantity of the goods mentioned in the notices. They did not import artists' colours for serious purposes. They did a re-export trade. The paints were imported from France and Germany ready for use. He explained the inconvenience caused to his company by the requirement of licences for the paints.

The Attorney-General said that as the copying ink pencils had not, since January 21, 1926, required individual licences there should be no declaration made on what was an abstract point. The object of the Act of 1920 was to protect the British dye-making industry, which had been established during the war, as being a vital industry. Under section 1 of the Act the Court had not to decide whether the colours would compete with the dye industry. They were not allowed to be imported without a licence. The colours and colouring matters in question were included in the Act by Parliament, as distinct from dyes for materials.

Mr. Edward Armstrong, F.R.S., managing director of the British Dyestuffs Corporation, said that synthetic organic colours were mainly made from coal-tar products. Dyestuffs were usually sold, whether imported or made in England, of a standard strength which could be diluted as required.

Synthetic organic colours could be used for colouring food. British dyestuffs were used for artists' colours.

MR. COMYNS CARR, K.C., in reply, said that the Board of Trade were protecting not the dye industry but the paint-box industry.

MR. JUSTICE ASTBURY in the course of his judgment read the pertinent sections of the Act and the notices, and said that a committee had been appointed to grant licences under the Act. The plaintiffs, who were a company importing copying ink pencils, and paint-boxes more or less of the nature of toys costing two shillings or half a crown, asked him to declare that the Board of Trade notices were invalid.

As far as the copying ink pencils were concerned, the notice requiring licences for them had been withdrawn before the action was commenced, and in the exercise of his discretion he declined to make a declaration in a case where, at the issue of the writ, the plaintiffs were in no way interested. As to the rest of the matter, the paint-boxes of artists' colours were admitted to contain a proportion, even if very small, of synthetic organic dye. The plaintiffs submitted that the object of the Act was to protect the British dyemaking industry, and argued their case on the footing that the colours in question contained so small a proportion of synthetic organic matter that its recovery was not a commercial proposition and that it did not fall within the Act. It was not within his province to decide whether the Board of Trade had acted wisely or unwisely.

It was plain that the plaintiffs imported colours containing specific organic matter. It was true that the paint-boxes as imported by the plaintiffs contained very small parts of specific organic colours or colouring matters, but they were imported as colours or colouring matters to be sold as such. That being so it was impossible for him to declare generally as asked, that such colours did not fall within the Act. Evidence had been called, though it was hardly necessary, and Mr. Parry and Mr. Armstrong were in agreement on all [illegible] matters. He did not think that the value of the pain[illegible] matters. He did not think asked to make a general decl[illegible] mattered. He was colours were not prohibited under th[illegible] that case the Act plainly prohibited the impoe Act[illegible] of any synthetic organic colours or colouringatio[illegible]tters except under licence. The action was misconceived, and must be dismissed.

[Solicitors—Messrs. Stikeman and Co.; the Solicitor to the Board of Trade.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1926. Dec. 10.

THE VALSESIA.*

Ship—Salvage—Duties of contracting parties—Salvage prevented by negligence of crew of ship—Damages.

The masters of the plaintiffs' tugs orally contracted with the master of a steamship—which after stranding and sustaining great damage had refloated on the flood tide—to render salvage services to the ship by towing her to a named spot and beaching her. Owing, however, to the negligence of the servants of the shipowners in failing to slip, at the proper moment, an anchor by which the steamship was being held, the tugs were unable to perform the contractual services, and the vessel again went aground.

Held, that there was an implied obligation on each party to the contract to act with ordinary skill and care in carrying out his share of the combined work, and that the plaintiffs, having been prevented by the negligence of the shipowners' servants from performing the contract, were entitled to recover *in personam* against the shipowners, as damages, the amount which but for such negligence they would have earned under the contract.

This was an action brought by the owners, masters, and crews of the steam tugs Bantam Cock and Prairie Flower against the owners of the Italian steamship Valsesia, her cargo and freight, for sums alleged by the plaintiffs to be due to them under a salvage agreement, or alternatively for a salvage award for services rendered.

At about 10 a.m. on August 25, 1926, during a dense fog, the Valsesia, which was bound to Barry Dock with a cargo of coal, went ashore at Friar's Point, Barry Island, and sustained damage. On the succeeding flood tide the vessel refloated and swung to her starboard anchor, which had been let go shortly before the stranding. Thereupon an agreement was entered into orally between the master of the Valsesia and the masters of the Bantam Cock and Prairie Flower by which, as the Court found, the tugs agreed to beach the Valsesia in Whitmore Bay. In order to enable this to be done it was necessary that, at the proper time, the anchor by which the Valsesia was being held should be slipped, but, as the Court further held, owing to the negligence of those on board the steamship the anchor was not slipped at the proper time, the tugs were unable to reach the Valsesia, and the vessel again grounded on Mr[illegible]ear Friar's Point and broke her back.

Thompso[illegible] Neilson, K.C., and Mr. G. H. Main Langton, k[illegible] appeared for the plaintiffs; Mr. G. P. [illegible] and Mr. Lewis Noad for the defendants.

MR. JUSTIC[illegible] launched against HILL.—The plaintiffs' claim is and her cargo, and [illegible]wners of the steamship Valsesia to the ship and cargo under a contract. The respect of services rendered contract, or that the sum August 25 and 26, 1926, tugs was as the plaintiffs a[illegible]dants do not deny the the condition was different fro[illegible]ble to the plaintiff plaintiffs. The plaintiffs say that but they say that to render such services as they p[illegible]t set up by the substance, to do their best, but th[illegible] were employed that the condition was that the tugs [illegible]med, and, in to beach the vessel. The circumsta[illegible]fendants say the services were rendered were these : [illegible]e employed on the morning of August 25, 1926, was in which Barry when she found herself close to t[illegible] Valsesia, Friar's Point. She thereupon dropped he[illegible]roaching anchor, but grounded on the rocks. [illegible]rocks at succeeding ebb tide, while the vessel w[illegible]starboard great danger, she ultimately was got [illegible]uring the but received great damage. On the [illegible]as in very floated, and in the evening on the sa[illegible] the rocks, the two tugs in question here were en[illegible]od tide she her assistance. It is common [illegible]ne flood tide [illegible]aged to render [illegible]ound—whether

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

expressed or not—that what was contemplated was that they should assist in getting the Valsesia on to the beach in Whitmore Bay, which is a little safe bay very close to Friar's Point and between it and Nell's Point further up the channel. That operation was not effective, and in the result, after some hours' work, the Valsesia grounded once again, after the tide had turned, on the same rocks, very nearly in the original position, so that she was in no better position than when the tugs took off. She had not been beached, and she was in no better position than she had been before. Therefore if it had been an ordinary claim for salvage the tugs would have been entitled to nothing because there had been no success. The first question I have to consider is the question as to what was agreed. There is a direct conflict of evidence as to this. It was all done orally—by hailing—between the ship and the tugs. The point which is made is, Was it stated that the money was to be paid for beaching the ship, or was it not stated at all? Unless it was stated, then the work for which the money was promised was not a definite work at all for any measured service in point of either time or duration. Undoubtedly it was in everybody's mind that the assistance of the tugs was for the purpose of beaching the ship in Whitmore Bay, and nobody contemplated anything else. The pilot of the Italian ship and the master had talked it over, and they did not contemplate anything else, and in view of that fact it is feasible that a matter which was in everybody's mind should not be specifically mentioned. On the other hand, there was some independent evidence, and that independent evidence supported the defendants' account of the conversation. The conclusion to which I come on the question of fact is that the promise or the contract was for £300 and £150 respectively either for putting the ship on the sands or for beaching the ship on the sands. But that does not, in my view, at all dispose of this case upon the facts as they have come out in the course of the case. If there was nothing else at all the plaintiffs clearly would not be entitled to recover, because it was a contract for a lump sum in respect of a completed work, and the work was not completed. But there is the question why the work was not completed. Both parties to the agreement knew that the intended operation which was in the common contemplation of both of them was the beaching of the steamer on the sands of Whitmore Bay, and both of them contemplated that the tugs would be used in that operation. Both knew that the anchor of the steamship was down, and that in order to carry out the intended operation it would have to remain down up to a certain point and then be slipped, and they all knew that unless it were slipped at the proper moment the operation must fail. Now with that knowledge in their minds they agreed to carry out this operation. In my view there was implied in such an agreement as this the obligation of each towards the other at least to act with ordinary skill and care in carrying out each his part in the combined work. It was the duty of the tugs to obey the orders of those who were in command of the ship, and to use skill and care in the handling of the tugs, and it was equally the duty of those in charge of the ship to use ordinary skill and care in carrying out their part of the contract, which in this case was the slipping of the cable at the right time, and, indeed, that was the essential part which the ship was to play in the combined operation. It was in that duty of slipping the cable that those on board the ship completely failed, with the result that the cable was not slipped. The tugs had got the ship into the position contemplated by the pilot as the position where the cable ought to be slipped, but, as I have said, the cable was not slipped. While they were trying to cut the cable—and they ultimately succeeded, after a long time, in doing so—the slack water had passed and the tide had turned, and then it is probable, as there was an exceedingly strong tide, that the tugs were no longer able to come up to the ship. But the pilot agreed, and the men on the tugs agreed, that, if the cable had been slipped when the pilot ordered it to be slipped, then the contemplated operation would have been carried to a successful conclusion, and the ship would have been beached in safety in Whitmore Bay.

The effect of these facts upon the legal position has been put in more than one way, and I am not satisfied that, apart from negligence, the failure to slip the cable would enure to the benefit of the plaintiffs or would entitle them to say they could still recover the agreed sum. But I clearly think that, if the failure to slip was due to negligence on the part of those on board the ship, then the plaintiffs must be entitled in one way or another to be put in the same position as they would have been in if that negligence had never occurred and if those in charge of the ship had carried out their duty towards the two tugs. I doubt very much whether the plaintiffs—apart from the ground of negligence and breach of contract by the defendants—can say: "We must be treated as if we had performed the contract, and we are entitled to recover the £300 and the £150," and I doubt that very much, because I find a difficulty in saying that anybody can ever recover a lump sum to be paid in respect of a completed work when, in fact, that work has not been completed. But if they were prevented from completing it by the negligence of those on board the ship, and if they were thereby deprived of the right to earn the stipulated sums, then they are entitled to damages for the breach of the shipowner through his agents, and in this case the damage would be exactly commensurate with the stipulated sums because the plaintiffs had really, and in substance, completed the whole of what they had undertaken to do. They had probably been saved no expense by reason that they were not able to complete the work. Therefore this issue remains: Has it been established that the shipowner, through his agents, was guilty of negligence? Such negligence has to be a breach on the facts as I have stated them of the implied undertaking towards the tugs. Now *prima facie* it seems to me that the failure to slip was the result of negligence. The pilot contemplated that the cable would be slipped, and the tugs contemplated it—everybody contemplated that it would be slipped, and it was not slipped. Now that seems to me to be *prima facie* evidence of negligence, and the Elder Brethren—as far as it is a matter of seamanship and therefore for them—are of opinion that everything in a well-found ship should be in a position to be slipped in an emergency, if it is something that can be slipped; but even apart from that, my own view, fortified as it is by the view of the Elder Brethren, is that the fact that the slipping in quite the ordinary way of ship working was not done when ordered by the pilot to be done, is some evidence of negligence, and puts upon the defendants the duty of showing that the failure to slip arose without any negligence on their part. They have, in my view, wholly failed to show that it arose without negligence on their part, and, indeed, it seems to me, looking at the evidence of the pilot, that it arose by reason

of and in consequence of some negligence on the part of the defendants. Now, it being taken that it was an essential part of the operation that the cable at the proper time should be slipped, the cable ought to have been so disposed of that it could be properly slipped. It is said that it was so attached at the bare end that it could not be slipped, or, if slipped at all, only with very great difficulty. If that were the fact, then preparations ought to have been made so that it could be slipped some links short of the bare end. The Elder Brethren advise me—and I am entirely of their opinion—that at and after the time when the tugs were engaged—up, at any rate, to the time when nearly all the cable had been paid out—preparations could have been made to secure that the cable should be slipped at the right moment. I have asked myself the question, how can it be that the failure to slip should be due to anything else but negligence? I do not think it could be due to anything else but that, and I find that it was due to negligence. The result is, assuming the true view of the law to be that the plaintiffs are not entitled to recover the £300 and the £150 under the contract as money earned, that they are entitled to recover the same amount as damages in so far as the defendants by the negligence of their servants prevented the plaintiffs from earning these amounts.

Now the only other question that I have to consider is against whom the claim can be made. In my view, I am not at all certain that the contract can be regarded as having been entered into on behalf of the ship and cargo; I am inclined to think that such a contract can be regarded only as having been entered into by the shipowner. But, be that as it may, I cannot find that the negligence of those in charge of the ship was negligence in any other capacity than as servants of the shipowner, and therefore I think I cannot give judgment against anybody except the shipowner, and that must be a judgment *in personam*, because an action arising out of the negligent performance of such a contract as this, in my view, does not give rise to a right *in rem*. Therefore this is an action *in personam*. A little difficulty arose just towards the end of the case as to whether judgment can proceed against the owners *in personam*, but that only arises from the unfortunate fact of the writ being directed against the owners of an Italian steamship—the Valsesia—and to that writ appearance was entered by some of the defendants in this case. But the defence that was delivered in reply to the claim was obviously a defence, so far as it went, on behalf of the owners of the ship, because it was pleaded by the defence that the statement of claim disclosed no case against the cargo, but did not plead that it did not disclose a case against the shipowner. Although that was the form in which appearance was entered, it was, in fact, an appearance entered for those who appeared as the owners of the Valsesia. The only alternative is to pronounce that no appearance has been entered by the owners of the Valsesia, and in that case the plaintiffs would be in a position to obtain judgment in default of appearance, but I do not think that is the real position. The real position is that the defendants appear as owners of the Valsesia, and judgment *in personam* can go against them. Therefore I think it will be judgment *in personam* against the owners of the Valsesia in respect of the sums of £300 and £150 respectively, with costs, and I dismiss the claim against the cargo owners.

[Solicitors—Messrs. Ingledew, Sons, and Brown, for Messrs. Ingledew and Sons, Cardiff; Messrs. Wm. A. Crump and Son, for Messrs. Gilbert Robertson and Co., Cardiff.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1926. Dec. 16.

MORGAN v. LIVERPOOL CORPORATION.*

Landlord and Tenant—Repairs—Liability on landlord—Disrepair—No notice by tenant to landlord—Right of landlord to enter and inspect—Damage to tenant—Non-liability of landlord for damage—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2—Housing Act, 1925 (15 Geo. V., c. 14), s. 1.

Neither s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which implies the liability of a landlord to do repairs where he has raised the rent under that section, nor s. 1 of the Housing Act, 1925, which enacts that, where the rent is less than a certain sum, there shall be implied "an undertaking that the house will be kept by the landlord, during the tenancy, in all respects reasonably fit for human habitation," imposes upon the landlord, even where he has a right to enter the premises for the purpose of inspection, any liability for damage caused to the tenant by a want of repair of which the tenant has not given him notice.

This was an appeal from a decision of the Presiding Judge of the Liverpool Court of Passage. It raised a question on the meaning of section 1 of the Housing Act, 1925, which enacted that in the case of the letting of small houses (the rent not exceeding £40 in London and £26 elsewhere) there should "be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation."

The plaintiff was the tenant of a house belonging to the defendants. The rent before the war had been 5s. 6d. a week, but had been raised to 8s. 1d. under the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On March 26, 1926, owing to the breaking of a window cord, a window fell upon the plaintiff's hand, inflicting some injury. The plaintiff brought an action for damages, contending that by reason of the broken window cord the defendants had failed to keep the house "fit for human habitation" within the meaning of section 1 of the Housing Act, 1920, and were therefore liable for the damage suffered. The Presiding Judge found for the plaintiff and awarded him £24. It was admitted that the tenant had not given notice before the accident of any defect in the window cord.

The defendants appealed.

Mr. Singleton, K.C., and Mr. W. Clothier appeared for the appellants; Mr. Raleigh Batt for the respondent.

The MASTER OF THE ROLLS, in giving judgment, said that the plaintiff had put forward three grounds to support his claim:—(1) A breach of the covenant for quiet enjoyment; (2) failure to keep the premises

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

in good and tenantable repair; (3) neglect to maintain them "fit for human habitation." Points (2) and (3) arose in connexion with the liability of landlords of houses of that class under the Housing Act, 1925, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The appellants argued that the facts did not put them under the liability sought to be imposed upon them under the Acts; and that, even if it were so, they were not in fact liable, because no notice had been given of the lack of repair. The point of giving notice was essential in the case, but it would be as well to express an opinion on the other points, lest it should be supposed that if the tenant had given the notice he would have been able to recover.

As regarded the expressions used in the Act of 1925, he (the Master of the Rolls) asked himself whether the fact that a window cord was broken was evidence that a house was not "fit for human habitation." The Judge below had attached importance to the words "in all respects" in section 1 of the Act of 1925, but it must be remembered that it also contained the word "reasonably." Although the two terms might seem antagonistic, one had to exercise common sense.

He did not wish to say anything which would cut down the responsibility of landlords for the condition of houses like that of the plaintiff, yet the breaking of a window cord was an accident which might take place at any time and in any class of house; it was an ordinary incident in the habitation of a house and did not appear to be of much assistance in determining whether the house was or was not fit for human habitation.

His Lordship then dealt with the claim that the appellants had failed to keep the house in good tenantable repair within the meaning of the various Rent Restriction Acts, and in particular within the scope of section 2 of the Act of 1920, which implied a liability for repairs upon a landlord who had raised the rent. Continuing, he said that even if the respondent could establish that proposition, and could assert the liability to repair the window, yet even then it was difficult to say that if a window cord broke the premises were not in good and tenantable repair. On the whole, he could not agree with the Judge of the Court of Passage that there was that liability upon the appellants in respect of the slight mishap which had occurred.

But, more than that, it had long been the law that when there was a liability upon the landlord to keep a house in repair, the tenant, to make the landlord liable for resultant damages, must give notice to him of whatever was out of repair, because the tenant would naturally know better what the condition of the premises was. The principles of that rule were laid down by Lord Sumner in *Murphy v. Hurley* (38 *The Times* L.R., 386; [1922] 1 A.C., 369, at p. 389). It was said that that rule only applied where the landlord had no right to enter the premises for the purpose of inspection, and that here the appellants had an agreement with the tenant by which they were entitled to enter and inspect; but Lord Russell of Killowen, in *Broggi v. Robins* (15 *The Times* L.R., 224), had held that there must be notice in any case. In *Murphy v. Hurley* (*supra*) it was clearly laid down that in a case like the present notice should be given, even if the landlord had a right of access. The appeal must therefore be allowed, with costs.

Lord Justice Atkin said that he agreed, and, unfortunately, upon the only ground upon which all three members of the Court were agreed—namely, that notice was required before liability of the landlord existed. As regards the Housing Act of 1925, while no one could say that the mere fact that one cord, or two cords, were broken necessarily put a house in a state unfit for human habitation, yet in a certain class of house, inhabited by a certain class of person, and under the peculiar circumstances of a case like the present, a different conclusion might be arrived at. The argument of the counsel for the respondent commended itself to him (the Lord Justice)—namely, that if the state of repair of a house were such that by ordinary user damage might be caused to the occupier, either by injury or prejudice to health, then the house was not "in all respects reasonably fit for human habitation," and if that were the correct test, then the facts seemed to bring the present case within the definition. There was certainly the question of health to be considered. If a man had a house with many rooms and windows, it might well be that one window not opening properly would not matter, but in dealing with a working-class house with only two bedrooms, occupied by man, wife, and children, the question whether the window would or would not open had an important bearing upon the question whether the room or house was fit for human habitation.

But as regards the alleged liability of the landlord to keep the house in good and tenantable repair and the Rent Restriction Acts, he (Lord Justice Atkin) could not agree that section 2, subsection (5), of the Rent Restriction Act of 1920 imposed a new liability upon the landlord. The provision that the landlord should be deemed to be responsible for any repairs for which the tenant was under no express liability seemed to be merely a statutory answer to the question which must be asked in order to determine whether a landlord might raise the rent or not—namely, whether the landlord was responsible for the repairs, or part of the repairs. He (Lord Justice Atkin) thought that that was very far from creating a statutory liability on the landlord by the tenant. In the ordinary case of houses of the sort in question nobody would have contracted to do any repairs; there might be an implied agreement by the landlord to keep the premises watertight, but that would be about the extent of it. If the landlord in fact did the repairs then he could demand a higher rent, but he (the Lord Justice) could not think that the Act of 1920, for the first time, was imposing a statutory obligation, in excess of the existing obligation of the contract of tenancy, upon the landlord. Upon the whole, therefore, it seemed that the only clause which bound the landlord was that in the Housing Act, 1925.

But the liability of the landlord to do repairs did not come into existence until he had notice of a defect. The tenant had occupation of the house, and it would be unjust to impose an obligation upon a landlord in respect of matters of which he had no knowledge. There were many defects in a house which arose quite suddenly, such as leaks in pipes, &c., and it would be intolerably harsh to make a landlord liable for damage resulting from such an occurrence when he had had no notice. Nor did the power of access, extensive though it might be, take away from the condition inferred by the Courts that liability was only to arise after notice.

Lord Justice Lawrence said that he could not concur in the finding of the Judge below that because window-cords were defective and broke therefore the house was not fit for human habitation. In the case of *Jones v. Geen* (41 *The Times* L.R., 311; [1925] 1 K.B., 659) Mr. Justice Salter said that the effect of section 1 of the Act of 1925 was that the house

must be decently fit for human beings to live in, and he (Lord Justice Lawrence) could not agree that a defective window-cord rendered a house unfit for human habitation within the ordinary meaning of the expression.

As regards the liability under section 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, he regretted that he could not see eye to eye with the other members of the Court, and if the question had depended upon that liability he should have taken time to consider it. But upon the question of the necessity for giving notice he was in complete agreement with the other members of the Court, and the appeal must therefore be allowed with costs.

[Solicitors—Messrs. F. Venn and Co., for Mr. W. Moon, Town Clerk, Liverpool ; Messrs. Attenboroughs, for Mr. R. Barrow-Sicree, Liverpool.]

K.B. Div. (Rowlatt, J.) } 1926. Dec. 21.

KOECHLIN ET CIE. v. KESTENBAUM BROS.*

Bills of Exchange—Indorsement—Signature of payee—Bill drawn in France—Acceptance in England—Indorsement in France by payee's agent in agent's own name—Sufficiency by French law—Action by indorsees—Whether acceptors liable on bill—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), ss. 32 (1), 72 (1).

A bill of exchange was drawn in France by E. V. upon the defendants in London to the order of M. V., and the defendants accepted it. It was indorsed in France to the plaintiffs by E. V. with the authority of M. V., but the signature was not expressed to be for M. V., and on presentment the defendants declined to pay the bill as it did not bear the indorsement of M. V. In an action by the indorsees against the acceptors evidence was given that a valid indorsement might be made according to French law by an agent signing his own name if he was so authorized by the payee.

Held, that though by s. 72 (1) of the Bills of Exchange Act, 1882, the validity of the indorsement "as regards requisites in form" was governed by French law, this provision did not let in the French law so as to dispense with the signature of the payee as required by s. 32 (1), and the plaintiffs could not recover.

This was an action in which Messrs. F. Koechlin et Cie., of 53, Rue de Châteaudun, Paris, sued Messrs. Kestenbaum Bros., of 21, Manchester-avenue, Aldersgate-street, E.C., for £461 10s. 10d., as acceptors of a bill of exchange for 60,000 French francs, dated December 14, 1925, and alleged by the plaintiffs to have been drawn by M. Vigderhaus, payable at the end of February, 1926, to the order of M. Vigderhaus and indorsed by him to the plaintiffs, together with interest and notarial charges. The bill was both signed and indorsed by E. Vigderhaus, the son of M. Vigderhaus, and the signature was not expressed to be for M. Vigderhaus, but evidence was given that E. Vigderhaus had authority to sign for his father and frequently did so in his own name without the words "for M. Vigderhaus."

The defendants denied that M. Vigderhaus was the drawer and that he had duly indorsed the bill to the plaintiffs ; and they alleged that the plaintiffs were not holders of the bill in due course.

Mr. H. du Parcq, K.C., and Mr. R. F. Levy appeared for the plaintiffs ; Mr. Macaskie for the defendants.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Mr. Justice Rowlatt delivered the following judgment :—The bill upon which this action is brought was drawn in France by E. Vigderhaus upon the defendants in London to the order of M. Vigderhaus. It was sent to the acceptors, and returned accepted payable at a London bank. It was presented for payment on behalf of the plaintiffs, or of a subsequent indorsee, but it did not bear the indorsement of M. Vigderhaus, the original payee, the first indorsement being "E. Vigderhaus." This indorsement was affixed, on behalf of M. Vigderhaus, in France, and by his authority, and the bill was negotiated in France. The question is whether the plaintiffs can recover on the bill against the acceptors.

Evidence was given on behalf of the plaintiffs by a French lawyer, who deposed that a valid indorsement might be made according to French law by an agent signing his own name if so authorized by the payee. Although I admit that this evidence surprised me, it was not contradicted, and I accept it for the purpose of this judgment. It is to be observed that the signature was the signature of the drawer of the bill, who happened to be the agent employed in this case, but the signature might have been that of a total stranger to the bill if such a person had been authorized.

By section 31, subsection 3, of the Bills of Exchange Act, 1882, a bill "payable to order" is negotiated by the indorsement of the holder and completed by delivery. By section 32, subsection 1, the indorsement must be written on the bill itself and signed by the indorser. The contract, therefore, of the acceptor of a bill "payable to order" is to pay a holder only if the bill bears by way of indorsement the signature of the payee. This bill, on inspection, does not bear such signature, and, *prima facie,* the acceptors have never contracted to pay it in that condition.

But it is said that section 72, subsection 1, imposes this liability upon them on the ground that it is a question of the "validity as regards requisites in form" of the indorsement, which is governed by French law. In my view, this subsection does not let in the foreign law to dispense with the signature of the payee written on the bill itself, which section 32, subsection 1, requires, just as I do not think that foreign law could be let in to declare that a bill "payable to order" could be transferred by mere delivery or by writing contained in an independent document. If the foreign law of the place of indorsement declares that something more is necessary, that requirement must be observed.

If a forged indorsement becomes, under the law of the place, effectual by subsequent negotiation of the bill to a *bona-fide* holder for value without notice, as was the case in *Embiricos v. Anglo-Austrian Bank* (21 *The Times* L.R., 268 ; [1905] 1 K.B., 677), that will be effectual here, though not by virtue of this subsection, as it is not a question of validity as regards a requisite in form. But no case seems to me to suggest that an acceptor can be called upon to overlook the absence of an apparent chain of regular indorsements. The bill does not appear to be in order. In *Embiricos v. Anglo-Austrian Bank* (*supra*),

at page 684, Lord Justice Vaughan Williams expressed himself as follows :—

"It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that is the true contract."

I think my decision in the present case exactly applies that formula. This is an indorsement not recognized by the law of England. It is not merely an indorsement invalid by that law. I have not overlooked section 72, subsection 2, by which the law of the place of indorsement governs its interpretation. Whatever scope may be assigned to the word "interpretation," there is no indorsement within the meaning of the Act to interpret.

There will be judgment for the defendants, with costs.

[Solicitors—Messrs. Herbert Baron and Co.; Mr. Henry Snowman.]

K.B. Div. } 1926.
(Salter and MacKinnon, JJ.) } Dec. 20.

METCALFE v. BOYCE.*

Landlord and Tenant—Surrender or assignment of tenancy—By act or operation of law—Substitution of master for servant as tenant—No express notice to determine servant's tenancy—Payment of rent, rates and taxes by master—Advantage of servant—Estoppel—Statute of Frauds (29 Car. II., c. 3), s. 3.

In 1910 the defendant, a policeman, became tenant of a house, paying the rent and rates personally, receiving receipts in his own name and drawing from the police authority a grant in aid of those expenses. In 1912 an Order was made, to the knowledge of the defendant, that in future the Chief Constable would be the tenant of all houses occupied by policemen not in barracks, and that policemen should occupy the houses as servants of the police authority and not as tenants. While no express notice was given either by the defendant or by his landlord to determine the defendant's tenancy, after the date of the Order the rent of the house occupied by the defendant was paid by the police authority through the defendant, the receipts being made out in favour of the authority, and no demands for rates or taxes being made to the defendant, who paid none. Deductions were made from the defendant's pay on account of rent, except during certain periods when quarters were free. In March, 1926, the defendant retired on pension, and the plaintiff, the Chief Constable, who in January, 1926, had signed an agreement with the landlord for the tenancy of the house, obtained judgment for possession in an action in the County Court.

Held, that there was evidence on which the County Court Judge could find that in 1912 the defendant agreed with the landlord and with the plaintiff to surrender his tenancy and in future to occupy the house as a servant of the police authority and not as a tenant, that the landlord agreed to accept the surrender and to take the plaintiff as tenant, and that the plaintiff agreed with the defendant to accept the tenancy from the landlord, to allow the occupation by the defendant as a servant, and to pay the rent, rates and taxes. The plaintiff had undertaken liabilities of which the defendant had had the advantage; and, therefore, the defendant was estopped from denying that there had been a surrender by him of his tenancy by act or operation of law or an assignment thereby of his interest to the plaintiff.

This was an appeal from Yatton County Court.

The facts and arguments appear sufficiently in the judgments.

Mr. Croom-Johnson and Mr. F. Cyril Williams appeared for the appellant (the defendant in the action); Mr. Schiller, K.C., and Mr. Wethered for the respondent.

The Court reserved judgment.

The following judgments were read :—

MR. JUSTICE SALTER.—In this case the plaintiff sued in the Yatton County Court to recover possession of a house, being No. 2, Orchard Cottages, at Blagdon, in the county of Somerset. Judgment was given for the plaintiff and the defendant appeals.

The house in question is the property of Sir George Wills and was tenanted in 1910 by one Skinner, who was the policeman then stationed at Blagdon. In that year Skinner was moved and the defendant was appointed in his place. The defendant became tenant of this house from Sir George Wills on a quarterly tenancy at a yearly rent of £12, payable quarterly, the tenant paying rates and taxes. It is common ground that this tenancy continued until 1912.

In those days the members of the county police force who were not quartered in barracks received a grant in aid of their rent. From 1910 to 1912 the demands for the quarterly rent were addressed to the defendant; he went to the police office and drew the grant to which he was entitled and then paid the rent, taking a receipt in his own name. Demands for rates and taxes were addressed to him and paid by him. He drew his pay in full. In 1912 the county police authority adopted a new system. It was decided that, in future, the Chief Constable should be the tenant of all houses occupied by policemen not in barracks, that the policemen should occupy them as servants and not as tenants, that the Chief Constable should pay all rent, rates and taxes, and that a deduction should be made from the men's pay. This change was announced in a general Order dated April 22, 1912, and it is admitted that the defendant had notice of its terms.

No express notice to determine the defendant's tenancy was given by the defendant or by the landlord. From 1912 onwards the quarterly demands for rent were sent to the defendant addressed to the county authority. The defendant took them to the police office and received the full amount of the rent due. He paid this at the estate office and received a receipt acknowledging payment by the county authority, and sent the receipt to the county treasurer. No demands for rates and taxes were addressed to him, and he paid none. This course of business continued for 14 years. He continued to occupy the house and his

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

name remained on the estate books as tenant. Deductions, varying in amount from time to time, were made from his pay on account of rent. During two periods in the 14 years quarters were free, and at those times no deduction was made from his pay. In 1923 a form of tenancy agreement was sent from the estate office to the defendant and to other occupiers of houses on the estate. They all refused to sign it. At the hearing, the landlord's representative said that the documents had been sent in error.

In November, 1925, the defendant gave notice of his intention to retire on pension. In January, 1926, a tenancy agreement in writing was signed by the landlord and by the plaintiff creating a quarterly tenancy at a yearly rent of £12, payable quarterly, the tenant paying rates and taxes. On March 26, 1926, the defendant retired on pension. He refused, on demand, to give up the house, and the plaintiff, who is and was at all material times the Chief Constable of Somerset, brought this action for possession. It was necessary for him to show that the defendant's tenancy which existed in 1912 had been surrendered or assigned. In the absence of writing it was necessary to show a surrender or assignment by operation of law. The plaintiff's case was that the tenancy had been surrendered or assigned by operation of law in 1912. The learned Judge held, on the evidence, that there had been a valid surrender, or, alternatively, a valid assignment by operation of law in 1912. The question is whether he was right in law.

I think that in view of the evidence and of his note of his decision it must be taken that he drew the following inferences of fact—namely, that in 1912 an arrangement was made between the defendant, his landlord, and the plaintiff, who was his employer ; the defendant agreed with the landlord that he would forthwith surrender his tenancy, and the landlord agreed with the defendant to accept the surrender and to accept the plaintiff as tenant ; the defendant agreed with the plaintiff that he would surrender the tenancy to the landlord and would in future occupy the house as a servant and not as a tenant ; the plaintiff agreed with the defendant to accept a tenancy from the landlord, to allow the defendant to occupy as a servant, and to pay the rent, rates and taxes ; and the plaintiff and the landlord agreed that the plaintiff should become tenant in place of the defendant and on the same terms.

I think that there was evidence on which the learned Judge could draw these inferences of fact. He further negatived the suggestion that the defendant made the above agreements under duress. The Rent Restriction Acts did not then exist, and the change was beneficial to the defendant on the whole. As regards rent, he did not lose but sometimes he gained, and he was relieved from payment of rates and taxes. The grant of a new tenancy by the landlord to the plaintiff, with the assent of the defendant, operated as a surrender of the defendant's tenancy, if the defendant gave up possession to the plaintiff at or about the time of the grant of the new tenancy. In my opinion, the defendant, while remaining in occupation of the house, did give up possession of it to the plaintiff in April, 1912, and the plaintiff took possession and remained in possession by his servant.

In *Peter v. Kendal* (6 B. and C., 703) it was necessary for the plaintiff to prove that a parol demise of a ferry by him to one Brown had been determined by surrender by operation of law. He proved that Brown, finding the ferry unprofitable, had agreed with him by parol to determine the tenancy and to work the ferry as the plaintiff's servant, and that Brown had then received wages and accounted for the takings. It was held that this effected a surrender of the tenancy by operation of law. A master is in possession of land rented by him and occupied by his servant as such and not as a tenant.

I think that the defendant, in pursuance of his agreement, ceased to occupy as tenant and occupied for his master, the plaintiff. There was, therefore, a good surrender by operation of law, and the appeal fails.

Mr. Justice MacKinnon.—I agree. The plaintiff says that by reason of what happened in 1912 there was either a surrender by the defendant of his interest to Sir George Wills, or an assignment by the defendant of his interest to the plaintiff. The learned County Court Judge seems to have accepted this contention. The only possible ground on which his judgment can be impugned is by the defendant's reliance on section 3 of the Statute of Frauds. And as there was clearly no written surrender or assignment, the sole question is whether the plaintiff can say that there was a surrender or assignment "by act or operation of law." We are told that this question was argued in the Court below, though there is no specific mention of it in the judgment.

I think that the cases cited to us, especially the judgment of Mr. Justice Chitty in *Wallis v. Hands* (9 *The Times* L.R., 288 ; [1893] 2 Ch., 75), show that "the act or operation of law" can be relied on when the party who is defending himself with this section 3 is estopped from denying that he has surrendered or assigned his interest. One form of such estoppel arises when a substituted tenant actually takes possession. My brother Salter has pointed out that that principle applies here. I agree that in the circumstances of this case the estoppel of the defendant can be asserted by the plaintiff. For on the facts the plaintiff can say to the defendant : "As a result of what happened in 1912 I have paid the rent every quarter and I have also paid the rates. These are liabilities which I have undertaken in consequence of your assent to my proposal at that time. I have altered my position for the worse, and you, especially with regard to the rates, have taken advantage of my action. You are therefore estopped from now denying the surrender or assignment."

That contention seems to me to have all the necessary ingredients of a plea of estoppel, and, if so, the plaintiff can rely upon a surrender or assignment "by act or operation of law" sufficient to satisfy section 3 of the Statute of Frauds. I therefore agree that this appeal should be dismissed, with costs.

[Solicitors—Messrs. Calder Woods and Sandiford, for Mr. George Stredwick, Bristol ; Messrs. Cameron, Kemm and Co., for Messrs. John Hodge and Co., Weston-super-Mare.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Sargant, L.JJ.)

1926.
Dec. 17.

IN RE WAIT—EX PARTE COLLINS.*

Contract—Sale of goods—Specific performance—Purchase of 1,000 tons of wheat to be loaded on named ship—Sale of 500 tons—Arrival of ship with wheat in bulk—Payment—Bankruptcy of vendor—"Specific or ascertained" goods—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), s. 52.

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

One W. made a c.i.f. contract to buy 1,000 tons of wheat to be loaded in America on a named ship for Avonmouth, and the respondents then made a c.i.f. contract to buy 500 tons of it from him. Subsequently the wheat was shipped in bulk and a bill of lading for the 1,000 tons was received by W. on January 4, 1926, the price being payable on February 6. On January 5 W. delivered to the respondents a provisional invoice for the 500 tons, the price of which, less half the freight payable at destination, was due on February 6. On February 5 the respondents gave W. a cheque for the price of the 500 tons. On February 24 W. was adjudicated bankrupt, and on February 28 the vessel arrived at Avonmouth with the wheat in bulk. On an application by the respondents against the trustee for specific performance of the contract by delivery of the 500 tons on payment of their proportion of the freight,

Held (Sargant, L.J., dissenting), that the 500 tons were not specific or ascertained goods within s. 52 of the Sale of Goods Act, 1893, and therefore specific performance of the contract would not be ordered.

Decision of the Divisional Court ([1926] Ch., 962) reversed.

This was an appeal from a decision of a Divisional Court sitting in Bankruptcy ([1926] Ch., 962).

The bankrupt Wait had carried on business in Bristol as a corn dealer. On November 20, 1925, he made a c.i.f. contract, as purchaser, with Balfour Williamson and Co., of London, as sellers, for 1,000 tons of western white wheat to arrive at Avonmouth, per motor-vessel Challenger, expected to load between December 16 and 31, 1925, from Oregon and/or Washington. On November 21, 1925, Messrs. Humphries and Bobbett made a c.i.f. contract with Wait to purchase 500 tons of that cargo of western white wheat.

The wheat was shipped in bulk from Oregon on December 21, 1925, and a bill of lading for the 1,000 tons was issued to Wait and was received by him on January 4, 1926, the purchase price being payable on February 6, 1926. On January 5, 1926, Wait delivered to Messrs. Humphries and Bobbett a provisional invoice for the 500 tons, the price of which, less half the freight payable at destination, was £5,933, due on February 6, 1926. On February 5, 1926, the sub-purchasers gave Wait a cheque for £5,933, and he paid the cheque, with others, into his general account at the bank.

On February 17, 1926, Wait gave notice of suspension of payments, and on February 24, 1926, he was adjudicated bankrupt on his own petition. On February 28, 1926, the Challenger arrived at Avonmouth with the 1,000 tons of wheat in bulk.

On March 3, 1926, the sub-purchasers, Messrs. Humphries and Bobbett, moved before the County Court Judge sitting in bankruptcy for an order that the trustee (then the Official Receiver) might specifically perform the contract by delivery of the 500 tons of wheat sold to them on payment of their proportion of the freight; or, alternatively, that the trustee should repay the purchase price of £5,933.

On March 5, 1926, Mr. Collins was appointed trustee. He was subsequently made a respondent to the motion.

On March 13, 1926, the County Court Judge held that the sub-purchasers could not obtain specific performance of the contract, but were entitled to a return of the £5,933 paid by them. On appeal, the Divisional Court in Bankruptcy (Mr. Justice Astbury and Mr. Justice P. O. Lawrence) discharged that order and declared that the sub-purchasers, the present respondents, were entitled to have the contract specifically performed on payment of £750 as an aliquot share of the freight.

The trustee appealed.

Mr. Jowitt, K.C., and Mr. Croom-Johnson appeared for the appellant; Mr. Luxmoore, K.C., and Mr. Wethered for the respondents.

The MASTER of the ROLLS, in his considered judgment, having stated the principal facts, proceeded. The Divisional Court held that the contract could be specifically performed because the goods were "specific" goods within section 52 of the Sale of Goods Act, 1893, and that was the point mainly relied on by the respondents. It was argued that the wheat was "ascertained goods" within section 52 as soon as it was shipped on board the Challenger, because it could and ought to be ascertained upon arrival at Avonmouth, and that upon payment of the purchase price there was an equitable assignment of so much of the wheat as was necessary to satisfy the sub-purchasers' contract. The cases mainly relied on were *Holroyd v. Marshall* (10 H.L.C., 191); *Hoare v. Dresser* (7 H.L.C., 290); and *Howell v. Coupland* (L.R., 9 Q.B., 462; 1 Q.B.D., 258).

Section 52 of the Sale of Goods Act, 1893, was a reproduction of section 2 of the Mercantile Law Amendment Act, 1856, which empowered the Courts to enforce contracts for the sale and delivery of specific goods. It provided for one of the remedies of the buyer, but did not give any correlative rights to the seller, and its operation remained limited. It applied to all cases where the goods were specific or ascertained, whether the property had passed to the buyer or not (*Jones v. Tankerville* (25 *The Times* L.R., 714; [1909] 2 Ch., 440, at p. 445).)

Looking at the history of the matter he could not agree with Mr. Justice Astbury in saying that if the property passed specific performance would not be necessary. The problem to be solved came back to the question—were the 500 tons specific goods? They were never appropriated, and it was admitted that the legal property had not passed to the purchasers. There was no ascertainment or identification of the 500 tons out of the cargo of the Challenger.

The argument for the respondents largely depended on the validity of a *dictum* of Lord Westbury in *Holroyd v. Marshall* (*supra*), which, if premature at the date of its utterance, was now said to be good law by virtue of section 52, and it was that passage which Mr. Justice Astbury mainly relied on. It was as follows (33 L.J., Ch., 193, at p. 196):—

"A contract for the sale of goods as, for example, of 500 chests of tea, was not a contract which would be specifically performed because it did not relate to any chests of tea in particular, but a contract to sell *the* 500 chests of a particular kind of tea which 'are now in my warehouse in Gloucester' was a contract relating to specific property, and which would be specifically performed."

Those words appeared to indicate specific goods in a specific place.

His Lordship then referred to other cases which

had been cited : *Wait v. Baker* (2 Ex., 1) ; *Hayman and Son v. M'Lintock* (44 Sc.L.R., 691, at p. 698) ; *Thames Sack and Bag Company, Limited v. Knowles and Co., Limited* (88 L.J., Q.B., 585) ; and *Laurie and Morewood v. Dudin and Sons* (42 *The Times* L.R., 149 ; [1926] 1 K.B., 223). The limitations of the jurisdiction of a Court of Equity to grant specific performance of a contract for sale of goods were recognized by the Master of the Rolls (Sir George Jessel) in *Fothergill v. Rowland* (L.R., 17 Eq., 132), and recognized and affirmed in *In re Clarke* (3 *The Times* L.R., 818 ; 36 Ch.D., 348), where Lord Justice Cotton, at p. 352, said :—

"The ordinary application of the doctrine of specific performance is to compel a vendor or purchaser to complete a contract for sale or purchase, a contract which is wholly executory. Where such a contract relates to goods, the Court will not in general decree specific performance. Why is this ? Because the Court considers that in general damages are a sufficient remedy, and the proper remedy for the breach of a contract to sell or purchase goods, but that does not apply to a breach of a contract relating to land."

Considering the facts of the present case in the light of the authorities, it was, in his Lordship's opinion, impossible to hold that the 500 tons of wheat ex Challenger were specific or ascertained goods, and thus specific performance would not be ordered as the remedy of the buyer under section 52 of the Act. The passage relied on in *Holroyd v. Marshall* (*supra*), if taken as reported in the *Law Journal*, did not conflict with that view. The illustration given depended, said Lord Westbury, on the contract being such that a Court of Equity would decree specific performance of it. The effect of *Holroyd v. Marshall* (*supra*) was summarized by Lord Justice Cotton in *Joseph v. Lyons* (1 *The Times* L.R., 16 ; 15 Q.B.D., 280).

In *Tailby v. Official Receiver* (4 *The Times* L.R., 726 ; 13 App. Cas., 523), Lord Macnaghten, at p. 547, rejected the test apparently intended by Lord Westbury in *Holroyd v. Marshall* (*supra*)—"would a Court of Equity decree specific performance ? "—as a measure of the rights of the parties, but he added the qualification that the rights must be completely defined as between the parties to the contract. Here there was no such identification of the "very thing," for the goods were not appropriated nor was their individuality ascertained. *Hoare v. Dresser* (*supra*) did not conflict with *Holroyd v. Marshall* (*supra*), but Lord Cranworth's words, at p. 317 of *Hoare v. Dresser* (*supra*), if they conflicted with the authorities, appeared to be too wide and must be reconsidered. Looking at the present case more particularly from the point of view of equitable assignment, the sub-purchasers could not fulfil the conditions necessary to give them such a right. *Howell v. Coupland* (*supra*), which was much insisted on, did not appear to be an authority on the point now in question.

For the reasons which he had given, and upon the authorities referred to, the appeal, in his judgment, must be allowed, the orders of the Divisional Court and of the County Court set aside, and the motion of the sub-purchasers refused with costs here and below. He (his Lordship) desired to add that he much regretted to find that he was differing not only from the Judges in the Divisional Court, but also from Lord Justice Sargant. The question for decision appeared to him to be governed by the mercantile law applicable to a not uncommon contract for the sale of goods.

Lord Justice Atkin said that the case had resulted in a decision which, if correct, would have far-reaching effects upon commercial transactions. That decision had the support of both learned Judges below and also of Lord Justice Sargant, and therefore in expressing the opinion that the decision was wrong he felt bound to examine in some detail the facts and contentions relied on. [His Lordship then stated the facts and proceeded.] It appeared that the debtor had other contracts with other buyers for the purchase from him of further grain—500 tons of western white wheat, and 1,500 tons of northern wheat, all of which was shipped in bulk on the Challenger ; of the western white wheat 1,190 tons were shipped in the after-hold, and 320 tons in No. 2 hold. No 500 tons of wheat had ever been identified, earmarked, or appropriated, as the wheat to be delivered to the claimants under the contract. They had never received any bill of lading, delivery order, or document of title representing the goods. The trustee had 530 tons western white wheat in his possession, and it was not suggested that it was not an ordinary commercial commodity. It was said, however, that the claimants were entitled to have the contract of sale of November 21 specifically performed by a direction to the trustee to deliver 500 tons, or that the transaction had resulted in an equitable assignment to the claimants either of the whole bulk of 530 tons, or at any rate of 500 tons of it, or that they had a charge upon the bulk to secure the sum of £5,933.

In his (his Lordship's) opinion the claimants failed, and the grant of the relief claimed would violate well-established principles of law and equity. It would also affect and seriously embarrass the ordinary operations of buying and selling goods, and the banking operations which attended them. The claim of the claimants to specific performance was based solely on section 52 of the Sale of Goods Act, 1893, under which the remedy might be given "in any action for breach of contract to deliver specific or ascertained goods." By section 62 "specific" goods were defined as "goods identified and agreed upon at the time a contract of sale is made." "Ascertained" probably meant "identified after the contract of sale is made." Here at no time were there any goods identified and agreed upon or ascertained. The effect of the Act was that in contracts for the sale of goods the only remedy by way of specific performance was the statutory remedy. It followed that as the goods were neither specific nor ascertained that remedy was not open to the creditors. His Lordship then discussed the decision in *Howell v. Coupland* (L.R., 9 Q.B., 462 ; 1 Q.B.D., 258), and said that the case had no reference to "specific" or "ascertained" goods for the purpose of passing the property or to specific performance. Decisions on cases before 1893 were not of much value, but he must refer to *Hoare v. Dresser* (7 H.L.C., 290) and *Holroyd v. Marshall* (10 H.L.C., 191), in which occurred the *dictum* of Lord Westbury relied on by the claimants. Its authority was weakened by the criticism of Lord Justice Fry in his work on Specific Performance. He (his Lordship) did not think that there was at any time an equitable assignment which gave the claimants a beneficial interest in the goods. It had been difficult to elicit the moment of time when that beneficial interest came into existence, and in the argument various times had been suggested. He thought (without deciding it) that much could be said for the proposition that an agreement for the sale of goods did not import any agreement to

transfer property otherwise than in accordance with the terms of the Act, *i.e.*, that the intentions of the parties were to be derived from the terms of the contract. The rules in the Act appeared to be complete and exclusive statements of the legal relations between the parties, both at law and in equity, though legal or equitable rights might come into existence *dehors* the contract of sale. He thought that it made no difference that in the present case the creditors had paid their purchase-money in advance of the due date, and in any case before they could get delivery under the contract. In *Holroyd v. Marshall* (*supra*) Lord Westbury was not directing his mind to contracts for the sale of goods which ordinarily would not be of the class in which a Court of Equity would grant specific performance. Payment of the price was no doubt material in contracts of sale of real estate as regards the right of an unpaid vendor to a lien on the land for his purchase-money. But that lien of the unpaid vendor could not exist in the case of any ordinary sale of goods; the remedies were defined; the unpaid vendor had a lien which was a possessory lien and a right of stoppage *in transitu*. But in his (his Lordship's) experience no one had ever claimed or been given as unpaid vendor a right to a lien over the goods in the possession of the purchaser. Similarly a purchaser who had paid the purchase price had never claimed or been given a lien over the property in the hands of the vendor.

It was said, however, that common honesty required that such a beneficial interest should be created. But the test of honesty was inadequate, being both too wide and too narrow; the sphere of honesty was not confined to dealings with beneficial interests in property. Many would think it dishonest deliberately to break a contract for the sale of future goods, but the law only gave a remedy in damages. If the contentions put forward by the claimants were to succeed the whole course of business would be fundamentally affected. Many large business transactions, and nearly all import transactions, were financed by banks or financial houses as this transaction was, and if notices of subsales were notices of equitable assignments the banks would be affected even though by holding the bills of lading or other documents they acquired the legal title to the goods. The effects of the decision below, when once appreciated, would throw the business world into confusion, for credit would be seriously restricted.

He (his Lordship) regretted to differ from the opinion of the Judges below and of Lord Justice Sargant, but he did not think that there was any difference of opinion as to the principles of equity, which were well settled and in their own sphere beneficial. The difference of opinion was as to their application to such facts as appeared in the present case, and he felt bound to repel the disastrous innovation which, in his opinion, the judgments now under review would introduce into well-settled commercial relations. He thought that the appeal should be allowed and the motion dismissed with costs here and below.

Lord Justice Sargant regretted that he could not agree with the other members of the Court, but his disagreement was complete and fundamental. In his opinion there had, before the bankruptcy, been created in favour of Humphries and Bobbett an equitable lien or equitable assignment in respect of the wheat, enforceable against Wait and the trustee in bankruptcy, and preventing the wheat from vesting in the trustee except subject to such equitable right. There was an executory contract for the sale of a definite portion of a definite cargo shipped on a named vessel at a definite period. The trustee in bankruptcy declined to recognize Humphries and Bobbett's title, and left them to prove in bankruptcy for purchase-money which they had already paid. Delivery of 500 tons from any other parcel of wheat than that contracted for would not satisfy the contract.

If they had bought and paid for the entire cargo of wheat they would have been entitled to something much more precise than a mere personal right to enforce delivery. Had Wait threatened to deal with the cargo in any way inconsistent with the sub-purchasers' interests (though they did not), the latter could have obtained an injunction restraining any such dealing. It made no difference to the equitable position that Humphries and Bobbett agreed to buy not the whole 1,000 tons, but only 500. Wait had been careful to dispose only of so much of the 1,000 tons as left 530 tons available to satisfy the equitable obligation.

He thought that there was an overwhelming mass of authority in favour of the proposition that the agreement for sale in the present case was an agreement for the sale of specific goods and amounted to an equitable assignment enforceable in respect of the particular goods, and that the sub-purchasers were entitled to have the 500 tons for which they had paid. The reasoning of Lord Cranworth in *Hoare v. Dresser* (7 H.L.C., 290) covered the exact point.

It was said that his (his Lordship's) decision was one which would interfere with the ordinary way in which business was conducted, but he could not agree, because ordinary business was not conducted dishonestly, and on any view of the law it would have been dishonest for Wait, after the sale to Humphries and Bobbett, to have sold so much of the parcel as not to leave enough to satisfy the respondents' claim. In his judgment the appeal should be dismissed.

[Solicitors—Messrs. Peacock and Goddard, for Messrs. Bevan, Hancock, and Co., Bristol; Messrs. Hancock and Willis, for Messrs. Barry and Harris, Bristol.]

K.B. Div. (Salter and Talbot, JJ.) 1926. Dec. 20.

PUTSMAN v. TAYLOR.*

Contract — Severance — Separate consideration and accord — Independent performance — Agreement by servant not to compete with employer in three different areas—Restraint of trade—Validity—Reasonable necessity to safeguard interests—Circumstances to be considered—Onus of proof.

A valid promise is enforceable although the promisor has made other and void promises supported by the same consideration and included in the same document if it is on the face of the document a separate promise, the subject of separate consideration and accord, and such that its performance is independent of the performance of any other promise made by the promisor. Whether or not a promise is separate depends on its particular language. Severance is an act of the parties, not of the Court.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

Where, therefore, a servant agreed with his employer that after the determination of his employment he would not for a period of five years be employed in any capacity by any person, firm, or company carrying on a business similar to that of the employer in three areas in which the employer carried on business,

Held, that the contract not to be employed in any one of the three areas was severable from the contracts not to be employed in the other areas, and breach thereof could be restrained by injunction.

An employer is entitled in a contract of employment to protect himself by a covenant against competition by his servant, provided that the covenant is not wider than is reasonably necessary to safeguard his proprietary interest against unfair use by the former servant of information gained during the service. The question whether such a covenant in restraint of trade is unduly wide, though depending on questions of fact, is a matter of law. The limits in time and space, the nature and duration of the employment, and all the other circumstances must be considered together, the onus being on the employer to show that the covenant is not too wide.

The defendant was employed by the plaintiff, a tailor, as manager and cutter for 12 months certain, the employment being thereafter terminable by one week's notice on either side, and the written agreement between the parties providing that "after a determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination . . . be employed in any capacity by any person, firm or company carrying on a business similar to that of the employer in Snow-hill, Birmingham, or within a half-mile radius of Aston Cross, Birmingham, or Bristol-road, Birmingham."

Held, that, in view of the facts that the employment was highly confidential, that the service was for 12 months at least, and that the limit in space was very narrow, the time limit of five years was not such as to render the covenant illegal as being in restraint of trade.

Mallan v. May (11 M. and W., 653) and *Attwood v. Lamont* (36 *The Times* L.R., 895 ; [1920] 3 K.B., 571) applied.

Mason v. Provident Clothing and Supply Company, Limited (29 *The Times* L.R., 727 ; [1913] A.C., 724) and *British Concrete Company v. Schelff* ([1921] 2 Ch., 563) considered.

This was an appeal from Birmingham County Court.

The facts and arguments appear from the judgments.

Mr. R. A. Willes appeared for the appellant (the plaintiff in the action) and Mr. C. Williams for the respondent.

The Court reserved judgment.

The following judgments were read :—

Mr. Justice Salter.—This is an appeal by the plaintiff from the refusal of the County Court Judge to grant an injunction restraining the defendant, his former servant, from competing in business with him after the termination of the service.

The plaintiff is a tailor carrying on business in Birmingham at three places—namely, Snow-hill, Bristol-road, and Aston Cross. The defendant was formerly in the employ of Dresdens, a brother-in-law of the plaintiff, who carries on business as a tailor quite near to the plaintiff, and is a trade rival. One Joe Putsman, a brother of the plaintiff, also carries on business as a tailor at 73, Snow-hill, and is a trade rival of the plaintiff.

The defendant left the employ of Dresdens and entered the service of the plaintiff in March, 1925. The contract of service is in writing and is dated March 21, 1925. The employment is for 12 months certain, and after that to be terminable by one week's notice on either side. The plaintiff promises to employ the defendant, to pay him £4 a week and a commission, and to allow him two weeks' holiday in a year at half wages. The defendant promises to serve the plaintiff as manager and cutter at Snow-hill, "or at such other place or places where the employer's business shall be carried on and as the employer may require," to serve with diligence and fidelity, to keep his employer's secrets, to keep and render accounts, not to compete or to be engaged in any other business during the service, and not to compete after the determination of the service.

The provisions relating to the last-named matter are contained in clause 11 of the contract, and are as follows : "After the determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or be employed by Dresdens, tailors, or be employed in any capacity by any person, firm, or company carrying on a business similar to that of the employer in Snow-hill, Birmingham, or within a half-mile radius of Aston Cross, Birmingham, or Bristol-road, Birmingham."

Under this contract the defendant managed the plaintiff's business at 49, Snow-hill for 15 months. On Thursday, June 10, 1926, he went to the plaintiff's brother, Joe Putsman, and arranged with him to leave the plaintiff's service and enter that of Joe Putsman on the following Monday. On Saturday, June 12, the defendant paid the plaintiff £4 in lieu of notice and left his service. On the Monday he entered the service of Joe Putsman, who exhibited a photograph of the defendant in his shop window with a notice that he had secured the defendant's services.

The plaintiff took proceedings in the County Court and prayed an injunction in the terms of clause 11. He further submitted that, if clause 11 should be held to be too wide to be enforceable as a whole, he was entitled to an injunction restraining the defendant for a period of five years from the determination of the agreement from being employed in any capacity by any person, firm, or company in a business similar to that of the plaintiff in Snow-hill, Birmingham.

The learned Judge evidently rejected the claim to an injunction in the terms of the whole clause. He held that the promise not to take service for five years with any tailor in Snow-hill was a promise which might properly be enforced as a separate promise, if it were a valid promise, but he held that such a promise was invalid as being in undue restraint of trade.

In view of the opinion which I have formed, it is unnecessary for me to consider the validity of clause 11 as a whole, and it is, therefore, unnecessary to consider its meaning and to decide, for example, whether there is any limit in space to the promises not to set up in business for himself and not to enter the employ of Dresdens. I confine my judgment to the questions of severability, and the validity of the promise not to take service with any tailor in Snow-hill for five years.

The "doctrine of severability" is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise, notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid as being in undue restraint of trade or for any other reason, the Court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the Court will enforce it. Whether it is separate or not depends on the language of the document. "Severance," as it seems to me, is the act of the parties, not of the Court.

Some of the judgments in the House of Lords in *Mason v. Provident Clothing and Supply Company, Limited* (29 *The Times* L.R., 727 ; [1913] A.C., 724) and the judgment of Lord Justice Younger in *Attwood v. Lamont* (36 *The Times* L.R., at p. 897 ; [1920] 3 K.B., at p. 581) appear to suggest that some of the earlier decisions on severance are no longer reliable guides. A definite test to be applied in determining, on the construction of an agreement, whether a particular promise contained in it is separately enforceable or not, is contained in the judgment of Lord Sterndale in *Attwood v. Lamont* (*supra*).

In that case (the converse of the present) the agreement was that the defendant would not engage in any one of many branches of business in one place. Lord Sterndale said (36 *The Times* L.R., at p. 896 ; [1920] 3 K.B., at p. 577) : "The doctrine of severability has been much criticized by Lord Moulton in *Mason v. Provident Clothing and Supply Company* (*supra*) and by Mr. Justice Neville in *Goldsoll v. Goldman* ([1914] 2 Ch., 603, at p. 613). These criticisms, however, were not accepted by the Court of Appeal—see *per* Lord Justice Kennedy in *Goldsoll v. Goldman* ([1915] 1 Ch., 292)—or by Mr. Justice Sargant in *Nevanas and Co. v. Walker* (30 *The Times* L.R., 184 ; [1914] 1 Ch., 413).

"I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining." Again (36 *The Times* L.R., at p. 896 ; [1920] 3 K.B., at p. 578) : "It remains, therefore, to consider whether the covenant in this agreement can be considered as though it contained a number of several covenants each relating to a separate trade. I think it clear that if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent." Lastly (36 *The Times* L.R., at p. 896 ; [1920] 3 K.B., at p. 579) : "I think it is necessary to examine the meaning of the agreement as unsevered in order to see whether it complies with the principles above stated, and then to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations."

Applying this test to the present case, the defendant has made many promises which are obviously separate. If clause 11 were held to be indivisible and wholly bad, the master could enforce the promises to be diligent, to account, and not to compete during the service. Turning to clause 11, the defendant promises, in consideration of the agreed employment, that for five years he will not (1) set up as a tailor for himself, (2) take service with Dresdens, (3) take service with any tailor in Snow-hill, (4) take service with any tailor in the Bristol-road area, (5) take service with any tailor in the Aston Cross area. If the first, second, fourth, and fifth of these promises are ignored and clause 11 is treated as though it comprised only the third, does the change give to the agreement as a whole "a meaning and object different in kind and not only in extent"? We have "to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations." In my opinion, the change is a change in extent only and not in kind, and the promise not to take service in Snow-hill is separately enforceable.

The remaining question is the validity of this promise. The relation between master and servant is always confidential, though in differing degrees. The relation between a master and the servant who manages his business for him is highly confidential. During the service he is in constant contact with the master's customers and cannot fail to learn their names and addresses, their likes and dislikes, and something of their financial credit. Such knowledge can be used with effect, after the determination of the service, to induce such customers to transfer their custom to a new employer.

Certain conduct of this kind will be restrained as being in breach of implied terms in the contract of service. (*Robb v. Green*, 11 *The Times* L.R., 517 ; [1895] 2 Q.B., 315 ; *Louis v. Smellie*, 11 *The Times* L.R., 515.) Other conduct of this kind, though injurious to the late employer, will not be restrained in the absence of express agreement. Such agreement need not take the form of a covenant against solicitation. Such a covenant is difficult to enforce ; it is difficult to show breach and difficult to frame an injunction.

The master is entitled to protect himself by a covenant against competition, provided that it is not wider than is reasonably necessary to safeguard his proprietary interest against unfair use by the former servant of information gained during the service. (See the judgment of Lord Sterndale in *Attwood v. Lamont*, 36 *The Times* L.R., at p. 896 ; [1920] 3 K.B., at p. 578.) The question whether a covenant in restraint of trade is unduly wide, though depending on questions of fact, is always treated as a matter of law. The limits in time and space, the nature and agreed duration of the employment, and all the circumstances must be considered together, the onus being on the employer to show that the covenant is not too wide.

Here the employment was highly confidential, the service was for 12 months at least, and the limit in space is, in my opinion, very narrow indeed. Seeing that the defendant could solicit the plaintiff's

customers from the next street, I think that a limit of five years is not too long. I am, therefore, unable to agree with the learned Judge on this point.

Moreover, he has applied a wrong test in considering whether the scope of the promise is, or is not, too wide. After quoting at length from the judgments in *Attwood v. Lamont* (*supra*) and laying down the right principle, he gives as his reason, and apparently his only reason, for holding the covenant to be too wide, that the defendant had acquired no knowledge of the plaintiff's customers during his 15 months' management of the plaintiff's business and was not, therefore, at the end of the service in a position to do any injury to the plaintiff's goodwill. This seems to me not only incredible in fact, but unsound in law. The question is not whether experience gained during the service has shown the restriction to have been excessive or insufficient. The question is whether the covenant was a reasonable one for the parties to agree to at the outset of the service on the best estimate which they could then make of the future. If, for example, a long service as manager was contemplated as probable, and it proves in fact to be short, it may appear that a narrower restriction would have been sufficient. If, on the other hand, a short service was contemplated, and it proves to be a long one, it may well be that if the parties could have foreseen the future they would have agreed on a wider covenant.

For these reasons I think that the appeal succeeds. The judgment for the defendant and the order for an inquiry as to damages must be set aside and judgment must be entered for the plaintiff for an injunction restraining the defendant for a period of five years from the determination of the agreement from being employed in any capacity by any person, firm, or company carrying on a business similar to that of the plaintiff in Snow-hill, Birmingham.

Mr. Justice Talbot.—I need not read the material clause of the agreement again. The learned County Court Judge has held that it contains a separate severable contract not to be employed for five years from the determination of the agreement in any capacity for any person, firm, or company carrying on a business similar to the plaintiff's in Snow-hill. He has held that this contract is illegal as being in restraint of trade.

The first question is whether this contract is severable as held by the learned Judge. I know of no ground for saying that the law in this respect is not precisely the same as to contracts illegal as being in restraint of trade and contracts illegal in any other respect. It is thus stated by Mr. Justice Willes in *Pickering v. Ilfracombe Railway Company* (L.R., 3 C.P., 235, at p. 250) : "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void ; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." The contract in the present case is (among other things) not to enter employment of a particular kind in either of three defined areas. Why is not that severable into three contracts each binding the defendant not to enter such employment in one of the three ? It is difficult to see how, if any such contract is severable, this is not.

There is, however, direct authority on this point. In *Mallan v. May* (11 M. and W., 653) there was a covenant that the defendant would not practise as a dentist as principal or assistant in London or any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before a certain time. The Court held that the covenant as a whole was unreasonable and illegal, but that if confined to London it was good. Baron Parke, in delivering the judgment of the Court, said : "We think that the stipulation as to not practising in London is valid, and is not affected by the illegality of the other part. That point was decided in *Chesman v. Nainby* (2 Str., 739)." *Chesman v. Nainby* (*supra*) was decided in 1726 first by the Court of Common Pleas, then by the King's Bench, on error, and lastly by the House of Lords, in accordance with the unanimous opinion of all the Judges.

The law, therefore, as declared in *Mallan v. May* (*supra*) has been recognized for at least 200 years. The case is of the highest authority and it is directly in point. It applies to a contract exactly similar in essentials to that in question in the present case and shows the principle governing all contracts impugned on the ground of illegality—namely, that a man is not the less bound by a legal contract because he has at the same time made a contract which is illegal, the only question in each case being whether the legal and the illegal can be severed.

I should feel no difficulty about this part of the case but for the judgment of Lord Justice Younger in *Attwood v. Lamont* (36 *The Times* L.R., at p. 897 ; [1920] 3 K.B., at p. 593). It seems to be there suggested that the fact that it is now settled that on the question of the validity of a contract in restraint of trade the burthen is on those who assert and not on those who deny its validity has made inapplicable to contracts of this kind the general rule of law as to contracts alleged to be illegal and has introduced some other rule. Speaking with great respect, I cannot see how the question whether a contract is severable can be affected by the burthen of proof on the question whether the contract as severed is legal. You have first to see whether there is a severable contract, and, if there is, the plaintiff has then to show that it is legal as not going beyond what is reasonable.

The two questions appear to me to be entirely independent. The suggestion of Lord Justice Younger seems to be based principally on the judgment of Lord Moulton in *Mason v. Provident Clothing and Supply Company* (29 *The Times* L.R., at p. 728 ; [1913] A.C., at p. 745). The judgment must be read in connexion with the facts of the case before the House. It cannot have been intended to overrule the authorities which, as was said by Lord Justice Kennedy in *Goldsoll v. Goldman* ([1915] 1 Ch., at p. 299), after referring to Lord Moulton's words in *Mason's* case (*supra*), have established that "if words are used in a covenant such as admit of severability *by mentioning different areas,* we must sever the covenant so as to limit its operation to an area which is not too large." In *Mason's* case (*supra*) the agreement was that within three years from the termination of a service terminable by a fortnight's notice Mason should not be employed within 25 miles of London or 25 miles of any place where Mason should have been employed by the company during the agreement. The House of Lords considered that the 25 miles area, whether applied to London or to other places, was unreasonable and illegal, and the language of Lord Moulton will be seen from its terms to refer to the suggestion that it was the duty of a Court to pick out from this unreasonably wide agreement something not expressed which if expressed might have been not unreasonable. This is plainly inapplicable to a contract not to trade in either of three defined

areas, which is indeed on the face of it the equivalent of three contracts each referring to one of the areas; and Lord Shaw draws this very distinction (29 *The Times* L.R., at p. 729; [1913] A.C., at p. 742); "There is," he says, "no occasion for the framing in the present instance of a limited injunction, *the contract not being in separate and clearly-defined divisions.*"

The same view of Lord Moulton's judgment was taken by Lord Justice Sargant when a Judge of the Chancery Division in *Nevanas and Co. v. Walker* (30 *The Times* L.R., at p. 185; [1914] 1 Ch., at p. 422). He said: "Here I may clear the ground at once from a suggestion that, in view of certain remarks of Lord Moulton in the recent case of *Mason v. Provident Clothing and Supply Company* (*supra*), this part of the covenant is invalidated because the succeeding part of the covenant, namely, that prohibiting the carrying on by the manager of any trade or business similar to any trade or business carried on during the period of his employment by the company, is admittedly too wide. I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants. No question of the kind was involved in the case before the House of Lords, and I think that Lord Moulton was not intending to deal with the numerous cases of high authority in which the good part of such a covenant was held to be enforceable, notwithstanding its collocation with a bad part, but was only thinking of those cases in which some severance has been effected by the Court, and the covenant has not been held bad merely because it might work unreasonably in certain exceptional circumstances not within its main and principal purpose and meaning." This passage was approved by Lord Sterndale in *Attwood v. Lamont* (36 *The Times* L.R., at p. 896; [1920] 3 K.B., at p. 578), and he states the law thus (36 *The Times* L.R., at p. 896 [1920] 3 K.B., at p. 577): "It is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining." I should add that in *British Concrete Company v. Schelff* ([1921] 2 Ch., at p. 572), a case later than *Attwood v. Lamont* (*supra*), Lord Justice Younger appears to treat a contract as generally speaking severable where it relates to a distinct area. It seems to me, therefore, that we are bound to apply to this agreement the law applicable to contracts generally as it has always been understood. So applying it, I am clearly of opinion that the agreement contains a distinct and severable contract, as found by the learned Judge, not to be employed in the business mentioned in Snow-hill.

It was argued for the respondent on the authority of *British Concrete Company v. Schelff* (*supra*) that the contract not to be employed as a servant could not be severed from the contract not to carry on business, and that the contract not to carry on business being unrestricted in point of space was illegal. In my opinion, the case relied on did not, and indeed could not, lay down any such general rule as was suggested. The contract there was very different from that in the present case, and the decision that it was not severable clearly does not make the contract now sued on not severable. Moreover, I am of opinion that on the true construction of this agreement the contract not to carry on business is limited in space to the three areas specified. No doubt the words are capable of the other construction, but, if they are to be treated as ambiguous, it is right to give them the more limited of the possible meanings. The principle also applies that if an instrument is reasonably capable of two constructions that which does not involve illegality is to be preferred to that which does. In any case, my opinion that the learned Judge was right in severing the contract as he has severed it would not be affected if I took a different view of the meaning of the earlier part of the clause than that which I have expressed.

The question then is whether the contract as so severed is valid. On this I have very little to add to the judgment which has been delivered. I think that the result of the authorities is that stated by Lord Sterndale, M.R., in *Attwood v. Lamont* (36 *The Times* L.R., at p. 896; [1920] 3 K.B., at p. 578), namely, that though in a contract such as this the restraint can only be justified so far as it is necessary to protect the employer "against an improper use by the servant of the knowledge which he has acquired in the master's service," yet this restraint may take the form not of forbidding such improper use but of restraining the servant generally from trading in a certain area. In other words, the employer is entitled to make himself reasonably safe against abuse of his confidence without the necessity of proving definitely that the servant has actually taken, or is threatening to take, unfair advantage of what he has learned in his service. In this case it is, in my opinion, sufficiently evident from the nature of the defendant's employment, and all the circumstances, that for the defendant to enter the service of a rival trader in the same street necessarily exposes the plaintiff to unfairness against which he is entitled to protect himself. This establishes the reasonableness and the legality of the contract, and I think that the learned County Court Judge was mistaken in thinking that any further evidence was necessary to support the plaintiff's case.

I agree, therefore, that the plaintiff should have had judgment and that the appeal must be allowed.

The appeal was accordingly allowed, with costs.

[Solicitors—Messrs. Sharpe, Pritchard, and Co., for Messrs. James, Barton, and Kentish, Birmingham; Messrs. Stibbard, Gibson, and Co.]

K.B. Div. (Rowlatt, J.) } 1926. Dec. 20.

INLAND REVENUE COMMISSIONERS v. PAKENHAM AND OTHERS. INLAND REVENUE COMMISSIONERS v. COUNTESS OF LONGFORD. INLAND REVENUE COMMISSIONERS v. EARL OF LONGFORD. GASCOIGNE v. INLAND REVENUE COMMISSIONERS.*

Revenue—Super-tax—Infant—Income of trust property—Sums paid by trustees for maintenance—Accumulation of balance of income—Whether moneys accumulated "receivable" by infant—Liability of infant to super-tax—Liability of trustees and guardian to make super-tax returns—Representative assessments—Conveyancing Act, 1881 (44 and 45 Vict., c. 41), s. 43—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), ss. 5 (3) (*c*), 7 (2) (5) and (6), 161—All Schedules Rules, rule 4.

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

Where trustees of a settlement set apart certain sums annually for the maintenance of an infant beneficiary and allow the balance of the income to accumulate, the income that is being accumulated is "receivable" by the infant within the meaning of s. 5 (3) (*c*) of the Income Tax Act, 1918, and he is liable to be assessed to super-tax in respect of the entire income as it accrues year by year and not merely in respect of the annual sums allowed to him by the trustees for his maintenance.

Representative assessments to super-tax cannot be made upon the trustees or the guardian of the infant beneficiary, either in respect of the actual total income of the infant, or in respect of a total income limited, as regards the particular trustee or guardian, to that income with which the trust or guardianship is concerned.

His Lordship delivered one judgment in these four cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

In the first two cases the Honourable G. M. Pakenham, Mr. G. F. Stewart, and Mr. H. N. Walford appealed against assessments to super-tax made upon them as trustees, and the Countess of Longford against an assessment to super-tax made upon her as guardian, of the Right Honourable the Earl of Longford, when he was a minor. The trustees were assessed in the amount of £16,000, £16,500, and £26,000, for the years ending April 5, 1918, 1919, and 1920 respectively; and the guardian was assessed in the amount of £12,000 for the year ending April 5, 1917.

The Earl of Longford was the sixth Earl, and was born on December 29, 1902. By a settlement made on August 22, 1899, the fifth Earl, his father, conveyed certain real estates in Ireland to trustees upon trusts under which, upon his own death on August 21, 1915, his son, the present Earl, became tenant in tail male. The settlement contained no express power of management during minority, and no direction that the statutory provisions were not to be applied. The trustees were appointed trustees for the purposes of section 42 of the Conveyancing Act, 1881. At the time of the fifth Earl's death, and since that date, the property settled consisted partly of realty and partly of personalty, which represented the investment of proceeds of sales of realty.

By a settlement dated November 8, 1862, certain property referred to as the Bedfordshire Estates was settled by the grandmother of the Earl upon her marriage with the fourth Earl of Longford. By that settlement the estates were limited to the use of the then Earl for life, with remainder to the use of his wife for life, with remainder to the use of the first son of the marriage in tail male, with divers remainders over. The settlement contained a clause directing the trustees to enter and receive and apply the rents and profits during minority, and they were given powers of management and, subject thereto, were to apply such sums as they should think fit to the maintenance of the infant and to accumulate the surplus. The trusts of the accumulations were, if the son should attain 21 or die under that age, leaving inheritable issue, for the son, but if he should die under 21 without such issue, then the accumulations were to be treated as capital money. The provisions were to apply, so far as they were or could be made applicable, to the minority of any person for the time being entitled under the settlement to the rents and profits. In the events that happened the sixth Earl, upon the death of his grandmother on January 22, 1918, became tenant in tail of these estates. The trustees of this settlement were not the same persons as the trustees of the settlement of August 22, 1899.

After the sixth Earl became entitled to the estates that were the subject of the settlement dated August 22, 1899, the trustees of that settlement paid yearly during his minority a sum of £2,500 for his maintenance, and after the Earl became entitled to the estates that were the subject of the settlement dated November 8, 1862, the trustees of that settlement paid yearly during his minority a sum of £500 for his maintenance, and the balance of income arising from both estates was accumulated.

During the year 1919 correspondence arose between the Special Commissioners of Income Tax and the guardian of the Earl with regard to the super-tax liability of the income of the Earl. The Countess of Longford was called upon, as guardian of the Earl, to make a return for the year ending April 5, 1917; and upon her failure to do so an estimated assessment to super-tax was made upon her for that year with the intention of bringing into assessment the total income of the previous year of the Earl from all sources, including the whole income arising from the estates that were the subject of the settlement of August 22, 1899, but not the income arising from the estates that were the subject of the settlement of November 8, 1862, as the Earl did not become entitled to such estates until January 22, 1918.

At a later date notices to make returns of the total income of the Earl from all sources for super-tax purposes for the years ending April 5, 1918, 1919, and 1920 respectively were served on the trustees, and the returns were in due course made by Mr. H. N. Walford on behalf of himself and co-trustees. In these returns there was included as the income of the Earl arising from both the settled estates each year only the sums paid by the respective trustees of both settlements for maintenance in the respective previous years. The assessments to super-tax referred to above were subsequently made upon the trustees with the intention of including therein each year the total income of the Earl from all sources for the respective previous years, including the whole income arising from both estates, whether used for maintenance or accumulated, but, as regards the income from the estates which were the subject of the settlement of November 8, 1862, only from the time at which the Earl succeeded thereto.

It was contended on behalf of the trustees and the guardian:—

(*a*) That the guardian was not liable to assessments as guardian for any year.

(*b*) That by virtue of section 43 of the Conveyancing Act, 1881, the Earl was not entitled, under the settlement of August 22, 1899, to receive more than the sums allowed to him for maintenance under that settlement, and that by the provisions of the settlement of November 8, 1862, he was assessable on the same principle as regards the income of that settlement.

(*c*) That the trustees of neither settlement were under any obligation to make super-tax returns on behalf of the Earl.

It was contended on behalf of the Crown (*inter alia*):—

(*a*) That the trustees were liable to be assessed to super-tax in respect of the total income of the Earl from all sources.

(*b*) That such total income included for the purposes of super-tax for each of the three years ending April 5, 1918, 1919, and 1920 respectively, the whole income arising during the respective previous years (i.) from the estates which were the subject of the settlement of August 22, 1899, and (ii.) from the estates which were the subject of the settlement of November 8, 1862, from the date at which the Earl succeeded to them.

(*c*) That the trustees were liable to make super-tax returns of the income of the Earl.

(*d*) That the guardian was liable to be assessed to super-tax in respect of the total income of the Earl from all sources.

(*e*) That such total income included the whole income arising from the estates that were the subject of the settlement of August 22, 1899, during the year ending April 5, 1916.

The Special Commissioners held that the trustees were debarred from objecting to the form of the assessments, so far only as the minor was liable either through his trustees or his guardian to assessment to super-tax ; that the liability through the guardian was restricted to so much of the income of the minor as passed through her hands ; that, since the liability of the minor to super-tax did not depend on the estates, but upon his total income from the estates and all other sources, the trustees were not liable to make the returns ; and that the income of the minor which was being accumulated by the trustees was not "receivable" by the minor so as to be liable to super-tax. They accordingly discharged the assessment for the year ending April 5, 1917, and reduced the assessments for the years ending April 5, 1918, 1919, and 1920 to £3,333, £3,333, and £4,285 respectively.

The Crown appealed.

In the third case the Earl of Longford appealed against an assessment to super-tax made upon him in the estimated sum of £26,000 for the year ending April 5, 1921.

For that year the Countess of Longford had been assessed to super-tax as guardian of the Earl in the sum of £4,642. It was admitted on behalf of the Earl that that assessment was correct, and that it represented the amount received by the Countess in the previous year for the maintenance of the Earl from the trustees of the settlements of November 8, 1862, and August 22, 1899. Income-tax was added to the amount so received in computing the assessment.

A notice to make a return of total income from all sources for the purposes of super-tax for the year ending April 5, 1921, was sent to the Earl and, no return having been made, the assessment of £26,000 was made by the Special Commissioners on September 11, 1923.

It was contended on behalf of the Earl :—

(*a*) That the Special Commissioners should follow their decision for the earlier years and discharge this assessment.

(*b*) That this assessment was a double assessment with the assessment on the Countess for the same year.

(*c*) That the Earl had no control over the income sought to be assessed so as to be able to make a return.

(*d*) That the Earl was not in receipt or control of the income which was being accumulated by the trustees.

(*e*) That the assessment should be discharged.

It was contended on behalf of the Crown (*inter alia*) :—

(*a*) That the Earl could be called on to make a return for the purposes of super-tax.

(*b*) That the Earl was assessable to super-tax.

(*c*) That the total income of the Earl for the year ending April 5, 1921, included the whole income arising during the year ending April 5, 1920, from the two aforementioned estates.

(*d*) That the assessment was not a double assessment and was not intended to create any liability to the extent to which it overlapped the assessment on the guardian.

(*e*) That the assessment was correct in principle and should (subject to any necessary adjustment of figures) be confirmed.

The Special Commissioners held that the Earl was not the person in receipt of the income which was being accumulated by the trustees so as to be liable to super-tax thereon, and discharged the assessment.

The Crown appealed.

In the fourth case Miss Cynthia Mary Trench Gascoigne appealed against three assessments to super-tax for the years ending April 5, 1917, 1918, and 1919 respectively. She was the daughter of Colonel Frederick R. T. Trench Gascoigne, and came of age on February 9, 1919.

Under the will of her grandfather, who died on June 12, 1905, certain property in Ireland was devised to trustees in trust for her if she should be living at his decease, the property during her infancy to be managed and the rents and profits thereof to be received by her father to invest the same so that they should accumulate at compound interest and be paid to her on her attaining 21 years or marrying under that age. In the event of her decease before the testator's death, the property was to be held in trust for his grandson. The residue of the testator's real and personal estate was devised and bequeathed to her absolutely, but if she should die under the age of 21 years and without having been married, then to the grandson absolutely.

The assessments were made on Miss Gascoigne in the gross amount of the income arising from the Irish property and the testator's residuary estate in the respective previous years.

The Special Commissioners held that in regard to the Irish estate, as Miss Gascoigne was living at the decease of the testator, her interest became vested at his death and, although the income arising from the Irish estate had to be invested and accumulated for a certain period, that income was nevertheless the income of Miss Gascoigne ; and that as regards the residue she obtained a vested and absolute interest on the death of the testator, although such interest was liable to divest if she died under the age of 21 years and unmarried ; that, therefore, in the case both of the Irish estate and of the residue, the income arising therefrom was the income of Miss Gascoigne, and that the assessments were valid in law and should be confirmed.

Miss Gascoigne appealed.

The Attorney-General (Sir Douglas Hogg, K.C.), Mr. C. Stafford Crossman, and Mr. R. P. Hills appeared for the Crown ; Mr. A. M. Latter, K.C., and Mr. A. Andrewes-Uthwatt for the trustees and the guardian ; and Mr. Cyril King for the appellant Miss Gascoigne.

Mr. Justice Rowlatt.—In all these four cases I am of opinion that the income was income liable to super-tax. In the case of the Longford settlement of 1862 this result was contended for on the part of the Attorney-General by a detailed argument rested upon the rule against perpetuities. To the relief of all concerned this argument was not contested.

As regards the income under the Longford settlement of 1899 and the income in Miss Gascoigne's case, liability was contested on the part of the subject on the strength of my own decision in *Commissioners of*

Inland Revenue v. Blackwell (40 *The Times* L.R., 801; [1924] 2 K.B., 351). I rather doubt, on the further consideration of the subject for which these cases have afforded me the opportunity, and also in view of what occurred in that case in the Court of Appeal (42 *The Times* L.R., 239; [1926] 1 K.B., 389), whether my view was right. However that may be, I think the income in these cases was the income of the infant year by year as it accrued. In *Blackwell's* case (*supra*) I thought the income was not his income, and that when he received the accumulated sum on attaining his majority he received it as capital. It was at that point that I went wrong, if wrong I was. In these cases I think that section 43 of the Conveyancing Act, 1881, in the Earl of Longford's case, and the clause in the will in Miss Gascoigne's case, merely put the trustees in the position of bankers for the infant, if I may use that phrase, to hold and invest the money on his behalf until his majority. The Special Commissioners decided against the Crown on the ground that it was not income "receivable" within the meaning of section 5 (3) (*c*) of the Income Tax Act, 1918, within the year. This conclusion I think wrong for the reasons given in *Blackwell's* case (*supra*), which I will not repeat.

Under these circumstances the result in Miss Gascoigne's case is that her appeal must be dismissed, with costs.

In Lord Longford's case there remain very important questions of machinery. As regards the last of the series of years in question—namely, 1920-1921—the infant himself was assessed on the whole of the income to which he was entitled under the settlements. The Special Commissioners, for reasons to which I have already adverted, reduced the assessment to the amount which he had actually received by way of allowances, and the Crown is entitled to have it restored to the full amount unless the infant is unassessable in person. I can see no reason for so holding (see *Rex v. Newmarket Income Tax Commissioners—Ex parte Huxley* (32 *The Times* L.R., 353; [1916] 1 K.B., 788)), and therefore in that case the appeal succeeds with costs.

As to the preceding years, the questions are as follows:—

(1) Can his mother, as guardian, be assessed in respect of all his income for the year 1916-1917 under the settlement of 1862, though she handled on his behalf only an amount below the super-tax limit?

(2) Can the trustees of the settlement of 1862 be assessed for the year 1917-1918 in respect of the infant's income under the settlement? There is no question here of assessing them in respect of income under any settlement with which they had no concern. The question is the broad one, whether trustees can be assessed to super-tax at all.

(3) Can these same trustees be assessed for the years 1918-19 and 1919-20 in respect of the income under their own trust together with the income under that of 1899, with which they had no concern, and of course in an amount and upon a scale dependent on the aggregate of the two incomes?

As regards the guardian, I wish first to advert to the provisions of section 161 of the Income Tax Act, 1918, in order to dispose of them. That section does not authorize an assessment. It assumes default in payment by the infant, and that, it seems to me, involves the assessment of the infant. One may observe in passing that it is here that we find what would generally be effective machinery for the recovery of tax upon the income of an infant. This was, I think, the view of the Lords Justices in *Rex v. Newmarket Income Tax Commissioners—Ex parte Huxley* (*supra*).

The question is therefore whether, by virtue of section 7, subsection (6), and Rule 4 of the General Rules applicable to all Schedules, what I may call representative assessments can be made upon trustees and guardians on the actual total income of the beneficiary. If not, a secondary point might arise—namely, whether they can be made on a total income taken as regards the particular trustee or guardian as limited to the income with which the trust or guardianship is concerned. The Attorney-General did not, however, contend for this, so I do not deal with it.

For income-tax purposes under the Act of 1842, and still under the Act of 1918, there is no obligation to make a general return of, and no assessment is made on, total income. As pointed out by Lord Macnaghten in *London County Council v. Attorney-General* (17 *The Times* L.R., 131; [1901] A.C., 26), any such idea was foreign to the scheme of the Act of 1842. The tax was and is imposed Schedule by Schedule, and its assessment and collection were and are divided locally among the places where the income arises. It is inconceivable, in my view, that for income-tax purposes trustees or guardians or agents for non-residents (who in the Act of 1842 and now under Rule 5 of the General Rules to Schedules A, B, C, D and E are found in association with trustees and guardians) should be assessable save in respect of the trust, the guardianship or agency. No distinction was suggested by the Attorney-General between trustees for incapacitated persons and agents for non-resident persons, in whose name the non-resident is assessable.

Under the Act of 1842, agents were assessable only if they had the receipt of the profits or gains. Necessarily, therefore, they are assessable only in respect of the income of the agency. By the Finance Act, 1915, that limitation has been removed, and I understand the Attorney-General to contend that this leaves an agent exposed to assessment to income-tax in respect of any British income of his non-resident principal (and I think he should have added, of his wife). The only limitations he would concede were that the agent must be an agent for income and not (*e.g.*) an agent for sale or purchase of a mere investment, and secondly that he must be still an agent at the time of assessment. It seems to me, however, that the immunity of an agent from assessment in respect of income unconnected with his agency did not depend on the requirement that he should be in receipt of the profits or gains taxed, but is fundamental, arising from the natural construction of the Act.

This being the position of these representative persons for income-tax purposes, I now come to super-tax. This tax is administered by one central authority, and the territorial and piecemeal organization of income-tax, as has been pointed out in the House of Lords, does not apply to it. It depends also on one general return bringing the income of the individual under all Schedules and in all places into one total. Against this total may be set deductions unconnected with any particular item of the income, as, for instance, annual payments of interest (see *Earl Howe v. Commissioners of Inland Revenue* (35 *The Times* L.R., 461; [1919] 2 K.B., 336, at p. 348)), and (until recently) life assurance premiums.

By section 7 (2) of the Act of 1918 persons assessable to income-tax, as representing incapacitated, non-resident, or deceased persons (as to these latter see Rule 18 of the General Rules applicable to Schedules A, B, C, D, and E) may be required to make a return of the total income of the person represented. In

Brooke v. Commissioners of Inland Revenue (34 *The Times* L.R., 142 ; [1918] 1 K.B., 257), the Master of the Rolls expressed the opinion that under this rule a trustee was bound to the best of his ability to include in the return income outside his trust. The liability to assessment depends, however, not on this subsection, but on subsection (6). The Attorney-General nevertheless based an argument on subsection (5) in connexion with subsection (2) as follows : As under subsection (5) it is only if there is a failure to make a return, or the Special Commissioners are not satisfied with it, that they can assess according to the best of their judgment, therefore when there is such a return as that described by the Master of the Rolls, they must, unless dissatisfied, assess the person returning and upon the total amount returned. I do not think this proposition is involved in the words used. I see no reason why they should not, on the information in the return, make an assessment on the beneficiary. The right to assess the representative depends on subsection (6).

By this subsection all the provisions of the Act relating (*inter alia*) to persons who are to be chargeable with income-tax and to income-tax assessments are, so far as applicable, to apply to the charge and assessment of super-tax. That subsection does not specifically mention, as did subsection (2), persons chargeable in a representative capacity. If they are included it is under the general words "persons chargeable," and the inclusion is not limited to persons representative of incapacitated, non-resident and deceased persons to which the provision in subsection (2) is confined. If all persons chargeable to income-tax are also chargeable to super-tax in respect of the total income (whether their own or another's) of which that in respect of which they are charged to income-tax forms part, then it would seem to follow that every occupier chargeable with the landlord's tax under Schedule A (see No. VII. (1)) would be chargeable with his landlord's super-tax. A receiver appointed by the Court (see General Rules 15) would be in an analogous position. Every railway company would be chargeable by reference to Schedule E, Rule 7 (2), with the super-tax of its higher officials. Perhaps even partners by reference to Schedule D, Rules 10 and 12 of the rules applicable to Cases I. and II., would be liable to be jointly assessed for the super-tax of all of them. Other persons exposed to this liability would be the collectors of tithes, royalties and fines (Schedule A, No. II., and rules), the managers of mines and the like (Schedule A, No. III.), and the occupiers of lands subject to tithes. Doubtless there are other persons in like situation. None of these persons would necessarily have adequate security for their indemnity. They could not command knowledge of the other income of their principals, or of the deductions available, nor could they independently promote an appeal. These are very startling consequences. The truth is that the machinery applicable to the compartments into which incomes divide themselves for income-tax purposes does not fit in this respect a tax like super-tax imposed on income in the bulk.

There is another way in which this proposition can be put. The question is whether a trustee is chargeable to super-tax in respect of income of his beneficiary outside his trust. Now there is no provision which makes him chargeable with income-tax in respect of such income, and therefore none, it seems to me, by the application of which he can be made chargeable to super-tax in respect of it. Perhaps an example may make it clearer. Suppose between 1910 and 1915 an agent for a non-resident person exercised a trade on his behalf by making contracts, but was not in receipt of the profits or gains. He was not liable for income-tax thereon. But if he received any other income for the principal he thereby (according to the present argument) became liable for super-tax upon the first-named profits. This result would follow by the application of the income-tax principle according to which he was not liable.

The conclusion I have come to does not involve the consequence that there is nothing in the charge of super-tax to which the income-tax provisions as to persons chargeable can be applied under the subsection.

It is to be observed that section 4, like the section in the Finance (1909-10) Act, 1910, which it replaces, merely creates super-tax in respect of the income of any individual. Section 5 (2), which makes income-tax assessments conclusive for super-tax purposes, was not to be found in the Finance (1909-10) Act, 1910. It was to be expected that some reference would be found to the person chargeable, even if there was no such thing as representative chargeability to income-tax. One important effect of the application of the income-tax provisions is to make a husband chargeable to super-tax on his wife's income as if it were his own. It is possible that it is only under this subsection that executors can be charged.

In the result the appeal of the Crown as regards the years 1918-19 and 1919-20 fails.

The question remains whether the trustees can be assessed for the year 1917-18 on the income of their own trust, being in fact the total income of the infant. I think I must deal with this point as the facts directly raise it, though the Attorney-General did not contend for any such limited success, pinning his faith to the larger view. If I may say so, I think he was right, because, in my view, if trustees and the like are not assessable on the total income *simpliciter*, the accident that there is no other income can make no difference. The non-existence of other income is a fact outside their sphere as much as the quantum of it if there is any. Moreover, the difficulty as to independent deductions still applies. I think, therefore, that the appeal in respect of this year fails also, and must be dismissed with costs.

The trustees have been assessed on the income actually allowed to the infant, and they have not appealed, being content to pay on those figures. It was not suggested that they are precluded from arguing the point of principle in resisting the larger demand.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Walfords ; Messrs. Simpson, Peckover, Curtis, and Batley.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1926. Dec. 20.

WELTON v. WELTON.*

Divorce—Wife's petition—Previous petition by husband—Finding of adultery by wife—Husband's conduct conducing—Dismissal of husband's petition—Alimony pending wife's petition—Jurisdiction of Court to order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 32, 190 (3).

* Reported by William Latey, Esq., Barrister-at-Law.

Where a wife has been found guilty of adultery on the petition of her husband for dissolution of marriage but the petition has been dismissed because the husband was found guilty of conduct conducing, and where the wife subsequently petitions for dissolution of marriage, the Court has jurisdiction to award her alimony *pendente lite*.

A question of considerable importance was raised on this summons adjourned into Court, namely, whether a wife, who had been found guilty by the Court of adultery on the petition of her husband for the dissolution of his marriage, though the petition was dismissed because the husband was found guilty of conduct conducing, was entitled on herself petitioning for divorce to alimony *pendente lite*. The matter came before the President on appeal from the Registrar.

Mr. J. Acton Pile appeared for the husband ; Mr. T. J. O'Connor for the wife.

Mr. ACTON PILE said that this was an appeal from an order of the Registrar directing that the husband, pending the hearing of his wife's petition for divorce, should pay her 10s. a week alimony. On February 5, 1917, the wife was granted a separation and maintenance order on the ground of her husband's cruelty. On June 4, 1918, the husband petitioned for the dissolution of his marriage on the ground of his wife's adultery, and at the hearing on January 22, 1922, Lord Coleridge found the adultery proved, but dismissed the petition on the ground that the husband had been guilty of cruelty and conduct conducing. In March of that year the separation and maintenance order was rescinded. In July, 1926, the wife filed her petition for divorce and also a petition for alimony *pendente lite*.

This form of relief, counsel argued, differed from any other sort of payment ordered by the Court inasmuch as it depended entirely on section 103 of the Supreme Court of Judicature (Consolidation) Act, 1925, which invoked the procedure of the Ecclesiastical Courts, "save as is otherwise provided by this Act or by rules of Court." Section 190 (3) of that Act said : "On any petition for divorce or nullity of marriage the Court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation." The Ecclesiastical Courts, in his submission, could never have entertained such an application as this, where a wife had been adjudged guilty of adultery. As regards the finding of the husband's conduct conducing, such a finding was not known to the Ecclesiastical Courts, whose procedure was founded on that of the common law and in this connexion recognized only condonation or connivance.

LORD MERRIVALE.—Conduct conducing was in a juristic sense the creation of the Matrimonial Causes Act of 1857.

In support of his submission Mr. ACTON PILE referred to *Whitmore v. Whitmore* (L.R., 1 P. and D., 96), *Wells v. Wells and Hudson* (3 Sw. and Tr., 542), *Wilson v. Glossop* (3 *The Times* L.R., 588 ; 19 Q.B.D., 379), and *Seaver v. Seaver* (2 Sw. and Tr., 665).

LORD MERRIVALE.—*Wilson v. Glossop* (*supra*) was a case of *compensatio*. This is not. In this case the wife says : "If I committed adultery, you caused it." The husband replies : "It is not open to you to raise that issue. You committed adultery." The wife's further answer is : "You conduced and cannot set up my adultery." Do you suggest that where there is a right to permanent alimony on a decree absolute there is none for alimony *pendente lite* ?

Mr. ACTON PILE.—Yes.

Counsel referred to *Ashcroft v. Ashcroft and Roberts* (18 *The Times* L.R., 821 ; [1902] P., 270) and other cases.

Mr. T. J. O'CONNOR, for the wife, submitted that alimony *pendente lite* was in effect a substitution by the Matrimonial Causes Act of 1857 for the common law, and that the argument advanced could not stand, as a case like the present could not have been presented under the ecclesiastical practice. The 1857 Act had changed the situation by the introduction of "conduct conducing," which eliminated the result of the wife's adultery. He cited several cases and said that the Supreme Court of Judicature (Consolidation) Act, 1925, laid down no principle which bound the Court to deal with these matters in accordance with an obsolete law.

LORD MERRIVALE delivered the following considered judgment :—The petitioner in this suit is suing for divorce on the ground of her husband's adultery. Pending the suit she has applied for and obtained in the Registry an order for weekly payment by way of alimony *pendente lite*. Against this order the respondent appeals. The Registrar has coupled with this order for alimony an order for payment by the respondent of moneys for the maintenance of his children of the marriage. This also was included in the respondent's notice of appeal, but the appeal in respect of this has not been proceeded with.

The ground of the respondent's appeal against the order for alimony *pendente lite* is that in a previous suit wherein he was petitioner for dissolution of marriage the present petitioner was found guilty of adultery. Counsel on his behalf contended that there is no jurisdiction in the Court to allot alimony *pendente lite* to a wife so found guilty, or to a wife shown to be guilty by her own confession. This proposition is founded on authorities in divorce such as *Holt v. Holt* (28 L.J., P. and M., 12) and *Whitmore v. Whitmore* (L.R., 1 P. and D., 96), and numerous decisions under the common law which lay down that a wife, living apart from her husband and guilty of adultery, may not pledge her husband's credit for necessaries, and that in the case of such a wife certain statutory liabilities of a husband in respect of maintenance cannot be enforced.

Holt v. Holt (*supra*) and *Whitmore v. Whitmore* (*supra*) were simple cases. In the former alimony *pendente lite* was refused in a suit for divorce upon proof that in an Ecclesiastical Court the respondent had already been found guilty of adultery. In the latter, upon a wife's confession of adultery in the course of the proceedings on a petition for divorce, an order for alimony *pendente lite* which was subsisting was, as from the date of the confession, discharged. In like cases the same course would probably be taken.

The present case is complicated, however, by the fact that the decree of the Court in the husband's suit, which pronounced the guilt of the wife, found the husband guilty of conduct conducing to the adultery, and therefore dismissed his petition. This state of facts was said by the wife's counsel to bring the case within the principle laid down in *Wilson v. Glossop* (3 *The Times* L.R., 588 ; 19 Q.B.D., 379), that a husband who connives at adultery on the part of his wife remains under the same liability for the wife's maintenance as though she had remained

chaste. So far as the argument on the husband's behalf goes to the jurisdiction of the Court to order payment of alimony in a case like the present, it depends upon the provisions of the Matrimonial Causes Acts, 1857 and 1907, which are re-enacted in the Supreme Court of Judicature (Consolidation) Act, 1925, whereby, under section 190 (3), power is given to make interim orders for alimony in a petition for divorce as "in proceedings for judicial separation"; and under section 32 this jurisdiction is to be "exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly appertained." The last-mentioned section, if examined, maintains with regard to proceedings for judicial separation the provision of the Matrimonial Causes Act, 1857, section 22, whereby the Court is to proceed therein "on principles and rules . . . as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts . . . acted and gave relief."

Concisely stated, the argument is this: A suit for divorce *a mensâ et thoro* by a guilty wife could not have been maintained; therefore no order for alimony *pendente lite* in such a suit could or would have been made; consequently no such order can be made under section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, in a suit for divorce instituted by a wife who has been guilty of adultery.

As a test of a wife's right to an allotment of alimony in a case like the present I was asked to determine whether she could sue for restitution of conjugal rights and to hold that she could not. Cogent reasons for not embarking on this inquiry are suggested by the conflict of opinion as to the true view of the ecclesiastical law regarding the matter, which is evidenced in *Seaver v. Seaver* (2 Sw. and Tr., 665), *Hope v. Hope* (1 Sw. and Tr., 94), *Russell v. Russell* (11 *The Times* L.R., 579; [1895] P., 315; 13 *The Times* L.R., 516; [1897] A.C., 395), *Brooking-Phillips v. Brooking-Phillips* (29 *The Times* L.R., 288; [1913] P., 80). However, the answer would not necessarily be decisive of the present dispute. The conformity to the principles and rules which is prescribed by the statutes is such conformity as may be had, due regard being given to the provisions of the Matrimonial Causes Act, 1857, and the rules and orders thereunder. The Act of 1857 instituted the jurisdiction of the Court to dissolve marriage, and it expressly provided that the adultery of a petitioner should not be an absolute bar to a decree. True it is that alimony *pendente lite* has been refused or discontinued in cases where adultery was established *simpliciter* against a guilty wife, but in cases where connivance or conduct conducing is alleged or established these decisions give little guidance. Nor are they necessarily decisive in any case of mutual guilt. So long as a wife was a competent suitor in the Ecclesiastical Court in a matrimonial cause the general practice of these Courts was to require the husband to make provision according to his means for her maintenance and for the costs of her suit.

I know of no ground for doubting the accuracy of the statement on this subject contained in Oughton's Ordo Judiciorum, Tit. 206, 207. The wife in the present suit is a competent suitor, in that she sues for relief which the Court is able, upon proper proof, to afford to her. Moreover, the husband is not free of complicity in the misconduct on her part, as has been established in his suit by the decree of the Court. Whether after such misconduct the wife could pledge the husband's credit for necessaries is not the question. The decisive inquiry, in my view of the matter, is whether the wife, on the facts before the Court, is a competent suitor for relief in a matrimonial cause. She undoubtedly is. Thereupon the jurisdiction of the Court to order alimony *pendente lite* appears to arise. It is that jurisdiction which has been exercised in the Registry.

Conditions are easily conceivable in which, although this jurisdiction exists, no order could properly be made. A wife who has brought cohabitation to an end by admitted misconduct for which the husband was not to blame, or a wife who, in some independent situation, is seeking divorce and cannot be granted relief except under the discretionary power of the Court, may very likely not be a proper applicant for an allotment of alimony. That will depend upon consideration of the relevant facts. In dealing with these regard must be had not only to the decisions in cases like *Holt v. Holt* (*supra*) and *Whitmore v. Whitmore* (*supra*), but to the state of the existing law of divorce, under which the Court has the responsibility of deciding, not only as to innocent wives but as to guilty wives, whether provision of some sort should be made for the wife by the husband.

There is jurisdiction to make an order in the present case, and I see in the facts nothing which ought to induce the Court to overrule the discretion of the Registrar as to the order proper to be made. The appeal therefore fails.

Leave to appeal was refused, but it was granted on December 21 by the Court of Appeal.

[Solicitors—Messrs. Mills, Lockyer, Church, and Evill; Messrs. Edmond O'Connor and Co.]

Court of Appeal. } 1926.
(Bankes, Scrutton, and Sargant, L.JJ.) } Dec. 3.

PUBLIC TRUSTEE AND OTHERS v. CHANCELLOR OF THE DUCHY OF LANCASTER AND ANOTHER.*

Tithe—Tithe rent charge—Separate hereditament—"Issuing out of the land"—Conveyance of land in general words—Whether passing title in the tithe arising out of the land conveyed—Tithe Act, 1836 (6 and 7 Will. IV., c. 71), ss. 67, 71.

A conveyance of land in general words does not pass the title in the tithe rent charge arising out of the land. Tithe does not belong to or appertain to the premises and it is not something which an owner of premises has in, to, or on the premises. It is a separate hereditament the title to which does not pass in the absence of special words in the conveyance.

Chapman v. Gatcombe (2 Bing. N.C., 516) followed.

This was an appeal by the defendants from an order of the Divisional Court.

The trustees of the settlement of the life interest of Sir Oswald Mosley sought an order against the Duchy of Lancaster, as representing the Crown, to recover arrears of rectorial tithes issuing out of certain lands at Tutbury, in the county of Stafford, the land in question having been conveyed to the Duchy of Lancaster as representing the Crown. The trustees further asked that the order for the recovery of the tithe rent charge should be executed by the appoint-

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

ment of a receiver under section 2 (3) of the Tithe Act, 1891.

The material facts were that in 1894 Mr. Oswald Mosley, being tenant in tail of certain lands at Tutbury, in Staffordshire, executed a disentailing assurance with the consent of his father, who was then life tenant and protector. By a resettlement dated March 12, 1895, Sir Oswald Mosley (then Mr. Oswald Mosley) conveyed the land to trustees on trust for himself for life with remainder over. On April 4, 1900, Sir Oswald Mosley assigned his life interest to trustees upon trust as to part for himself and on further trusts not material to this report. The trustees of the indenture of April 4, 1900, were not the same as the trustees of the indenture of March 12, 1895. Sir Oswald Mosley, as tenant for life, offered the lands at Tutbury for sale subject to certain conditions of sale and particulars disclosing a tithe of £3 16s. 8d. and land tax of £4 8s. 9d. as being the only outgoings known to the vendor. On September 2, 1920, the lands were conveyed to H.M. the King in the right of the Duchy of Lancaster. It was subsequently discovered that a tithe rent charge of £36 6s. 3d. was payable out of the lands so conveyed to the King, but that the same had not been paid for a great many years as the tithe had been bought in 1859 by Sir Oswald Mosley's predecessor in title.

These proceedings were taken by the present trustees of the assignment of April 4, 1900, to recover two years' arrears of the tithe rent charge against the King and the occupier of the lands conveyed by the conveyance of September 2, 1920.

The defendants pleaded (*inter alia*) that the tithe rent charge had been extinguished by merger or by the doctrine of lost grant; that the plaintiffs were estopped from claiming it; and that the tithe rent charge passed to the defendants under the conveyance of September 2, 1920. It was said that the word "hereditament" in that conveyance included and denoted the tithe rent charge, which it was contended therefore passed, along with the fee simple, to the Duchy of Lancaster under the conveyance. Neither party to that conveyance knew of the existence of the tithe rent charge.

The main question in the case was whether the general words used in the conveyance passed the "tithe rent charge" in question to the purchasers.

The County Court Judge held that the conveyance did not pass the tithe rent charge, whether it was intended to do so or not, and he gave judgment in favour of the plaintiffs, with costs. The defendants appealed to the Divisional Court, who affirmed the decision of the County Court Judge.

The defendants appealed to the Court of Appeal.

Sir Herbert Cunliffe, K.C., and Mr. E. J. L. Whitaker appeared for the appellants; and Mr. Gavin Simonds, K.C., and Mr. T. N. Winning for the respondents.

Lord Justice Bankes, in the course of his judgment, said that he would have been very glad if he could have been shown in some way how to reverse the judgment of the Divisional Court which affirmed the judgment of the County Court Judge. The judgment of the County Court Judge was quite right, and he (the Lord Justice) almost felt inclined to content himself by saying that he agreed with the decision of the learned County Court Judge, and with the reasons for his decision, but out of deference to the arguments of the appellants' counsel he would deal with the points that had been raised.

The property was put up for sale, and there was an elaborate catalogue with a description of the property. The description of the lot in question contained the statement "Outgoings: Tithe £3 16s. 8d." That was a correct statement with regard to the vicarial tithe, but it was quite incorrect in reference to tithe as a whole—that is, true rectorial tithe. It was a misrepresentation, but it was admitted that it was an innocent misrepresentation, which in itself, the conveyance having been executed, gave no relief.

The first point taken by Sir Herbert Cunliffe on behalf of the appellants was that on the face of it that was a contract for the sale of property which was liable to a payment in respect of tithe of £3 16s. 8d. only, and that it was inequitable, in the first instance, to treat the matter from any other point of view. But there was no ground on which relief could be given. The second point was that the statement in question was an estoppel. But one of the first points in reference to an estoppel by representation was that there could be no estoppel against a person except in respect of a representation which he had made himself, or which had been made on his behalf, and even assuming that the representation in this case was what it was contended to be, Sir Herbert Cunliffe had wholly failed to bring it home to the plaintiffs in this case. They stood in quite an independent position. They were the trustees, and the sale was one by the tenant for life. Even assuming that their consent was necessary, as indeed it was, and that the sale was a consent sale, it was not brought home to them that they had any knowledge of the statement in question, or approved of it, or authorized it. Therefore the appellants' first two points failed.

Then it was said that the right in reference to the rectorial tithe in question had ceased to exist. But the reason why it came to cease to be paid or claimed was because in 1859 the tithe was bought by the then tenant for life of the lands, and therefore, the result was that the tenant for life became no longer liable to pay the tithe to himself, and no record was made, but it was treated as though the tithe was no longer payable. That, however, was not enough. It could not be assumed that the fact that the tithe was not paid for a number of years was due to a lost grant. Nor was there any ground for saying that the tithe had been discharged by merger. The appellants had therefore failed in proving either merger or lost grant.

Then it was said that the conveyance of September 2, 1920, by the tenant for life—who undoubtedly had the right to convey the tithe in question if he had desired to do so—did in fact, by the conveyance which was executed, convey the tithe. It was said that not only must the general description of the parcels be considered, but special attention must be given to the words in the conveyance which described what the habendum was to be, and the habendum was to be "freed and discharged from" certain matters which were set out in the conveyance; but when those matters were looked into it was plain that they were confined to a certain class of obligation or liability which might arise under the original settlement and could not possibly include a claim for the tithe in question. That point therefore failed. It was also said that it might be quite true that up to the time of the Tithe Act, 1836, the tithe was looked on as a separate or independent hereditament, not issuing out of the land, and that it required special words in the conveyance of land to convey the separate hereditament—the tithe. But that Act, it was said, had altered the essential characteristics of the tithe and had converted it from a separate or independent hereditament into something issuing from the land, like a rent charge, and that the conveyance of the land, as from the date of that Act, operated to convey the tithe. That assumed

that it was the object of the Legislature and the effect of the Act to create that complete transformation in the essential characteristics of tithe. He (the Lord Justice) was unable to accept that view, because it seemed to him that the whole object of the Act of 1836, and particularly of section 71, was to maintain the essential characteristics of tithe, and that that had been the view of the profession might be accepted from the fact that all the text-books had so treated it, and no reference could be made to any decision indicating a contrary view, or to any extract or any expression of judicial opinion anywhere suggesting that it was the intention or effect of the statute to alter the essential characteristics of the tithe. There was no ground for the suggestion that, merely because the statute (in section 67) used the words "issuing out of the lands," it was to be assumed that the whole essential characteristics of tithe had been changed. *Chapman v. Gatcombe* (2 Bing. N.C., 516) was still good law, and the reasons given by the learned Judges in giving their judgment in that case disposed of the contentions put forward by both counsel for the appellants in the present case. Tithe rent charge was not anything which the conveying party had in, to, or on the property conveyed. Mr. Justice Park indicated that view pretty clearly in *Chapman v. Gatcombe* (*supra*), when he said that he would give his decision not merely on the view that tithe would not pass by virtue of "hereditament," but also on the view that it would not pass where that word was employed only in the society of general words and was limited by the words "belonging or appertaining to the premises." The tithe did not belong or appertain to the premises, and it was not something which the party had in, to, or on the property conveyed. The appeal ought to be dismissed, with costs.

Lord Justice Scrutton, in concurring, said, in the course of his judgment, that he agreed with Lord Justice Bankes in thinking that if it were possible to decide in favour of the appellants he would have liked to do so, because it was clear that the trustees who were claiming the tithe rent charge were getting, if they were right, first of all, the tithe rent charge, and were, secondly, getting interest on the price of the land, which was larger because it had been assumed that there was no tithe rent charge except the small one which was mentioned, and therefore they were, as a matter of business, getting the money twice. But it did not follow from that that the rules of law, in the events which happened, prevented them from getting the benefit of the money twice.

Up to the time of the passing of the Tithe Act of 1836 it was quite clear that the conveyance simply of land and hereditaments would not convey tithe issuing out of the land. Tithe would be called, and was called in the language of the lawyers of that time, a collateral hereditament, or a collateral inheritance, which did not pass simply by the conveyance of land and hereditaments. In *Phillips v. Jones* (3 Bos. and P., 362) it was stated that tithes were not hereditaments belonging to land, but were a separate subject of tenure, and must be held by a different title.

It was stated in *Chapman v. Gatcombe* (3 Bing. N.C., 516) that tithes were not a charge; they were a collateral inheritance. That case clearly decided that before the passing of the Act of 1836 a conveyance of land with hereditaments did not pass tithes, because tithes were a collateral inheritance which did not pass under such words. The Act of 1836 did effect a change in the manner of recovering the tithe. Instead of getting one-tenth of the corn grown, and counting the chickens and taking every tenth, and counting the eggs and taking every tenth, and counting the fish and taking every tenth fish, a sum of money was fixed in accordance with the price of corn and according to certain rules. But although there was a tithe rent charge, the Act never intended to alter the incidents of the previous tithe, because section 71 provided as follows:—"Any person having any interest in or claim to any tithes . . . before the passing of this Act shall have the same right to or claim upon the rent charge for which the same shall be commuted as he had to or upon the tithes, and shall be entitled to have the like remedies for recovering the same as if his right or claim to or upon the rent charge had accrued after the commutation: provided that nothing herein contained shall give validity to any mortgage or other incumbrance which before the passing of this Act was invalid or could not be enforced; and every estate for life, or other greater estate, in any such rent charge shall be taken to be an estate of freehold; and every estate in any such rent charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent charge. . . ."

Parliament intended to leave the legal incidents exactly where they were, altering only the method of collection, and that view seemed to have been taken from 1836 down to the present day. The text-books continued to cite *Chapman v. Gatcombe* (*supra*), and there did not appear to have been any suggestion that, in some way, whereas before 1836 a conveyance of "land and hereditaments" did not pass tithe as a hereditament, since 1836, because it was a tithe rent charge, a conveyance of "land and hereditaments" did pass the tithe. That point, therefore, failed and therefore the appeal must fail.

Lord Justice Sargant, in the course of his judgment, said that he agreed with what had been said with regard to the strong desire, if possible, to afford some relief to the appellants, because there could be no doubt whatever that, through an innocent misrepresentation by the vendor, the result was that the estate retained the rent charge in question as part of the property belonging to it and at the same time received the price of land sold increased by the ignorance of the purchaser that it was subject to the rectorial tithe rent charge in question. But there was no method by which such relief could be given.

Turning to the conveyance of September, 1920, the parcels in the conveyance showed quite clearly that what was being conveyed was physical land. It was property mentioned in a schedule. Therefore, *prima facie*, the subject-matter of the conveyance was physical land with metes and bounds; and, if there was any hereditament, quite distinct from that physical land, that hereditament would not pass. One hereditament could not be appendant or appurtenant to another hereditament, and would not pass if it was a separate hereditament by a conveyance of the other hereditament. Before the Tithe Act, 1836, a conveyance of physical land, with any number of words added, such as estate, right, property, interest, claim and demand, and many other words such as were to be found in the case which had been referred to, *Chapman v. Gatcombe* (*supra*), would not have the effect of conveying rectorial tithes and other appropriate tithes arising out of that land.

Could it be assumed that there had been such an alteration in the nature and incidence of the tithe by the Tithe Act, 1836, that tithe rent charge was a property of a different nature, and that it was not a separate hereditament, but was some-

thing in the nature of a mere rent charge issuing out of the land? The object of the Act of 1836 was to render definite that which was previously indefinite, and to prevent the discouragement which was cast on the owner of the land by reason of the fact that under the law as it existed one-tenth of the value of any improvement, as well as one-tenth of the original value of the land, went to the tithe proprietor, who had no share in the expense and risk and trouble of making that improvement, and throughout the Act there was nothing—apart from the words of section 67—which suggested that there was any intention at all of putting the tithe commutation rent charge on any different footing from that on which the tithe previously stood. Section 67 provided that a certain sum should be paid, having regard to the value realized by certain kinds of produce during the year, and then the amount was to be payable instead of the said tithes in the nature of rent charge issuing out of the lands charged therewith; and then under section 71 there were general words also. It seemed to be a quite general intention that tithe rent charge should be held and dealt with on the same footing as the tithes for which they were substituted. Having regard to the fact that the tithe rent charge was to be payable instead of the tithes, and having regard to the language of section 71 and the preamble to the Act, the words "in the nature of a rent charge issuing out of the lands charged therewith" (in section 67) could not have such a sweeping effect as was contended for by the appellants, nor could they have had the effect of radically altering the nature of tithes, and converting them into something which instead of being a separate hereditament, was in the nature of a charge on the land. The position was that the conveyance, which was on the face of it a conveyance of physical property, had not the effect of conveying, in addition to that physical property, the rectorial tithe commutation rent charge which was payable out of the property in the nature of a rent charge, but which nevertheless formed, as the tithes formerly did, a definite separate hereditament which had to be conveyed, if at all, by separate deed.

The appeal was dismissed with costs.

[Solicitors—The Solicitor to the Duchy of Lancaster; Messrs. Kirby, Millett, and Ayscough.]

Chan. Div. (Tomlin, J.) } 1927. Jan. 11.

HUTTON v. ATTORNEY-GENERAL AND OTHERS.*

Lands—Compulsory acquisition—Military purposes—Certificate by deputy-lieutenants of county—Whether judicial decision involved—Defence Act, 1842 (5 and 6 Vict., c. 94), s. 23.

The grant of a certificate by two deputy-lieutenants of a county under s. 23 of the Defence Act, 1842, that the acquisition of certain land in the county is expedient for military purposes, is not a judicial matter, and therefore, before giving the certificate, they are not bound to give the owner of the land an opportunity of being heard.

This was a motion brought by the plaintiff, as the tenant for life of an estate near Richmond, Yorkshire, to restrain the Attorney-General and the Right Hon. Sir Laming Worthington-Evans, the present Secretary of State for War, from proceeding with an arbitration under the Acquisition of Land (Assessment of Compensation) Act, 1919, for fixing the price at which part of the above estate was to be compulsorily acquired for the purposes of the War Office, and to restrain the arbitrator, Mr. John Willmot, from holding any such proceedings.

Mr. Schiller, K.C., and Mr. H. G. Robertson appeared for the plaintiff; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Dighton Pollock for the Attorney-General and Sir Laming Worthington-Evans; and Mr. Morton for the arbitrator.

Mr. Schiller said that the War Office were purporting to acquire the land compulsorily under the Defence Act, 1842. Notice to treat had been given, and negotiations had followed. Section 19 of the Act, if the negotiations failed, gave power to acquire compulsorily, but section 23 provided, by way of condition precedent to anything being done under section 19, that a certificate should be granted by the tribunal there mentioned that it was necessary and expedient that the land should be acquired. It was not until long after a certificate had been obtained under section 23 from two of the deputy-lieutenants of the North Riding of Yorkshire that the plaintiff became aware that it had been granted, and the first ground on which he claimed an injunction was that the condition precedent in section 23 involved a judicial decision, for which purpose it was necessary that both sides should be heard: *Everett v. Griffiths* (37 *The Times* L.R., 481; [1921] 1 A.C., 631); *Spackman v. Plumstead District Board of Works* (1 *The Times* L.R., 313; 10 App. Cas., 229); *Cooper v. Wandsworth District Board of Works* (14 C.B., N.S., 180); and *Local Government Board v. Arlidge* (30 *The Times* L.R., 672; [1915] A.C., 120).

Mr. Justice Tomlin said that the whole issue was whether section 23 of the Defence Act, 1842, involved the determination of a matter between the parties, or merely provided that the War Office must, as a preliminary to acquiring land compulsorily, obtain the certificate of independent officers that it was necessary and expedient to acquire the land.

Mr. Schiller contended that it was a matter for determination between the parties. It was a very serious thing to expropriate land, and the subject was entitled to every protection.

Mr. Justice Tomlin said that the warrant of the Lord High Treasurer was also required under section 23. Was it suggested that the parties must be heard before that was done? It was most unlikely, and, if not in that case, why should it be different in regard to the granting of the certificate?

Mr. Schiller said that there was a further objection to the holding of the arbitration—namely, that it was a condition precedent under section 19 for the War Office to go into possession. This had not been done. Under that section a jury was only to be summoned to assess compensation after the land had been taken.

Mr. Justice Tomlin said that even if that was so under the Defence Acts, was not the objection met by sections 1 and 7 of the Acquisition of Land (Assessment of Compensation) Act, 1919?

Mr. Schiller submitted that it was not, and said that the Act of 1919 did no more than create a new tribunal for assessing compensation.

The Attorney-General said that, without accepting the suggested construction of section 19 of the Defence Act, 1842, his answer would be that already indicated by the Court—namely, that assessment of compensation was sufficient.

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

As regards the other contention that the Lord Lieutenant and deputy-lieutenants exercised a judicial function in granting their certificate, he submitted that that was clearly not so. The Lord Lieutenant was, in 1842 and for many years after, the head of the military forces of the county ; so that he would be the very last person to be selected to decide judicially between the War Office and a subject, but a most suitable person to say whether the acquisition of the land was necessary and expedient for military purposes.

In 1842 the position of the Lord Lieutenant had been laid down in 42 Geo. III., c. 90, an Act relating to the raising of militia. Deputies acted for him when he was out of the country. It was in the following two years that the Acts were passed as emergency provisions which were afterwards embodied permanently in the Defence Act, 1842.

Mr. ROBERTSON replied.

MR. JUSTICE TOMLIN said that in this action the plaintiff, who was the tenant for life of a large estate in Yorkshire, was suing the Attorney-General and Sir Laming Worthington-Evans and Mr. John Willmot. Sir Laming Worthington-Evans was sued in his personal capacity as the present Secretary of State for War, and Mr. Willmot was the arbitrator appointed in circumstances to be mentioned. The plaintiff was moving to restrain the first two defendants from taking any proceedings to ascertain the assessment of compensation to be paid for the compulsory acquisition of the plaintiff's land, and to restrain Mr. Willmot from holding any such proceedings.

The War Office required part of the plaintiff's land for military purposes, and had taken steps for that purpose under the Defence Act, 1842. On August 5 and 6, 1925, certificates had been obtained from two deputy-lieutenants under section 23 of the Act, and a warrant had also been granted by the Treasury under the same section. On October 2, 1925, notice was served on the plaintiff under an earlier section requiring him to agree the purchase price of the land. That the parties had failed to do, but it was not till March, 1926, that the plaintiff learned that the certificates had been given by the deputy-lieutenants in the preceding August.

The plaintiff now claimed that the exercise of the compulsory powers under section 19 was contingent on a certificate being obtained under section 23 ; and that the granting of that certificate by the Lord Lieutenant or two deputy-lieutenants was a judicial matter, so that a certificate could not properly be granted without giving the owner of the land an opportunity to be heard.

Mr. Schiller had cited a number of authorities to show that a body of that sort was acting in a judicial capacity. In *Cooper v. Wandsworth District Board of Works* (14 C.B., N.S., 180) Mr. Justice Willes said that a tribunal which was invested by law with power to affect the property of one of his Majesty's subjects was bound to give the subject an opportunity of being heard. That was not questioned, and the only matter to be determined was whether the deputy-lieutenants were such a tribunal, and that was a question of construction of the statute.

His (his Lordship's) attention had been called to the historic position of the Lord Lieutenant and the deputy-lieutenants, as laid down in 42 Geo. III., c. 90, and to the fact that the Act (43 Geo. III., c. 55), which, though a temporary measure, was the prototype of the Defence Act, 1842, was passed in the following year, and was amended (44 Geo. III., c. 95) in the next year afterwards. It was said, on behalf of the plaintiff, that a judicial function was vested in the Lord Lieutenant or deputy-lieutenants, and that, if that were not so, then the procedure under the Acts was such that a landowner could have his land compulsorily acquired without his ever being in a position to object on the ground that it was neither necessary nor expedient. But that consideration would not justify him in coming to a conclusion contrary to the reasonable meaning of the language employed in the statute.

It was to be observed that when, under the Defence Act, 1842, a judicial function fell to be performed, the Act provided for its being performed by judicial officers, with elaborate provisions as to procedure. That was so in section 19, but in section 23, on the contrary, officers who were not judicial officers were selected. They were persons who had certain military functions and might well be considered by Parliament to be well qualified to form a judgment as to the necessity or expediency of the taking of lands in their county for military purposes.

Further, section 23 contained two conditions precedent which were linked together—namely, the certificate under consideration and the warrant of the Treasury. It would be a bold person who contended that the subject must be heard before that warrant was granted. The question of the necessity or expediency of acquiring the land must be largely a matter of policy, and it was difficult to suppose that the Legislature should contemplate a question of policy, possibly vital to the defence of the country, being debated before a tribunal at the instance of the subject whose land was being acquired.

That consideration would not affect the Court if the language of the section was such as clearly to set up a judicial tribunal ; but when the Court was asked to construe language that did not clearly do so it was a material consideration. He came, therefore, to the conclusion that this contention of the plaintiff failed.

A further point had been taken—that there was no power under section 19 of the Act to summon a jury to assess the compensation until the Crown had taken possession of the land. There were two answers to this. First, the power to call a jury did not, on the true construction of section 19, depend on the Crown having been put in possession. Secondly, even if that had not been so, the matter was now governed by the Acquisition of Land (Assessment of Compensation) Act, 1919, the provisions of which were, by section 7, made to prevail over those of any earlier Act. The second contention also failed. The motion would, therefore, be refused.

[Solicitors—Messrs. Maxwell, Simpson, and Batley, for Messrs. Simpson, Curtis, Dixon, and Burrill, Leeds ; the Treasury Solicitor ; Messrs. Trower, Still, and Keeling.]

K.B. Div. (Branson, J.) } 1927. Jan. 11.

GUILDFORD TRUST, LIMITED v. GOSS AND ANOTHER.*

Bills of Exchange—Cheque—Partnership—Two partners sued as drawer and indorser respectively—Cheque drawn in favour of third partner—Signatures in blank—Belief that partnership stamp would be affixed—Fraudulent negotiation of cheque to money-

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

lenders by payee—Right of moneylenders to recover.

The plaintiffs, who were moneylenders, sued the defendants as the drawer and one of the indorsers of a cheque indorsed to the plaintiffs for value. The defendants were in partnership together with the payee of the cheque and other persons. The cheque had been signed by them in blank, in the belief that the rubber stamp of the partnership would be added and that the cheque would be used for the partnership's business. The payee, in fraud of the other partners, neglected to affix the partnership stamp and used the cheque for the purpose of raising money from the plaintiffs. The cheque, which was post-dated at the time of the loan, was subsequently presented by the plaintiffs, when repayment of one of the agreed instalments under the loan became due, and was dishonoured.

Held, that the plaintiffs were entitled to recover as holders of the cheque for value in due course, as nothing had occurred to put them on inquiry whether the payee was committing a fraud, and the defendants could not contend that the cheque was a document given in escrow, so as not to impose liability until the fulfilment of a special condition, since both the drawer and indorser, when signing the document, had intended that it should be used and negotiated as a cheque.

In this action, which was tried as a short cause, judgment for £100 and interest was given in favour of the plaintiffs, the Guildford Trust, Limited, who were registered moneylenders carrying on business at 29, Duke-street, St. James', S.W. The defendants Goss and Curry were in partnership and carried on business as the Kent Match Syndicate, with another partner named Holdaway, who had also been made a defendant, but upon a receiving order having been made against him the action against him had been stayed. There were also two other partners. The action was brought upon a cheque drawn by the defendant Goss and dated November 1, 1926, upon the Shaftesbury-avenue branch of the Westminster Bank (the bank used by the syndicate) in favour of Holdaway. The cheque was indorsed by Holdaway and Curry in favour of the plaintiffs, but was not met upon presentation. The defendants set up the defence that the cheque was obtained from Goss by the manager of the syndicate, a man named Dursford, in conjunction with Holdaway, apparently for use in the ordinary course of the syndicate's business, and that they did not know that it would be used by Holdaway for the purpose of borrowing money from the plaintiffs. They also claimed relief on the ground that the cheque was given in respect of a moneylending transaction and that the rate of interest charged was harsh and unconscionable.

At the time when the syndicate was formed, about the end of 1925, the defendant Goss was living in London, but subsequently he removed to Aldershot. The banking account of the syndicate continued to be kept in London, and Goss was the person authorised to draw on that account. A practice was adopted whereby the manager Dursford used to send blank cheque forms to Goss, which Goss used to sign, trusting that the syndicate's stamp would be affixed in due course and that they would be used for the syndicate's business. In July 1926 Goss signed a batch of ten such cheques. To five of them Holdaway affixed the syndicate's stamp, so that they appeared as properly drawn syndicate cheques. The other five were left unstamped and appeared as the personal cheques of Goss himself. Holdaway procured those ten cheques to be indorsed by the defendant Curry, who was prepared to back the syndicate's cheques in certain circumstances.

Holdaway then approached the plaintiffs for a loan of £400. He showed them the ten cheques which appeared as post-dated, and the plaintiffs agreed to grant the loan, but required from Holdaway a promissory note for £500 payable by five monthly cheques of £100 each. £200 of that sum was repaid to the plaintiffs by two cheques that appeared on the face of them to be the syndicate's cheques and were met by the syndicate's bankers.

A third cheque, which appeared on the face of it to be a syndicate cheque, was not met, as the syndicate had by that time no available funds at the bank. Subsequently the plaintiffs presented in place of it a cheque which appeared to be drawn as the personal cheque of Goss and was in fact one of the five to which Holdaway had not affixed the syndicate's stamp. It was dishonoured on presentation, and on that cheque the plaintiffs now sued Goss as drawer and Curry as indorser.

Mr. F. T. Barrington-Ward, K.C., and Mr. H. J. Wallington appeared for the plaintiffs; Mr. Robert Ritson for the defendants.

Mr. Justice Branson, in giving judgment, said that the plaintiffs were claiming as indorsees for value of a cheque for £100, the cheque being on the face of it drawn by the defendant Goss in favour of Holdaway and indorsed by Holdaway and by the defendant Curry. *Prima facie,* therefore, the plaintiffs were entitled to succeed. It was said, however, on behalf of the defendants that the cheque had been negotiated by Holdaway in fraud of the two defendants and that therefore the *prima facie* inference did not follow.

It was possible that if the case had borne certain aspects it would have been necessary to draw a distinction between the two defendants, but in the view that he (his Lordship) took that distinction ceased to be material. The first defence raised by the defendants was that the fact that the cheque was post-dated should have put the plaintiffs on enquiry, when they would have found that Holdaway was not entitled to negotiate the cheque. Evidence had, however, been given on behalf of the plaintiffs that it was quite usual for a syndicate such as this to borrow money from moneylenders and to give post-dated cheques in connexion with such transactions. In the fact that the cheque was post-dated and in the fact that a person, whose name appeared as a partner in the printed heading of the syndicate's paper, was dealing with cheques that bore the signature of other partners, there was, in his opinion, nothing that ought to have raised a suspicion in the plaintiffs' mind that a fraud was being perpetrated. The first defence, therefore, failed.

The next defence was that the ten cheques, of which the cheque sued on was one, were not cheques signed in order to be used in the way in which they had been used, and that therefore the matter fell within the case of *Smith v. Prosser* (23 *The Times* L.R., 597; [1907] 2 K.B., 735), in that the cheque was a document delivered in escrow and one that could not impose liability, if used prematurely. The

plaintiffs' answer was that when the defendant Goss signed those documents he intended that they should be used as cheques and issued as negotiable instruments, and that it was not a case of documents having been given which were not to be issued except in certain circumstances that had not arisen. It was contended on behalf of the defendant Curry that when he indorsed those cheques he intended in every case to indorse a document which should purport to be drawn by the syndicate and not by Goss personally. Had the syndicate been a limited company, a strong argument, and one requiring very careful consideration, might have been developed on those lines, but those questions did not arise in the present case, because the syndicate was an ordinary partnership, and consequently, when Goss signed a cheque intending that it should bear the rubber stamp of the syndicate, he did not thereby limit his liability, inasmuch as, if the cheque had been negotiated in the way that he had intended, he would still have been liable to a holder for value for the full amount. Similar considerations applied in the case of the defendant Curry.

The plaintiffs, therefore, were entitled to recover as holders for value in due course. Having seen Mr. Harris, who conducted the transaction on behalf of the plaintiffs, in the witness-box, and having listened to his evidence, he (his Lordship) was quite satisfied that the plaintiffs had no suspicion that Holdaway was perpetrating any fraud at all.

With regard to the defendants' claim to relief under the Money-lenders Act 1900, relief would be granted upon their paying the balance of the principal due to the plaintiffs, together with interest at 40 per cent., within fourteen days.

[Solicitors—Messrs. Woolfe and Woolfe; Messrs. Skelton and Rust, for Mr. Charles W. Buckwell, Battle.]

Court of Appeal. } 1927.
(Bankes, Scrutton, and Atkin, L.JJ.) } Jan. 19.

KOSKAS v. STANDARD MARINE INSURANCE COMPANY, LIMITED.*

Insurance (Marine) — Certificate of insurance—Goods consigned c.i.f.—Sale by consignee on arrival — Goods damaged — Right of action against insurers by purchaser — Condition as to notice—Liability of insurers.

The defendant company insured a quantity of leather, consigned c.i.f., for a voyage from New York to Tunis, by a certificate of insurance which provided: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder . . . as fully as if the property were covered by a special policy direct to the holder of this certificate." By clause 11 of the policy, "In case of loss or damage to the property hereby insured the loss shall be reported to the representative of the company, or, if there be no representative of the company, to Lloyd's agent, as soon as the goods are landed or the loss is known or expected." On the day after the arrival of the goods at Tunis the consignee sold them to the plaintiff, who found them to have been damaged by salt water. In an action by the plaintiff on the certificate of insurance the defendant company pleaded that the clause in the policy as to giving notice within a limited time had not been complied with.

Held, that as it was not clear either that the certificate incorporated clause 11 of the policy or that clause 11 was a condition precedent, the plaintiff was entitled to recover.

Decision of Sankey, J. (42 *The Times* L.R., 692) affirmed on a different ground

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This was an appeal by the defendants from a decision of Mr. Justice Sankey (42 *The Times* L.R., 692).

By a certificate of insurance dated May 16, 1919, 281 bales of sole leather were insured for $10,000 for a voyage from New York to Tunis. The bales were taken from New York as far as Algiers on a steamer, the Eole, and were trans-shipped at Algiers and carried on to Tunis by another steamer, the Nice. The bales arrived at Tunis on July 9, 1919, consigned c.i.f. to a firm called Medina, and on July 10 Medina sold them to Mr. Koskas, the plaintiff.

Mr. Koskas examined the leather and found it, so he said, to have been damaged by salt water. Both steamers had met with bad weather. Mr. Koskas claimed under the policy, and certain examinations of the goods and other proceedings took place at Tunis, but the defendants refused to pay and the plaintiff brought an action.

The defence put the facts in issue and raised two points of law: (1) that the plaintiff was not the right person to sue; and (2) that a clause in the policy as to giving notice of claim within a limited time had not been complied with.

The certificate of insurance was worded as follows:—

"This certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder . . . as fully as if the property were covered by a special policy direct to the holder of this certificate."

One of the conditions of the policy was in much smaller print than other parts of the policy and was as follows:—

"11. In case of loss or damage to the property hereby insured the loss shall be reported to the representatives of the company, or, if there is no representative of the company, to Lloyd's agent, as soon as the goods are landed or the loss is known or expected."

Mr. Justice Sankey held that the certificate, having been issued by the defendant company itself, enured to the benefit of the plaintiff; and that since the plaintiff did not know of the condition as to notice, and since the clause as to notice was in such small print that a reasonable man reading with reasonable care would not regard it as forming part of the contractual terms, the plaintiff was entitled to recover.

The defendants appealed.

Sir W. Greaves-Lord, K.C., and Mr. R. K. Chappell appeared for the appellants; Mr. S. L. Porter, K.C., and Mr. J. St. C. Lindsay for the respondent.

The Court did not call on counsel for the respondent.

Lord Justice Bankes, in giving judgment, said that this was an appeal in an action brought by a person claiming to be entitled to certain policy

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

moneys because he was the holder of a certificate of insurance. In the Court below the defendants had contended that there was no loss covered by the terms of the insurance. That point was decided against them, and there was no appeal as to that. Secondly, it was said that the plaintiff was not the right party to sue, there having been no assignment. That point had not been persisted in. Thirdly, it was said that by the terms of the policy notice to Lloyd's agent (there being no representative of the company at Tunis) was a condition precedent to any right of claim.

His Lordship then referred to clause 11 of the policy, and said that the question was whether that condition, properly construed, created a condition precedent which, if unfulfilled, would avoid the plaintiff's claim. For that purpose he thought that it was necessary to consider the contract as a whole. It presented some very remarkable features. The certificate was said to represent and take the place of the policy and convey all the rights of the original policy-holder. Now what did those words mean? There were three separate expressions to indicate the effect of the document. Did they mean that the certificate wiped out the policy altogether and gave to the holder all the rights contained in the original policy, even though they were inconsistent with the special certificate? He thought it impossible to put a meaning on those three separate expressions and for the insurance company to set up a condition precedent in their favour. In dealing with the contract as a whole he was driven to the policy in spite of the certificate. The policy was the governing document, and it said nothing about notice being a condition precedent. In those circumstances he was not satisfied in dealing with these particular documents that it was the intention of the parties that the giving of notice was a condition precedent. For those reasons the appeal failed. He wished to add that upon the question of the small print, if that point had been taken, he would not have been able to agree with the Judge below. He thought that the printing was sufficiently clear and intelligible to bind both parties.

Lord Justice Scrutton said that he agreed. As to the language of the certificate, he found it extremely puzzling. It was said on behalf of the defendants that clause 11 was a condition precedent. Whether it was so depended, in his opinion, on the construction of the contract between the parties. It was impossible to construe the certificate without reference to the policy which the certificate was said to represent. There were any number of matters in which the certificate differed from the form of the policy. It was impossible for the Court to see what conditions governed or limited the right of payment, or whether compliance therewith was a condition precedent. If underwriters wished to set up a condition limiting liability, they must make it clear in reasonably plain words. In the present case the certificate did not make it clear that notice was to be a condition precedent, and he was not satisfied that clause 11 was to be such a condition. He thought certificates like the present were very common in America, but it was not for him to lecture the Americans. Nevertheless, as regards English certificates, that particular form required to be thoroughly overhauled.

On the question of the illegibility of the print, he was not disposed to agree with the Judge below. He did not agree with the doctrine that one could get out of a clause by saying that one could not read it.

Lord Justice Atkin said that he agreed. The main contention that had been put forward on behalf of the appellants was that there had been a breach by the plaintiff of the condition precedent mentioned in clause 11—namely, that notice should be given as soon as the goods arrived. He thought that the certificate was difficult of construction. It was not a complete contract of insurance in itself. It seemed to him that the policy must be read with the certificate. The net result was that a jumble of clauses had been put before the Court and they were asked to say that one particular clause constituted a condition precedent. He was not satisfied that in this particular case a condition precedent had been established. Upon the question of the illegibility of the small print he agreed with what had been said by the other members of the Court. In his judgment the appeal failed and must be dismissed.

[Solicitors—Messrs. Finch, Jennings, and Co., for Messrs. Weightman, Pedder, and Co., Liverpool; Messrs. Waltons and Co.]

K.B. Div. (Wright, J.) } 1927. Jan. 18.

BEHNKE v. BEDE SHIPPING COMPANY, LIMITED.*

Ship—Sale—Goods—Specific performance—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), ss. 4, 62 (1).

A ship comes within the description of "goods" in the Sale of Goods Act, 1893, since by s. 62 (1) "'goods' include all chattels personal other than things in action and money." Under s. 52 of the Act the Court may direct specific performance of the sale of a ship.

In this action the plaintiff, Mr. Behnke, a German residing at Rostock, claimed specific performance of an alleged contract made on behalf of the defendants for the sale of a steamer to the plaintiff. Alternatively, he claimed an injunction restraining the defendants from parting with the steamer to anyone but himself; and in the further alternative he claimed damages for breach of contract.

Mr. Langton, K.C., and Mr. Carpmael appeared for the plaintiff; and Mr. Miller, K.C., and Sir Robert Aske for the defendants.

Mr. Langton, in opening, said that in the autumn of 1926 the defendants wished to dispose of a steamer called the City. The steamer had been built in 1892, but the boilers and machinery had been renewed in 1921. The plaintiff was looking out for an old vessel which could be acquired at a low price; but such a vessel would be useless to him unless its boilers would pass the German classification authorities.

The defendant company was managed by a firm, Messrs. Frew, Elder, and Co., and that firm had informed various shipbrokers that the City was for sale. A firm of brokers, Messrs. Sloan and Jackson, of Glasgow, brought the vessel to the notice of the plaintiff. A number of letters and telegrams passed between the plaintiff, Sloan and Jackson, and Frew, Elder, and Co., the effect of which was, in the plaintiff's contention, that a definite contract to sell the City to the plaintiff was entered into. Frew, Elder, and Co. denied that a binding contract had been reached, and in the end they sold the steamer

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

to other buyers at a price higher than that offered by the plaintiff.

The plaintiff wanted specific performance of the contract rather than damages. The fact that the boilers and machinery of the City were comparatively new would enable him to satisfy the German authorities, and the steamer was just what he required for the purposes of his business.

Mr. LANGTON called evidence to prove the making of the contract, and to prove that the age of the City made her a cheap ship, while the fact that her boilers would pass the German authorities made her valuable to a German purchaser. It would be difficult to find another ship at the price which combined these advantages.

Mr. LANGTON submitted that the case raised three questions : first, was there ever a concluded contract ; secondly, if there was, could specific performance of it be decreed ; and, thirdly, did a ship come within the provisions of section 4 and section 52 of the Sale of Goods Act, 1893 ? He referred to Fry on Specific Performance (6th edition, p. 36) ; Halsbury's Laws of England (Vol. XXVII., p. 14) ; Chalmers on the Sale of Goods Act, 1893 (10th edition, p. 150), on the question whether a ship was within the Act ; *Claringbould v. Curtis* (21 L.J., Ch. 541) ; *Hart v. Herwig* (L.R., 8 Ch., 860) ; *Jones v. Tankerville* (25 *The Times* L.R., 714 ; [1909] 2 Ch., 440, at p. 445) ; and *In re Wait* ([1926] Ch., 962, since reversed by the Court of Appeal, 43 *The Times* L.R., 150). As to the point that the letters constituted a binding contract, he referred to *Lewis v. Brass* (3 Q.B.D., 667) and *Bonnewell v. Jenkins* (8 Ch.D., 70).

Mr. MILLER, for the defendants, called Mr. Frew, a partner in the firm of Frew, Elder, and Co., managers of the Bede Steamship Company. The City had been for sale for five or six years before this case began. He first met Mr. Sloan, of Sloan and Jackson, when Mr. Sloan called on him in the ordinary way of business and said that he had buyers for steamers, and asked for prices. In the negotiations with Mr. Sloan he (the witness) made it quite clear that his offer was open only until the following Saturday, and as it was not accepted by the stipulated time he considered that it had lapsed and that he was free to deal with other buyers.

On the Monday, however, Mr. Sloan asked for further time, which was refused ; and Mr. Sloan then asked him to put the other buyers off, if possible, and he promised to do his best. But on the same day the other buyers called for an immediate answer to their offer, and he put his final conditions before them and said that he must have an answer by 3 o'clock. He telephoned to Mr. Sloan that if the other buyers did not conclude a contract by 3 o'clock he would continue negotiations with him ; but at ten minutes to 3 the other buyers called and bought the steamer. He then telephoned to Mr. Sloan and told him that the matter was finished.

Cross-examined by Mr. LANGTON, he denied that Mr. Sloan was his agent for the purpose of making an offer to Mr. Behnke.

Mr. MILLER said that one party or the other must have made a mistake. The burden was on the plaintiff to prove his case. The plaintiff must show that there was a contract—an offer and an acceptance covering the whole of the ground.

Mr. MILLER then dealt with the documents, interviews, and telephone conversations in detail, and submitted that no contract had been concluded. Mr. Sloan, he submitted, was a broker acting as an intermediary between the parties, desiring to earn a commission for himself. He was not employed by the defendants as agent.

Even if the plaintiff succeeded in establishing a contract, the case would still be only one for damages and not one for specific performance. There was a doubt whether a ship was or was not within the Sale of Goods Act, 1893, but if it was, then the only power to order specific performance must be found in section 52 of the Act. That section gave the Court a discretion to order specific performance, but, so far as he could find, specific performance of the sale of a ship had never been ordered.

The ordinary rule was that specific performance was never ordered where damages would be an adequate remedy, and that principle would apply to this case. Moreover, this contract, if there was a contract, was not a mere contract for the sale and delivery of a chattel ; for it contained provisions, *inter alia*, that repairs should be carried out to the satisfaction of Lloyd's surveyor, and the Court would never order specific performance of such matters. And section 52 only gave a claim to specific performance where the seller wished to retain the goods for himself.

Mr. LANGTON, in reply, pointed out that the plaintiff had paid a deposit to Sloan and Jackson, and this indicated that Sloan and Jackson were acting as agents for both parties.

He submitted that there was a concluded contract and that the letters constituted a sufficient note or memorandum in writing of it to satisfy section 4 of the Sale of Goods Act, 1893 (*Buxton v. Rust*, L.R., 7 Ex., 279).

On the question whether a ship was within the Sale of Goods Act, 1893, there was no authority to show that it was. All the cases which were material were cases dealing with ships under construction and not with complete ships.

As to specific performance, the evidence showed that at the time of this contract there was in the market only one other steamer which would suit the plaintiff's purposes, and that steamer would have cost him £2,000 more. The City therefore had a particular value to the plaintiff, and specific performance of the contract should be decreed.

MR. JUSTICE WRIGHT delivered the following considered judgment :—This is an action tried before me on January 12, 1927, without pleadings under an order of the Vacation Judge dated January 5, 1927. The plaintiff, a German shipowner, claims against the defendants, the owners of the British steamship City, a declaration that he purchased the City by contract from the defendants, and an order for specific performance of that contract, and an injunction ; and, in the alternative, damages. The defendants deny the contract, and in the alternative say that it is not enforceable by reason of section 4 of the Sale of Goods Act, 1893 ; and in any event say that it is not a case in which specific performance ought to be decreed.

The negotiations between the plaintiff and defendants were conducted through the intermediation of a Mr. Sloan, of Sloan and Jackson, Limited. I find that he acted throughout in his capacity of a broker for sale and purchase, and that he was not specifically or peculiarly the agent of either party, with any authority to bind either party or to accept a communication for either party. He was in turn the agent of either party "for the purpose of receiving and transmitting propositions." (See Storey on Sale, section 87.) This is the true position of such a broker, whose duty and interest are to do his best to bring the parties together. In the events which happened it is important to define this position. Commission would be paid by the sellers out of the gross price. The deposit was to be paid to the brokers as stake-

holders. The plaintiff, who was at Rostock, communicated by letter or telegram with Mr. Sloan, who, in turn, communicated with the plaintiff in the same manner. Mr. Frew, on behalf of the defendants, whose office was at Newcastle-on-Tyne, spoke on the telephone with Mr. Sloan, who was at Glasgow, and letters and telegrams also passed between them. On November 17, 1926, the plaintiff wrote to the brokers with a firm offer of £7,650 for the City, but he made it a condition that the design of the boilers should be such as to satisfy the German boiler authorities; he also stated other conditions. On November 19 the brokers wrote in reply, after a long conversation with the defendants, that the business might be considered as a fixed sale, subject to the boilers being in accordance with German law requirements, and to the adjustment of details of the contract. It was contended by Mr. Langton that the contract was complete at that date, subject to the question of the boilers and to the preparation of a formal contract. I decide against this contention. In my judgment the agreement of the precise terms of the contract was no formality, but an essential part of the bargain, so that no contract could be concluded till the terms had been adjusted and agreed between both parties.

On November 27 (a Saturday) the plaintiff, who had obtained the design and plan of the boilers and submitted them to the German authorities, who were satisfied, telegraphed to the brokers: "City confirmed send contracts." Mr. Langton contended that this closed the bargain and concluded the contract. For the same reasons as stated above, I do not accept this contention. The final stage—namely, the submitting of the contract by the defendants as sellers, and its approval by the plaintiff as buyer—was still not reached. The preparation of the contract had been proceeding.

On November 19 the brokers, after a telephone conversation with the defendants, wrote to them enclosing a *pro forma* contract for the defendants to amend so that a clean copy could be drafted and sent to Rostock. The defendants replied with various suggestions, all of substance, such as amount of deposit, inspection, &c., and on November 23 the brokers, having sought to embody these suggestions on a clean draft, sent it by letter to the defendants for their approval. On November 24 the defendants, having made various amendments, returned it to the brokers. On the following day they telegraphed to the brokers referring to the doubt that the German authorities would pass the boilers, and added: "We cannot allow later than noon, Saturday, for definite acceptance of steamer on terms of contract posted yesterday." They confirmed this by letter. Mr. Sloan, on receipt of this telegram, telegraphed and spoke to Mr. Frew pointing out that the contract could not reach the plaintiff till Saturday afternoon and suggested further time, say, till Monday afternoon. There was some dispute in the evidence as to what was actually said. I find that Mr. Frew said he would do nothing till Monday, and suggested the contract should be sent by air mail, as indeed it was sent by Mr. Sloan. The reason of Mr. Frew's urgency was that another set of brokers, Wait and Dodds, had approached him with offers from another buyer, which were not indeed at that stage very satisfactory. Mr. Sloan sent a clean copy of the contract as altered by Mr. Frew to the plaintiff with a letter saying that he was only allowed till Saturday to say whether he accepted the steamer on the enclosed form of contract. He also sent another copy of the contract to the defendants. On the same day Wait and Dodds wrote offering on behalf of their clients to buy the steamer for £8,000, paid in certain instalments, or £7,700 cash; and the defendants replied that a meeting of directors would be held on the Monday, November 29.

The plaintiff did not receive the brokers' letter sent on November 25 till the morning of Sunday, November 28. Having regard to the early date fixed for the trial he was not present at the trial, but there is no ground for suggesting that he was not anxious to buy the steamer if the boilers would satisfy the German authorities, and he wired on November 26, as already stated, as soon as he ascertained that fact. He may have been puzzled to receive on the Sunday a letter limiting his time to reply to the previous Saturday, and seems to have waited till the Monday to hear further. The position on the Monday morning, November 29, was that the offer, whether open for Saturday or up to noon Saturday, had lapsed. About 10.30 a.m. Mr. Sloan spoke to Mr. Frew on the telephone and told him of the telegram from the plaintiff, "City confirmed send contracts." Mr. Frew was willing to close with the plaintiff if it appeared that the plaintiff accepted the contract sent to him, but it was obvious that he had not received it. What was said at the conversation is disputed, and I have to decide what version to accept. I have seen both Mr. Sloan and Mr. Frew in the witness-box, and I am satisfied I ought to prefer the evidence of Mr. Sloan. I do not question the honesty of either witness, but Mr. Sloan appears to me to be more accurate and precise in recollection. Immediately after the interview he sent a telegram to the plaintiff, "Owners must have your telegraphic acceptance of contract sent our letter 25th before 4 o'clock to-day otherwise will accept an offer by others who are waiting your reply telegraph instantly whether you agree contract which please sign and post to-day sure to us along with deposit." The telegram was signed with the brokers' telegraphic name. I find that that telegram was dispatched by Mr. Sloan with the authority of Mr. Frew given on the telephone. Mr. Frew denies that he gave any such authority, but apart from the personal impression I have formed of the two witnesses I cannot think that so careful a person as Mr. Sloan would have sent such a telegram without clear authority to do so. The telegram reached the plaintiff at 1.40 p.m. German time, and he at once sent in reply the following telegram to Mr. Sloan, "City accepted contract deposit posted," and he in fact the same day sent by post the contract signed and a cheque for the deposit of £1,500. Mr. Sloan passed on to Mr. Frew by telephone, about 2.50 p.m., the contents of the telegram. I hold that the contract was thereby concluded. I do not think that this result is affected by certain intervening circumstances. Mr. Frew saw Mr. Dodds at 11 a.m., just before his directors' meeting, and after the directors' meeting informed Mr. Dodds (about 11.30) that he could have till 3 p.m. to conclude the purchase of the City on the proposed cash basis. At the same time he telegraphed to Mr. Sloan that as other buyers were insisting on an immediate reply therefore negotiations with the plaintiff must be subject to steamer being free. The latter phrase means, I think, not being under firm offer elsewhere. Mr. Sloan at once telegraphed this to the plaintiff and at the same time telegraphed in reply to Mr. Frew protesting that he was entitled to 5 o'clock as arranged. Mr. Frew, I think, realized, after the firm offer was given to Mr. Dodds, that he had put himself in a difficult position, and sought to revoke his offer to the plaintiff, as he might have done if the revocation had reached the plaintiff before the plaintiff sent off his acceptance. It did not, however, do so. Having regard to the view I have expressed as to the position of the brokers, it seems to

me upon well-known principles applying to contract by correspondence that the revocation did not affect the plaintiff till it actually reached him, whereas his acceptance was effective when it was dispatched. Mr. Dodds, for the other buyers, accepted the firm offer before 3 p.m. Some excited and strained passages occurred on the telephone between Mr. Sloan and Mr. Frew. There was still in law no contract between the other buyers and the defendants because various terms of the contract had to be settled, but this was done a few days later. The defendants refused to give any instructions as regards the deposit of £1,500 received by Mr. Sloan from the plaintiff, and repudiated any contract with the plaintiff, who on December 24, 1926, issued the writ in the action.

I have found that a contract for the sale and purchase of the City was concluded between the defendants and the plaintiff, but it is contended that it is not enforceable by reason of section 4 of the Sale of Goods Act, 1893. It is curious that it has not been decided whether a ship comes within the description of goods under that section. Section 62 of the Act defines goods as "All chattels personal other than things in action and money." A ship is clearly a chattel personal. It is true that some provisions of the Act do not apply to it, for example, the rule as to market overt. A British ship is also a chattel which is subject to special rules as to registration and transfer under the Merchant Shipping Acts, though a British ship sold to a foreigner would come in a different category. But section 4 of the Act relates to the antecedent contract, not the actual transfer, and ought logically to apply to so valuable a chattel as a ship. A contract for the building of a ship was held by Mr. Justice Romer to be a contract for the sale of goods within the Act in the case of *In re Blyth Shipbuilding and Dry Docks Company, Limited* ([1926] Ch., 494). (Compare *Sir James Laing and Sons, Limited v. Barclay, Curle, and Co., Limited* [1908] A.C., 35.) I hold that section 4 of the Act applies.

Mr. Langton contended that the section was satisfied by the payment of the deposit which was sent by the plaintiff to the brokers. But to constitute part payment not only must the money be sent by the buyer but must also be either accepted or in some way acknowledged by the sellers so as to constitute a recognition by the sellers that there is a contract. (*Davis v. Phillips, Mills, and Company*, 24 *The Times* L.R., 4. *Parker v. Crisp and Company*, 35 *The Times* L.R., 112; [1919] 1 K.B., 481.) The contract here provided that the deposit was to be held by the brokers pending completion of the contract; hence the brokers received it, not as agents for the defendants, but as stakeholders, and the defendants expressly declined to give any instructions with reference to it. I hold that there was no part payment within the section.

But I hold that there was such a note or memorandum in writing of the contract as the statute requires. The form of contract which the defendants altered in order that it (or a clean copy) should be sent to the plaintiff as the final offer for his acceptance was headed with their name as sellers. They instructed the broker (by letter dated November 25, 1926) to inform the buyer that he must accept the vessel on the terms of the *pro forma* contract which they had prepared or altered: the brokers sent on a copy under these instructions. I think it must be held that either the *pro forma* contract, so headed and adopted and altered by the defendants, or the letter in terms referring to it as their offer, or both, constitute an offer in writing, which, if accepted either orally or in writing, would constitute a written note or memorandum. But Mr. Miller contended that the offer of November 25 lapsed and is immaterial. I have, however, found that the first telegram sent to the plaintiff on November 29 was sent with the defendants' authority, and thereby the offer was reinstated. The telegram is signed by the brokers, who at this stage in my opinion were the defendants' agents and signed the telegram which in terms refers to the *pro forma* contract. Indeed, I think the mere delivery of the *pro forma* contract created or recognized by the defendants in the way which I have indicated would constitute delivery of a note or memorandum in writing signed by the defendants. The signature may be constituted by a written or printed heading if adopted or recognized by the party to be charged (*Schneider v. Norris*, 2 M. and S., 286, and *Evans v. Hoare*, 8 *The Times* L.R., 441; [1892] 1 Q.B., 593). I think the contract is enforceable.

It remains to consider what is the proper remedy. The plaintiff claims a decree of specific performance. This claim is strongly contested on behalf of the defendants. It is curious how little guidance there is on the question whether specific performance should be granted of a contract for the sale of a ship. Section 52 of the Sale of Goods Act, 1893, gives the Court a discretion, if it think fit, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically. I think a ship is a specific chattel within the Act. In Fry on Specific Performance, page 37, note 4, it is said that a ship is probably within the general principle. (See *Claringbould v. Curtis*, 21 L.J., Ch., 541), which, however, is the case of a barge and contains no distinction of principle. *Hart v. Herwig* (L.R., 8 Ch., 860) seems to imply that a man who has contracted to purchase a ship is *prima facie* entitled to have it—that is, by an order for specific performance.

In the present case there is evidence that the City was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, and was built in 1892, but her engines and boilers were practically new and such as to satisfy the German regulations, and hence the plaintiff could, as a German shipowner, have her at once put on the German register. A very experienced ship-valuer has said that he knew of only one other comparable ship, but that may now have been sold. The plaintiff wants the ship for immediate use, and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done. What is the position between the defendants and the other buyers, whose contract was later in time than that of the plaintiff, is irrelevant in this action.

I have not overlooked the argument of Mr. Miller, based on the clauses in the contract which provide that before completion of payment of the balance of the purchase price the buyer was to have the option of inspecting the vessel afloat and of requiring the sellers to place her in dry dock for inspection, and of requiring the sellers to repair certain damage if any were found. Mr. Miller contended that, as the Court will not decree specific performance of a contract to do work or perform services, these clauses constitute a bar to a decree here. But I think this contention is not sound.

The defendants are neither dry dock owners nor ship repairers. All they could be required to do would be to give the appropriate orders to a dry dock owner or ship repairer if necessary. But the plaintiff may not require inspection or dry-docking (which, if no damage be found, will be at his own expense), and no damage requiring repairs may be discovered. Thinking, as I do, that justice can only be satisfied

by an order for specific performance, I do not find in the clauses referred to, the only ones relied on by Mr. Miller, any ground why I should not make the decree. There will be judgment, therefore, for the plaintiff, with a declaration that he purchased the City from the defendants and a decree that the contract shall be specifically performed, and an injunction as prayed, and costs.

On the application of Sir Robert Aske a stay of execution was granted.

[Solicitors—Messrs. Stokes and Stokes, for Messrs. Bramwell, Clayton, and Clayton, Newcastle-on-Tyne; Messrs. Botterell and Roche, for Messrs. Botterell, Roche, and Temperley, Newcastle-on-Tyne.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Jan. 11.

WELTON v. WELTON.*

Divorce—Wife's petition—Previous petition by husband—Finding of adultery by wife—Husband's conduct conducing—Dismissal of husband's petition—Alimony pending wife's petition—Jurisdiction of Court to order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190 (3).

Where a wife has been found guilty of adultery on the petition of her husband for dissolution of marriage but the petition has been dismissed because the husband was found guilty of conduct conducing, and where the wife subsequently petitions for dissolution of marriage, the Court has jurisdiction to award her alimony *pendente lite*.

Decision of Lord Merrivale, P. (43 *The Times* L.R., 161), affirmed.

This was an appeal by a husband from a decision of the President of the Divorce Division (43 *The Times* L.R., 161) refusing to discharge an order of the Registrar for the payment of alimony *pendente lite* to a wife, who was petitioning for a divorce, although she had in previous proceedings by the husband been found to have been guilty of adultery. The husband was, in those previous proceedings, refused a decree on the ground that he had been guilty of cruelty and of conduct conducing to his wife's adultery.

The President refused leave to appeal, but the Court of Appeal granted leave on December 21.

Mr. Acton Pile and Mr. Rewcastle (Mr. Hutchinson with them) appeared for the husband; Mr. Merriman, K.C., and Mr. T. J. O'Connor for the wife.

The MASTER OF THE ROLLS, in giving judgment, said that the argument had raised a somewhat interesting point. The President had given a considered judgment on it, and had refused leave to appeal, probably because the amount involved was only 10s. a week and would not amount altogether to more than £13, assuming a decree to be given within six months. But the Court thought it right to give leave to appeal on the terms that the appellant should make himself liable for the costs of the appeal in any event. The appellant claimed that the order of the President was wrong.

The facts were that the petitioner was married to the respondent on March 9, 1909, and two children were born. In 1918 the husband petitioned for divorce on the ground of his wife's adultery. At the hearing it was proved that the wife had committed adultery, but Lord Coleridge dismissed the petition because the husband had been guilty of cruelty and conduct conducing to the wife's adultery. As early as February, 1917, an order had been made against the husband in the police court for maintenance of his wife under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, but after the decision in the Divorce Division an application was made to the magistrate, the late Mr. Waddy, to revoke the order, and he revoked it on the ground that the wife's adultery had been proved. Therefore, by March, 1919, there had been decisions both in the High Court and in the police court that the wife had committed adultery.

On June 29, 1926, the wife filed a petition charging her husband with adultery. He admitted the charge, but made a counter-charge against his wife. The wife then filed a petition for alimony. The husband's sworn answer was that his means were not so great as they had been represented to be, and that because of her adultery the wife was not entitled to alimony. The petitioner, in her affidavit, said that she was only just able to earn enough to support herself and her two children, one of whom was an invalid, and to pay the rent of a single room; and that the man with whom she had been living had died some 18 months before. The Registrar ordered the payment of 10s. a week alimony, and the President affirmed his decision. The husband appealed.

Two points were raised by counsel for the appellant—(1) that where the wife had been guilty of adultery there was no power in the Court to grant her alimony; and (2) that where the spouses had in fact been separated for some years, and the wife had been able to maintain and support herself and her children, the Court ought not to order alimony *pendente lite*.

The first point depended on the interpretation to be given to the statutes. Under section 190, subsection (3), of the Supreme Court of Judicature (Consolidation) Act, 1925, it was provided as follows:—

"On any petition for divorce or nullity of marriage the Court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation."

The argument was that the power was only given to the same extent as in proceedings for judicial separation, and no more, and that that power depended on section 22 of the Matrimonial Causes Act, 1857, which was as follows:—

"In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted, but subject to the provisions herein contained and to the rules and orders under this Act."

It was important to notice the proviso at the end of the section, "subject to the provisions herein contained. . . ." One of the new principles laid down by the Act, and found in section 31, was that the Court was not bound to pronounce a decree for dissolution if the petitioner had been guilty of wilful neglect or misconduct conducing to the respondent's adultery.

It was said that, according to the cases such as

* Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

Otway v. Otway (4 *The Times* L.R., 523, 534; 13 P.D., 141) and *Everett v. Everett* (35 *The Times* L.R., 613; [1919] P., 298), a judicial separation could be granted only where the wife had been free from all matrimonial misconduct, and that, as the present petitioner came into Court with a decree against her finding that she had been guilty of adultery, she must fail if the Court were to test her position by the question whether she would be able to get a decree for judicial separation. But the cases referred to were cases where the adultery was considered *simpliciter* and without any question of a disability on the part of the other spouse by reason of his conduct having conduced to it. In *Everett v. Everett* (*supra*) the Court refused a decree on the ground that the petitioner was in fact still living in adultery. Neither of the cases dealt with the position of persons applying for an order for alimony *pendente lite*. In *Holt v. Holt* (28 L.J., P. and M., 12) the Judge Ordinary said that a husband was no longer bound to support a wife who was guilty of adultery, and that she was not entitled to ask for alimony. But whether, as it was said, the right to alimony depended on the wife's right to pledge her husband's credit for necessaries or not, that point, in his Lordship's opinion, did not arise in the present case. There were several kinds of cases where a husband was not entitled to impute adultery to his wife, such as connivance and condonation, and under the Matrimonial Causes Act, 1857, conduct conducing to adultery.

Here there was a case in which adultery *simpliciter* could not be charged against the wife, as it was plain from the order of Lord Colcridge that he did not regard the husband as free from fault. Therefore the cases which had been cited by counsel for the appellant were not really in point, and did not restrict the power of the Divorce Court in the matter of ordering the payment of alimony *pendente lite*. The Court could not hold that it could not grant alimony merely because of the fact that the wife was guilty of adultery. The President spoke of the wife as a competent suitor, and her husband could not rely on her previous adultery as preventing her from taking proceedings herself. It appeared, therefore, that section 190, subsection 3, of the Supreme Court of Judicature (Consolidation) Act, 1925, operated, and there was power in the Court to make an order for alimony *pendente lite*.

On the second point, the Court again could not neglect the effect of the conduct of the husband in conducing to his wife's adultery. The evidence was not sufficient to oust the jurisdiction of the Court, which could not be considered solely from the point of view whether the wife could have pledged her husband's credit for necessaries. The Registrar had abundant material upon which to make the order, and the appeal must be dismissed, with costs.

Lord Justice Sargant said that he was of the same opinion and would compress his remarks into a very short space. The appellant wanted to read section 190 (3) of the Act as if the words were "the Court shall have power to make the same kind of interim orders as the Ecclesiastical Courts could have made in proceedings for judicial separation." That argument was quite ill-founded; there was a general power given by the language of the subsection. The President stated the point quite succinctly. The appellant's argument, if acceded to, would have the effect of unduly crippling the powers of the Court. As the President said, the wife had a right to bring the suit, and, though she had committed adultery, she might succeed in getting a decree. That summed up the reasons upon which the President considered that he had power to grant the alimony in question. Then came the second question. It was said that alimony was never granted where it was shown that the wife was maintaining herself, and cases were cited, but those decisions depended upon their own facts. In the present case the wife had made a distinct statement that she was incapable of maintaining herself. There was sufficient evidence upon which the Registrar could make the order, and he had fixed the alimony payable at a very moderate amount.

Lord Justice Lawrence agreed. He thought that section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, conferred on the Court a general power to make such an order. He agreed that the wife was a competent suitor, and he had nothing to add on the second point.

[Solicitors—Messrs. Mills, Lockyer, Church and Evill; Messrs. Edmond O'Connor and Co.]

K.B. Div.
(Lord Hewart, C.J., Salter and Talbot, JJ.)
1926.
Dec. 15.

POINTON v. COX.*

Justices — Summary jurisdiction—Conviction—Particularity—Betting Act, 1853 (16 and 17 Vict., c. 119), ss. 1, 3—Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 79 (1) (*b*).

The licensee of a public-house was convicted under s. 79 (1) (*b*) of the Licensing (Consolidation) Act, 1910, for that he ". . . unlawfully did suffer to be used his premises . . . in contravention of the Betting Act, 1853."

Held, that the conviction was bad on the face of it, because it did not specify the particular contravention of the Betting Act, 1853. The defendant was entitled to demand the same particularity in proceedings under s. 79 (1) (*b*) of the Licensing (Consolidation) Act, 1910, as he would have been entitled to in a prosecution under the Betting Act, 1853, itself.

This was a case stated by Warwickshire Quarter Sessions.

An appeal by Thomas Pointon (hereinafter called the appellant) against a certain conviction, as hereinafter stated, came on for hearing at the general quarter sessions of the peace in and for the county of Warwick on July 2, 1926, when the Court allowed the said appeal subject to the opinion of the King's Bench Division of his Majesty's High Court of Justice on the following case:—

On the hearing of the said appeal the following facts were proved or admitted:—

On April 24, 1926, at the court of summary jurisdiction held at Coventry, an information under the Licensing (Consolidation) Act, 1910, section 79 (1) (*b*), was preferred by Henry Cox, a police inspector (hereinafter called the respondent), against the appellant for that he "At the said city on divers dates between March 26, 1926, and April 17, 1926 (both dates inclusive), then being the holder of a justices' licence, unlawfully did suffer

* Reported by J. W. Hall, Esq., Barrister-at-Law.

to be used his premises, situate at New-street there and known by the sign of the 'Livery Stables,' in contravention of the Betting Act, 1853." The said information was heard and determined by the court of summary jurisdiction on April 29, 1926, when the said court convicted the appellant of the said offence and fined him the sum of £10. A copy of the said conviction accompanied this case.

The appellant duly appealed against the said conviction to the quarter sessions for the county of Warwick. The notice of appeal contained five grounds of appeal, one of which was as follows :— "That the said conviction is bad on the face of it."

On the hearing of the said appeal before the deputy-chairman of quarter sessions it was argued by counsel on behalf of the appellant that the said conviction was bad on the face thereof on the ground that the alleged contravention of the Betting Act, 1853, was not set out, nor was the section of that Act of Parliament a contravention of which was alleged referred to, and that the conviction was indefinite and ambiguous.

After hearing arguments by counsel on both sides the deputy-chairman came to the conclusion, and held, that the appeal must be allowed on the ground that the conviction was bad on the face thereof. In the course of the argument counsel for the respondent applied to him to amend the said conviction if he was of opinion that the conviction in its original form was insufficient. Having considered the said application and the several cases to which he was referred by counsel, the deputy-chairman refused in the exercise of his discretion to amend the conviction. His reasons for refusing to amend the said conviction were stated by him as follows : "The long course of decisions on this point has established this principle, that, when a Court of quarter sessions is asked to amend a conviction of this kind, though the Court can and in a proper case ought to make a correction, where the only defect is a clerical mistake—an accident—in the court below, the Court here ought not to exercise its power to amend and has no right to make an amendment if what it is asked to do is to write into a conviction something which involves an alteration in the judgment—the judgment which is appealed from, and which has been pronounced and is supposed to be recorded in the document itself. This Court cannot write with any safety into this conviction what ought to be there—namely, a clear statement of the actual offence for which this man was convicted—and the reason why it cannot write that in is because it has not before it any material for deciding which of the possible offences that might be written in is the proper one that should be written in, and this Court is not going to investigate the case with the idea of finding out what the proper charge was, and what the actual decision of the justices was, and how it ought to be entered, and how this document ought to have been made definite and clear. The Court does not exercise its jurisdiction to amend in this case." The deputy-chairman offered to state a case upon the question of law raised, if so desired.

The question for the opinion of the High Court was whether the deputy-chairman, being the Court of quarter sessions as aforesaid, was right in holding that the said conviction was bad upon the face thereof and in allowing the said appeal.

The material parts of the conviction are set out in the judgment of the Lord Chief Justice.

Mr. Birkett, K.C., and Sir Travers Humphreys appeared for the respondent ; Sir Henry Maddocks, K.C., and Mr. J. F. Eales for the appellant.

The Lord Chief Justice.—I desire to preface the very few observations that I have to make by repeating the words which were employed by Lord Coleridge, then Chief Justice, in the case of *Cotterill v. Lemprière* (6 *The Times* L.R., 262 ; 24 Q.B.D., 634), where he said, at page 636 : "I yield to this objection with extreme reluctance, because, as Lord Tenterden, C.J., said in *Rex v. Pain* (7 D. and R., at p. 684), 'It is a very nice and subtle objection, and quite beside the merits.'"

The conviction is set out as part of the case ; and the important words are the following : "Thomas Pointon, of the Livery Stables Publichouse, Newstreet, Coventry (hereinafter called the defendant), is this day convicted before this Court for that he at the said city on divers dates between March 26, 1926, and April 17, 1926 (both dates inclusive), then being the holder of a justices' licence, unlawfully did suffer to be used his premises, situate at New-street there and known by the sign of the 'Livery Stables,' in contravention of the Betting Act, 1853, contrary to the form of the statute in such case made and provided." There is, as is obvious, no little particularity in that form of conviction. It is not complained that the dates are not present, or that the defendant is not accurately described as being the holder of the particular justices' licence which is referred to, or that the premises are not accurately described. The complaint is that in one particular respect there is a lack of that precision which is required, namely, in the phrase, "Did suffer to be used his premises . . . in contravention of the Betting Act, 1853," no more exact description being given of the section or the part of the section which the defendant was found to have contravened.

Now, by section 79 (1) of the Licensing (Consolidation) Act, 1910, it is provided, among other things, that the holder of a justices' licence shall not "suffer his premises to be . . . used in contravention of" the Betting Act, 1853 ; and when one looks to see in what different ways such a person occupying such premises could be guilty of a contravention of the Betting Act, 1853, in the sense of suffering his licensed premises to be used in some unlawful way, it is apparent from section 1 of the Betting Act, 1853, that he may suffer his premises so to be used in one or other or both of two ways : he may suffer his premises to be used for the purposes of a ready-money betting establishment, or he may suffer his premises to be used for the purposes of a credit betting establishment ; and undoubtedly this form of conviction, like the form of the information, does not allege in which of those two contrasted ways the defendant is said to have infringed the law.

Is it sufficient that the conviction should record, and record merely, that the defendant has suffered his premises to be used in contravention of the Betting Act, 1853 ? In support of the proposition that the conviction as it stands is sufficient Mr. Norman Birkett, if I may say so, has urged a very ingenious argument, and an argument which for some time I at any rate was disposed very much to entertain. The argument may be stated quite shortly in this way : It is quite true that the Betting Act of 1853 by the section already referred to constitutes at least two quite different offences, and, if the prosecution in this case had been launched under the Betting Act, 1853, it would have been right and necessary to state in the information which of the two offences exactly was alleged ; and more than that, it was conceded that, if that element of particularity was in fact missing from the information, it would have been right for the defendant to apply

for and to obtain the requisite particulars. But it was said : This was not a prosecution under the Betting Act, 1853. It was a prosecution under the Licensing (Consolidation) Act, 1910 ; and what is done in section 79 (1) (*b*) in the words already cited is to make a different offence, which consists of the infringement of the Betting Act, 1853, in either of the ways referred to. It is as if these words in section 79 (1) (*b*) of the Licensing (Consolidation) Act, 1910, "To be . . . used in contravention of that Act," were a combined verb, every pair of words in the expression being notionally united by a hyphen, and so the offence is that the premises were suffered to be used in contravention of the Betting Act, 1853, and that is true, whether the business there carried on is a ready-money betting business or is a credit betting business.

It is, as I have said, an attractive argument, but upon further consideration I cannot perceive any good and sufficient reason why, when the offence is under the Licensing (Consolidation) Act, 1910, there should be an omission in this respect to afford the defendant the precise information to which, *ex concessis*, he would have been entitled if the prosecution had been under the Betting Act, 1853.

Now, in order to see how exacting are the requirements of the law in that respect, one need only turn to one case. There are many other cases to the same effect, but this case exhibits the point of the matter with remarkable clearness. It is the case of *Cotterill v. Lemprière* (*supra*). In that case what was being dealt with was a statute or by-law which created two distinct offences and provided the same penalty for both. It provided that "No smoke or steam shall be emitted from the engines"—that is, the engines attached to certain tramcars—"so as to constitute any reasonable ground of complaint to the passengers or the public," and the penalty was the same whichever class of persons had a ground of complaint. The information and conviction stated that the defendant permitted smoke to escape contrary to the by-law, without stating in terms any reasonable ground of complaint to the passengers or the public or either of them ; and it was held that that statement was insufficient and that the conviction must be quashed. There the matter which was left vague, and the only matter which was left vague, was whether it was the passengers on the one hand or the public on the other hand who suffered from the emission of the smoke. And in giving judgment Lord Coleridge, having referred to the words of Lord Tenterden already mentioned, said : "Probably it is true that the principles of construction have been to a certain extent relaxed in formality in modern days ; yet at the same time strictness of statement is still valuable, especially in a case where the result may be highly penal. Where the result of a conviction is to inflict a heavy penalty on the person accused, it lies on the prosecution to prove the case strictly. In the present case the by-law on which the conviction is founded provides that 'No smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public.' This provides for the case of smoke being emitted so as to cause a nuisance both to the passengers and to the public, or to one only of these two classes of persons, while in either case the penalty provided is the same. It does not follow that the cause of complaint is to the two classes together, for it may be to one and not to the other. It has long since been decided that where a man is convicted on a statute creating an alternative offence, and the same penalty is imposed in either case, the information and conviction must state which offence is intended to be charged. In the present case the information stated simply that the appellant permitted smoke to escape from his engine contrary to the by-laws of the Board of Trade, and the conviction followed the words of the information. Both the information and the conviction stated a general offence against the by-laws, whereas the by-law creates two separate and distinct offences in the alternative. I think that even now, if the point arose for the first time, I should hold that the information and conviction must point out which offence is intended to be charged, but the point is not open, being concluded by authority." And Lord Esher, giving judgment to the like effect, said, at page 639 : "This case, like the old cases which have been referred to, is to be decided on the governing rule and principle of English criminal law, which is, that the question in this country is not, as it is in many countries abroad, simply whether the person charged is guilty or not guilty, but whether the prosecution proves the case strictly and in form. If the cases which have been referred to did not exist, I should still be of opinion that the offence in the present case was not distinctly and properly charged. Take the information. It may be that the smoke annoyed the passengers ; whether it did or not is a question of evidence ; or, on the other hand, it may be that it annoyed the public. It is important that the defendant should know which of these two offences is intended to be proved against him. Something is wanting the want of which might cause injustice. But if we look at the cases we find that they are distinct authorities for the contention that this conviction cannot be supported."

In like manner, to refer only to one of the many other relevant cases, in *Smith v. Moody* (19 *The Times* L.R., 7 ; [1903] 1 K.B., 56, at p. 63), Mr. Justice Channell said this : "The principle . . . seems to be that, subject to statutory provisions making certain things unnecessary in certain cases, the conviction must be as precise as the summons"—that means as precise as a properly drawn summons —"and if there were a charge against a man—either by an indictment or by summons, made in the vague way in which this conviction is drawn up—a charge against a man of injuring the property of another, without specifying what property or giving any further information, it does seem to me that that would be insufficient. Therefore, following the rule that the conviction must be as precise as an indictment, I think that this conviction is wrong in form unless it is met by some statutory provision on the point. Section 39 of the Summary Jurisdiction Act, 1879, is the one relied on ; but that seems to be rather a repetition of previous enactments, and, although section 39 provides that it shall be sufficient, so far as regards the description of the offence, to follow the statute, I do not think the section in any way dispenses with the usual necessity for specifying time and place and matter in the way in which it has been hitherto specified. It could not possibly suffice in a case of larceny simply to specify the name of the person whose property was stolen. There must be facts relating to the particular matter, such as the time when, and the manner in which, the offence was committed, which would have to be inserted in the charge, and the omission of which cannot be cured by stating the offence in the words of the statute." In the same case Lord Alverstone, on page 60, having explained that he had for a time entertained the contrary view, said : "On further considering the question, which is undoubtedly one of importance, it seems to me that it could not have

been intended by that section"—that is to say, by section 39 of the Summary Jurisdiction Act, 1879—"to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions." Then he added, a little later: "In my opinion, section 39 does not cure the omission from a conviction of such particularity in the description and details of the offence as has always been required."

The attention of the Court was directed in the course of the argument in the present case to the provisions (which, however, at the relevant date had not yet come into operation) of the Criminal Justice Act, 1925. If one contrasts and compares the provisions of that Act with the provisions of section 39 of the Summary Jurisdiction Act of 1879, it is apparent that in the later legislation there is a change in the direction of greater latitude. But even under the Criminal Justice Act, 1925, section 32, there are still important matters to be observed. By subsection (1) of section 32 it is provided that "Every information, complaint, summons, warrant or other document laid, issued, or made for the purpose of or in connexion with any proceedings before examining justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information"—"reasonable information"—"as to the nature of the charge." Then, subsection (2) more particularly adds: "The statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence."

Now, in the present case it seems to me that the argument which was urged at quarter sessions was right, that the conviction was bad on its face, because the alleged contravention of the Betting Act, 1853, was not set out, nor was the section of that Act of Parliament referred to. It is, as I said, conceded that if the prosecution had been under the Betting Act, 1853, itself, those matters which this conviction omits would have been necessary. I cannot accept the argument that, because the prosecution is not under the Betting Act, 1853, but is under a different Act referring to that Act, a less degree of precision is permissible.

In these circumstances, and for these reasons, I think that the Court of quarter sessions came to a correct conclusion in point of law, and that this appeal must be dismissed.

Mr. Justice Salter.—I am of the same opinion. The conviction must be as precise as the information or summons or other document formulating the accusation. This does not, of course, mean that, if the accusation is insufficient, a conviction which follows the accusation is good. The conviction must be as precise as a proper and sufficient information or summons. The question, therefore, is whether the information here was sufficient.

The question whether a conviction is or is not sufficiently precise seems rather a technical point; but, inasmuch as it appears to involve the question whether the accusation is sufficiently precise, I think it contains elements of substance. In my opinion, an accused person is entitled to information in two respects: he is entitled first of all to be told what law, statutory or other, he is alleged to have broken; and in addition he is entitled to be told with reasonable particularity how he is alleged to have broken that law.

The Indictments Act, 1915, section 3 (1), provides that "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." The same provision, in substance, is contained in section 32 of the Criminal Justice Act, 1925, to which my Lord has already referred. If that Act had come into force in time to govern this case, I think Mr. Birkett's case would have been unarguable. The section which governs this case is section 39 of the Summary Jurisdiction Act, 1879. That section was considered in the case of *Smith v. Moody* (19 *The Times* L.R., 7; [1903] 1 K.B., 56), to which my Lord has already referred. He has referred to the observations of Lord Alverstone in that case; and similar observations were made by Mr. Justice Channell, who said, on page 63: "Section 39 of the Summary Jurisdiction Act, 1879, is the one relied on; but that seems to be rather a repetition of previous enactments, and, although section 39 provides that it shall be sufficient so far as regards the description of the offence to follow the statute, I do not think the section in any way dispenses with the usual necessity for specifying time and place and matter in the way in which it has been hitherto specified."

Now, here the information alleges, and alleges only, that the accused person, being a licensed person, suffered the premises in respect of which he was licensed to be used in contravention of the Betting Act, 1853, within a certain period of time. The time is defined, and the place is defined, but nothing more. The material sections, sections 1 and 3, of the Betting Act, 1853, appear to me to create a large number of offences. It is unnecessary to go into the matter in any detail; but it is an offence to use a place for the owner to bet there; it is an offence to use a place for the occupier to bet there, or for the keeper to bet there, and so on. There is a series of offences in connexion with ready-money betting, and a corresponding series of offences in respect of credit betting; and all that this man is told is that it is alleged that he has suffered one or more or all of those offences to be committed at that place during this period.

I have some doubt whether this is even a sufficient description of the offence, to use the expression of section 39 of the Summary Jurisdiction Act, 1879, or a sufficient statement of the specific offence, within the meaning of section 32 of the Criminal Justice Act, 1925. But, whether that be so or not, I am quite clearly of opinion that it is not sufficient to give him the particulars to which he is entitled. The conviction followed this information, and it is therefore equally bad, and it should be set aside.

Mr. Justice Talbot.—I am of the same opinion. The appellant was convicted of suffering his licensed premises to be used in contravention of the Betting Act, 1853. There are at least two ways in which premises can be used in contravention of that Act, and they are specified in the first section of the Act. The rule stated, for example, by Mr. Justice Channell, in the case of *Smith v. Moody* (19 *The Times* L.R., 7; [1903] 1 K.B., 56), that a conviction must be as precise as a summons or indictment, and described by Lord Alverstone, C.J., in *Rex v. Hankey* (21 *The*

Times L.R., 409 ; [1905] 2 K.B., 687), as an important and salutary rule, was not disputed by the learned counsel for the respondent ; and it was accordingly admitted that a conviction under the Betting Act, 1853, would be bad if it did not specify the particular use of the premises which had been charged and proved. But it was said that in a conviction under section 79 of the Licensing (Consolidation) Act, 1910, it was enough to state that the defendant suffered his premises to be used in contravention of the Betting Act, 1853 ; that that is a separate statutory offence created by the Act of 1910, and not the same as that created by the Betting Act, 1853—permitting premises to be used in the way described by that statute. This distinction, though highly technical, is sound according to the decision in the case of *Bannister v. Clarke* (36 *The Times* L.R., 778 ; [1920] 3 K.B., 598) ; and it is also true that by section 39 of the Summary Jurisdiction Act, 1879, which appears to be merely declaratory of the law as previously understood, it is enough, in the description of the offence and the conviction, to use the words of the statute which creates it.

Assuming that this is satisfied by the present conviction, it does not make it the less necessary, as was held in *Smith v. Moody* (*supra*), to specify the particulars of the offence so described ; nor is that obligation removed by the fact that the offence under the Licensing (Consolidation) Act, 1910, is technically distinct from the offence under the Betting Act, 1853. It would be quite contrary, in my opinion, to the settled rule which governs this matter to hold that a conviction, stating that the appellant suffered the use of his licensed premises in contravention of the Betting Act, 1853, is good without specifying the manner in which that Act was contravened.

In my opinion, therefore, the Court of quarter sessions came to a right conclusion, and the question which is asked of this Court must therefore be answered in the affirmative.

[Solicitors—Messrs. Sharpe, Pritchard, and Co., for Mr. Vernon Younger, Deputy Town Clerk, Coventry ; Messrs. Philip Baker and Co., Birmingham.]

K.B. Div.
(Lord Hewart, C.J., Salter and Talbot, JJ.)
1926. Dec. 17.

SMITH v. WOOD.*

Emergency Regulations—Supply of fuel—Publication of statement calculated to restrict—Distribution—Emergency Regulations, 1926, reg. 21.

During a strike it was agreed between the colliery owners and the miners that the safety men should remain at work. Some owners posted up offers of work to miners, and certain miners, not safety men, returned to work. A board of enginemen, deputies, and miners, of which the appellant was secretary, then passed a resolution that if coal were raised for other than safety purposes all the safety men would be withdrawn ; and the appellant, by direction of the board, sent copies of the resolution to the secretary of the owners' association and to the managers of certain collieries. The appellant was convicted of distributing a document containing a statement the publication of which was calculated to impede, delay, or restrict the supply or distribution of fuel, contrary to reg. 21 of the Emergency Regulations, 1926.

Held, per Lord Hewart, C.J., that the document was not calculated to restrict the supply of fuel, but was merely a complaint that the agreement for preserving the pits was being broken, that it was not "distributed" by the appellant, but merely communicated, and that the matter came within the proviso to reg. 21 (1) ; per Salter, J., that there was a publication, and that it was calculated to stop the supply of fuel, but that the communication was "taking part in a strike" within the proviso ; and per Talbot, J., that the regulation did not apply to an official communication sent by one party in a dispute to the other party. The conviction was accordingly quashed.

This was a case stated by Derbyshire justices.

The appellant, William Knight Smith, was the agent of the South Derbyshire Miners' Association. He was convicted on August 24, 1926, by a Court of summary jurisdiction at Swadlincote, of an offence against Regulation 21 of the Emergency Regulations, 1926, which provided :—

"(1) If any person attempts or does any act calculated or likely . . . to impede, delay, or restrict the supply or distribution of . . . fuel he shall be guilty of an offence against these regulations : Provided that a person shall not be guilty of an offence under this regulation by reason only of his taking part in a strike or peacefully persuading any other person to take part in a strike.

"(2) If any person prints, produces, publishes, or distributes any document containing any report or statement the publication of which would be a contravention of the foregoing provisions of this regulation . . . he shall be guilty of an offence against these regulations."

Sir Henry Maddocks, K.C., and Mr. H. H. Maddocks appeared for the appellant ; Mr. H. H. Joy, K.C., and Miss Campbell (Mr. T. N. Winning with them) for the respondent.

Smith was charged on five informations for that on August 13, 1926, at the parish of Church Gresley, he did unlawfully distribute a certain document containing a report or statement the publication of which was a contravention of Regulation 21 (1), to wit, by signing and distributing a copy of a resolution of the Joint Board of Enginemen, Deputies, and Miners of South Derbyshire, passed at their meeting held on August 11, 1926, which was calculated or likely to impede, delay, or restrict the supply or distribution of fuel.

The case stated that at all material times the members of the South Derbyshire Miners' Association (hereinafter called the miners' association) and the members of the South Derbyshire Coal Owners' Association (hereinafter called the owners' association) were taking part in a strike. The appellant was the agent for the miners' association, and the secretary of the Joint Board of Enginemen, Deputies, and Miners, which was formed for the purpose of advising the members of the miners' association upon matters arising during the strike.

It was agreed between the owners' association and the miners' association that the safety men (members of the miners' association) should be advised to remain

* Reported by J. W. Hall, Esq., Barrister-at-Law.

at work during the strike for the preservation of the pits only.

The Joint Board of Enginemen, Deputies, and Miners met on August 11, 1926, to discuss the position of the safety men, and the following resolution was passed :—

"That this meeting of the Joint Board of Enginemen, Deputies, and Miners decides that each manager in the district be notified forthwith that no coal shall be raised for other than safety purposes, and that there shall be no raising or lowering of men other than those granted permits by the joint board. It must be noted that permits will only be granted where pre-stoppage conditions are observed. Any violation of this decision will be met by the withdrawal of the whole of the safety men in the district."

The appellant, as secretary of the joint board, was directed by the board to sign and send a copy of this resolution to the secretary of the owners' association and to the certified managers of a number of collieries which belonged to members of the owners' association. The appellant signed and sent by post copies of the resolution accordingly, and such signing and sending by post were the offences charged against him.

The secretary of the owners' association had been invited to attend the meeting at which the resolution was passed, but had declined to do so. At the collieries belonging to members of the owners' association there had, subsequently to the agreement as to safety men above referred to, been posted offers of work to miners upon terms not approved by the National Federation of Miners and the miners' association, and in consequence of these offers certain miners (other than safety men) had returned to work and had been and were engaged in getting coal for other than safety purposes.

It was contended on behalf of the respondent that the document, on the face of it, was within the words and meaning of the said regulation, and was calculated and likely to impede, delay, or restrict the supply of coal.

It was contended on behalf of the appellant :—(*a*) That the act of the appellant in signing and posting the copy of the resolution was not within the meaning of the regulations ; and (*b*) that the appellant was engaged only as secretary of the board in taking part in a strike and was within the proviso to paragraph (1) of Regulation 21.

It was contended on behalf of the respondent that the document on the face of it was within the words and meaning of the said regulation, and was calculated and likely to impede, delay, or restrict the supply of coal.

The justices accepted the respondent's contention. They convicted the appellant and fined him £46 on the first summons, and £1 on each of the four other summonses.

The Lord Chief Justice recapitulated the facts and observed, with reference to the agreement for the safety men to remain at work, that it was just as much open in the beginning to the safety men as to other persons employed in the mines to withdraw their labour. Such a withdrawal would undoubtedly have had very serious results to the mines themselves. To prevent that disastrous result and preserve the pits, this agreement was entered into, and the safety men remained solely for the purpose of preserving the pits. Sir Henry Maddocks had submitted that the history might be divided into three stages :—(1) At the outset the safety men were perfectly entitled to decline to work. (2) For the safety of the pits the safety men agreed to remain. (3) It was found that that concession was being employed not only for safety, but to allow other men to get coal. Sir Henry Maddocks had argued that the resolution had for its object the preservation of the beneficial arrangement for the safety of the mines, and was not a destructive scheme, but a complaint that a beneficial agreement was being broken, and that, if the breaches continued, the agreement would be brought to an end, and this the makers of the resolution would deplore.

At first sight the resolution might be thought calculated or likely to impede, delay, or restrict the production of fuel. That was an exceedingly short-sighted view. When looked at with the other facts of the case, this letter was a complaint that an agreement for preserving the pits was being broken. It must be viewed not as an isolated fragment of history, but as a step in a considerable series, which was not within Regulation 21.

More than that, this appellant was charged with distributing. He could not think that that word was applicable to such an act as was done by the appellant in this case. If the owners' secretary had attended the meeting, as he was invited to do, he could have communicated the result to his own organization himself. He did not attend, and the other organization communicated the resolution through their secretary.

So far did this differ from distribution that it belonged to the class of communications which in the law of defamation would have a qualified privilege, as being published to persons having a common interest.

But even if his view on those two points were wrong he thought that the matter fell within the proviso, which saved the acts of those who did what was naturally and ordinarily involved in taking part in a strike, or peacefully persuading others to do so, and he did not think the regulation was intended to fetter the liberty of the persons engaged in a strike to endeavour to increase it in a direction where it had hitherto been diminished.

For these reasons he thought that the appeal should be allowed.

Mr. Justice Salter thought that there was a publication, and that that publication was clearly calculated to restrict and, indeed, to stop altogether, the supply of fuel at the pits in question. But he agreed that the proviso applied. He thought that the resolution was a communication sent by one organization through its secretary to inform the other that unless the agreement was kept the safety men would lawfully terminate their engagements. He thought that that was "taking part in a strike," and on this ground the appeal succeeded.

Mr. Justice Talbot thought that "publish" and "distribute" must have their ordinary meaning of dissemination to an indefinite number of people. The regulation, in his view, did not apply to an official communication by one party to the dispute to the other. He thought that the appellant had neither published not distributed any document calculated to impede, restrict, or delay the supply of fuel, and without expressing any opinion on the other points, he agreed that the appeal succeeded.

[Solicitors—Messrs. Hamlins, Grammer and Co. for Mr. Bendle W. Moore, Derby ; Messrs. Andrew, Wood and Co., for Messrs. Fishers, Ashby-de-la-Zouch.]

K.B. Div.
(Lord Hewart, C.J., Salter and Talbot, JJ.)
1926. Dec. 16.

THOMAS AND OTHERS v. NEWINGTON LICENSING JUSTICES.*

Intoxicating Liquors — Licence — Renewal — Application — Adjournment till after licence due to expire—Whether a refusal of renewal — Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 16 (1).

The appellants, the licensee and the owners of licensed premises, applied to the respondent licensing justices on March 1, 1926, for a renewal of the licence, which was due to expire on April 4, 1926. The justices, on the ground that summonses were pending against the licensee for supplying intoxicating liquor during non-permitted hours, adjourned the application to April 12, 1926, and the appellants gave notice of appeal to quarter sessions. On March 4, 1926, the licensee was convicted, and on April 12, 1926, the licensing justices refused the renewal. At quarter sessions the appellants contended that the licensing justices had no power to adjourn the application for renewal to a date after the expiry of the licence, that the adjournment amounted to a refusal to renew the licence, and that on March 1, 1926, they had no evidence on which they could refuse the renewal. Quarter sessions held that the decision to adjourn the application to April 12, 1926, was not a refusal to renew the licence, and they dismissed the appeal but stated a case.

Held, that the decision of quarter sessions was right, as the application was made within the licensing year and the licence remained in force by virtue of s. 16 (1) of the Licensing (Consolidation) Act, 1910.

These were two appeals, by way of cases stated, from the County of London Quarter Sessions, and arose out of the same facts.

Mr. Richard William Thomas, as licensee, and Meux's Brewery, Limited, as owners, of the Peacock public-house, Holland-street, Blackfriars, appealed to the quarter sessions against what was stated by their notices of appeal to have been the refusal of the respondent licensing justices on March 1, 1926, to renew the licence of the premises. Quarter sessions dismissed the appeals subject to these cases.

The following facts were admitted: The licence of the premises was transferred to the appellant Thomas in February, 1924, as tenant of the premises, and was duly renewed to him in February, 1925. On February 11, 1926, certain summonses were issued from the Tower Bridge Police Court, returnable on February 25, 1926, charging that Thomas on certain dates in December, 1925, and January, 1926, at the said premises during other than permitted hours unlawfully did supply to divers persons intoxicating liquor to be consumed on the premises. On February 19, 1926, a notice was served on Thomas by the respondent justices requiring his attendance before them on March 1, 1926, on account of there being summonses pending against him. On February 25 an application was made on behalf of the said Thomas for the adjournment of the summonses, it being alleged that, owing to pressure of licensing business, it was found impossible to present properly the case of the said Thomas by that date, and with the consent of the Commissioner of Police the summonses were adjourned by the magistrate to March 4, 1926.

On March 1, 1926, at an adjournment of the general annual meeting of the respondent justices, an application was duly made for the renewal of the licence. Both the licensee, Thomas, and the appellant owners appeared by their separate legal representatives. As the police court summonses had not at that date come on for hearing, the respondent justices were, on grounds both of fact and law, strongly pressed to renew the licence, and were referred to the various provisions of the Licensing (Consolidation) Act, 1910, relating to the matter.

Undertakings were unreservedly offered on behalf both of Thomas and of the owners that, whatever might be the result of the summonses, Thomas, if called on by the justices, would attend at the then next transfer sessions on April 12, 1926, and that the whole facts would then be brought before them and a new tenant would be found for the premises if they desired it.

The justices retired to consider their decision. They refused to adjudicate finally upon the application for renewal, and, notwithstanding the objection raised that they had no power so to do, they adjourned or purported to adjourn the consideration of the renewal to the then next transfer sessions on April 12, 1926, a date subsequent to the expiration of the existing justices' licence.

At the hearing no evidence was given upon which the renewal of the licence could have been refused.

The renewal of the licence not having been granted before it expired, both Thomas and the owners gave notice of appeal to quarter sessions. On an application under section 89 of the Licensing (Consolidation) Act, 1910, the Commissioners of Customs and Excise granted permission to carry on the business during the pendency of the appeal.

On March 4, 1926, the police court summonses were heard. Thomas pleaded guilty and was convicted upon three summonses for offences which took place on January 16, 1926, and was fined ten guineas and ordered to pay ten guineas costs.

On April 12, 1926, the justices purported to refuse the renewal of the licence.

It was contended for the appellants before quarter sessions that, as the respondent justices had abstained from granting the renewal of the licence either on March 1, 1926, or subsequently during its currency, they had in law and in fact refused the renewal of the licence; that they were wrong in law in so refusing, as there was no evidence before them upon which they could in law refuse; that they had no power to adjourn the consideration of the renewal to April 12, on which date the licence would be no longer in existence and there would, consequently, be nothing in respect of which they could grant a renewal; and that a renewal of a licence must be either granted or refused within the licensing year, which expired on April 4. The appellants relied on sections 10, 16, 41, and 89 of the Licensing (Consolidation) Act, 1910, and cited *Webber v. Birkenhead Justices* (61 J.P., 664); *Reg. v. Denbigh Justices—Ex parte Fisher* (59 J.P., 708); and *Rex v. Tower Justices* (unreported, January 16, 1920).

It was contended for the respondents that they

* Reported by J. W. Hall, Esq., Barrister-at-Law.

had jurisdiction to act as they did, and that, in any case, an appeal to quarter sessions was not the proper remedy. It was submitted that on March 1, 1926, there had been no refusal but merely an adjournment. *Webber v. Birkenhead Justices* (*supra*) was relied on as showing that the appeal to quarter sessions was wrong. Reference was also made (in addition to the cases mentioned above) to *Reg. v. Anglesey Licensing Justices* (12 *The Times* L.R., 4).

The Court of Quarter Sessions was of opinion that the decision of the justices on March 1, 1926, to adjourn the application to April 12, 1926, did not amount to a refusal to renew the licence, and that, even if the justices were wrong in refusing to adjudicate on March 1, 1926, the proper remedy was by application to the High Court for a *mandamus*. The appeals to quarter sessions were accordingly dismissed.

Mr. Cecil Whiteley, K.C., and Mr. S. H. Lamb appeared for Thomas; and Mr. R. O. B. Lane for Meux's Brewery, Limited; and Mr. H. H. Joy, K.C., and Mr. Harold Murphy for the justices.

Mr. Whiteley said that it was hoped at last to get a decision on the question, which was always arising in licensing matters, whether justices had power to adjourn an application for renewal beyond April 4. He contended that the power, under section 16 (4) of the Licensing (Consolidation) Act, 1910, to adjourn an opposed renewal to a date "whether more or less than one month from the date of the original general annual licensing meeting" must be so limited that the adjourned hearing should take place while there was still a licence in existence. The usual course, if there were summonses pending, was to grant a formal renewal, without prejudice to dealing with the matter on its merits if a transfer was applied for.

He submitted that if the justices could insist on an adjournment beyond April 4, there was no limit to the date to which the matter might be postponed, and such an adjournment amounted to a refusal of the renewal, entitling the licensee to appeal to quarter sessions. *Mandamus*, in his submission, was not the proper remedy; for even if a rule could be obtained it was doubtful whether it could be heard in time to be effective.

He referred to *Webber v. Birkenhead Justices* (*supra*), *Reg. v. Denbigh Justices—Ex parte Fisher* (*supra*). With those two conflicting decisions before them, both the justices and the applicants had great difficulty in knowing the law, and both sides would welcome a decision. If the Court were of opinion that *mandamus* was the proper remedy, he submitted that the Court, having all the materials before them, could deal with that matter.

Mr. Lane, for the owners, adopted Mr. Whiteley's legal arguments, and said that the Bench were unequivocally asked by the owners on March 1 to renew the licence, but they refused to do so. The Court ought to adopt the more convenient of two possible constructions of section 16.

Mr. Joy submitted that the question of the power of the licensing justices to adjourn beyond April 5 did not emerge from this special case. The mention of the undertakings offered to the justices was inserted to make it appear that the justices had acted harshly or arbitrarily. But there was no suggestion of an undertaking to close the house, and the undertaking to apply for a transfer left the justices in the difficulty that, if they objected to the proposed transferee, they might be left with the person whose misconduct had made the transfer desirable.

Counsel referred to *Roberts v. Aizlewood* (5 *The Times* L.R., 181), and submitted that in any event the remedy was *mandamus*. A refusal, in order to give rise to an appeal to quarter sessions, must be a refusal on the merits; a refusal to hear the application—if such there was—was a refusal to exercise jurisdiction for which the party aggrieved must seek a *mandamus*.

Adjournment over April 5 did not involve the extinction of the licence, for a renewal could be granted under the express words of the statute if the licence was in force at the date of the application. He cited *Reg. v. Belton* (17 L.J.M.C., 70). The tendency of legislation was to do away with those rigid rules as to time. See *Rex v. Bristol Licensing Justices—Ex parte Whiting* (19 *The Times* L.R., 596), where the remedy sought was *mandamus*.

In answer to the Lord Chief Justice, Mr. Joy said that he thought that the existence of the licence beyond April 4 was, in a sense, preserved by section 16. With regard to the licensed premises, the licensee must either apply for a *mandamus* to fix an earlier date, or probably the matter could be dealt with by a protection order under section 88 of the Licensing (Consolidation) Act, 1910. It seemed to be a *casus omissus* that a case such as this was not within section 89, which empowered the Commissioners of Customs and Excise to grant a permit during the pendency of an appeal.

He admitted that it was not the normal practice to adjourn cases beyond April 4: it was a power which should only be exercised in case of emergency.

He was stopped.

The Lord Chief Justice, in giving judgment, said that in the course of an extremely interesting discussion various questions had been raised which it did not seem necessary to determine. It was sufficient to say that, in his opinion, the Court of Quarter Sessions rightly held that the decision of the justices to adjourn the application for renewal was not a refusal to renew. It clearly was not in terms a refusal; but it was said that because the date fixed was after April 5 it was, in effect, a refusal. That view did not seem to him correct, because by section 16 of the Licensing (Consolidation) Act, 1910, a renewal of a licence meant "the grant of a justices' licence at a general annual licensing meeting by way of renewal of a similar licence which is in force in respect of the premises at the date of the application." The application having been made within the licensing year, the licence remained in force.

Attention had been directed to various cases. It was not contended on behalf of the licensing justices that an adjournment beyond April 5 was part of the normal jurisdiction of justices. It was admitted that the power, though it existed, was a power only to be exercised in emergency—he would add in real and urgent emergency. Among the inconveniences resulting from the exercise of that power might be mentioned that it had the effect of involving the licensee, and possibly other persons, in expense. But upon the question raised in the case—whether the adjournment amounted to a refusal of the renewal—quarter sessions were right, and the appeal must be dismissed.

Mr. Justice Salter.—I entirely agree. I think there has been some confusion about the sense of "refusal to renew." A refusal to renew, to give rise to an appeal to quarter sessions, must be a refusal on the merits, and a decision in favour of the objector.

Mr. Justice Talbot.—I am of the same opinion. If the adjournment had been such that the application would have had to be for a new licence, I think the

justices would have been wrong, but in view of section 16 of the Act the application in this case would have been for a renewal.

I desire expressly to agree with what my Lord has said as to the exposure of an applicant to what must necessarily be an embarrassment and may involve inconvenience and expense.

[Solicitors—Messrs. Hunters ; Mr. G. T. Whiteley.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1926. Dec. 20.

REX v. LEICESTER JUSTICES—EX PARTE ALLBRIGHTON.*

Intoxicating Liquors—Licence—Old on-licence—Renewal—Objection by licensing justices—Ground of redundancy—Reference to compensation authority — Right of objecting justices to sit on compensation authority—Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 19.

Where licensing justices object to the renewal of an old on-licence on the ground of redundancy and refer the matter to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, they are not, by the mere fact of their objection, disqualified from sitting as members of the compensation authority and adjudicating on the question of renewal.

This was a rule *nisi* for a writ of *certiorari* directed to the justices of the City of Leicester, acting as the compensation authority, to quash certain orders refusing the renewal of the licence of the Hen and Chickens, Halford-street, Leicester. The rule was obtained upon the ground that the proceedings of the compensation authority were vitiated by reason of the fact that four of the justices sitting were disqualified by interest.

The case raised the question whether justices who had taken objection to the renewal of a licence could sit as members of the compensation authority.

It appeared from the affidavit of Mr. John Thomas Allbrighton, the applicant, that on February 10, 1926, he received notice that the application for renewal of his licence had been adjourned to March 10, 1926, as objection had been made thereto on the ground that it was unnecessary. At the hearing on March 10 before the licensing committee the following justices, among others, were present :—Messrs. F. S. Brice (in the chair), J. E. Faire, G. Sedgwick, and G. E. Hubbard. The application was referred to the compensation authority. The justices issued a report signed by their clerk recommending that the licence should not be renewed.

At the meeting of the compensation authority on May 19, 1926, the same four justices proceeded to sit as members of the compensation authority. Their presence was objected to by counsel for the applicant on the ground that they had committed themselves to a decision adverse to the applicant and were biased.

The objection was overruled, the decision being given not by the chairman of the compensation authority, but by Mr. F. S. Brice, who had sat as chairman of the licensing committee. The renewal was refused.

Mr. Montgomery, K.C., and Mr. Douglas Jenkins showed cause ; Sir Henry Maddocks, K.C., and Mr. C. E. Loseby supported the rule.

The Lord Chief Justice delivered the following considered judgment :—This is a rule *nisi* for a writ of *certiorari* to remove into this Court to be quashed an order made by the justices for the city of Leicester, acting as the compensation authority for that city, on May 19, 1926, whereby the renewal of the licence of the Hen and Chickens inn in the said city was refused subject to the payment of compensation under the Licensing (Consolidation) Act, 1910. The only ground relied upon in support of the rule was that the proceedings of the compensation authority were vitiated for the reason that four of the justices sitting were, it was said, disqualified by interest.

The facts are shortly as follows. At the general annual licensing meeting held on February 10, 1926, the four justices in question, as the licensing committee for the said city, orally objected to the renewal of four old on-licences, including that of the Hen and Chickens inn, on the grounds, in the case of each house :—

1. That having regard to the character and necessities of the neighbourhood and the number of licensed houses in the immediate vicinity the licence which is now held in respect of the said premises is unnecessary.

2. That in the interests of the public the renewal of the licence is not desirable.

These applications were accordingly adjourned, and the applicants were duly notified of the objection, and at the adjourned meeting on March 10, 1926, the said licensing committee, after hearing evidence on oath, and being of the opinion that the question of the renewal of the licences required consideration on the above-mentioned grounds, being grounds other than those on which the renewal of an old on-licence could be refused by them, decided to refer the matter to the compensation authority under section 19 of the Act, and duly made their report to that authority, suggesting that the renewals of the licences should be refused.

At the principal meeting of the compensation authority held on May 19, 1926, fourteen justices, including the four justices who had sat as the licensing committee, attended, and ten of them, including the said four justices, finally adjudicated upon the applications referred to them. After having heard evidence on oath, and counsel having addressed them on behalf of the applicant, the compensation authority refused the renewal of the licence of the Hen and Chickens subject to the payment of compensation.

In these circumstances, it is contended on behalf of the applicant that the mere fact of the four justices who sat on the licensing committee having originated the objection to the renewal of the licence disqualified them from sitting as members of the compensation authority, and that the principle that the same person cannot act as prosecutor and judge applies. It is not suggested that the justices objected to took any other part in opposing the renewal of the licence, except by sitting and voting as members of the licensing committee and of the compensation authority.

In my opinion, the case is concluded by the decision in *Rex v. Howard* (18 *The Times* L.R., 690 ; [1902] 2 K.B., 363), where it was treated as settled law that justices were entitled to take objection to the renewal of licences, and afterwards to take part in hearing

* Reported by J. W. Hall, Esq., Barrister-at-Law.

the applications and deciding on the question of renewal. Lord Justice Cozens-Hardy, at pages 382 and 383, said : "The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter v. Kent Justices* (13 *The Times* L.R., 538 ; [1897] A.C., 556) that there is no *lis* between an objector and a licence-holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points. . . . The justices . . . were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred."

The recent decision of the House of Lords in *Frome United Breweries Company v. Bath Justices* (42 *The Times* L.R., 571 ; [1926] A.C., 586) was based on the fact that three of the justices who sat and voted as members of the compensation authority had been parties to a resolution of the licensing justices authorizing a solicitor to appear before the compensation authority and oppose the renewal of a licence on their behalf, and that such solicitor had appeared and opposed the renewal, and there is in the decision nothing which is inconsistent with the view that a justice who originates an objection is not, for that reason alone, disqualified from afterwards sitting as a member of the licensing authority which deals with the application for renewal, and, if the question of renewal is referred for decision to the compensation authority, from sitting as a member of that authority. In doing so he is merely carrying out his duties in accordance with the scheme prescribed by the Legislature.

In my opinion, therefore, the rule should be discharged, with costs.

Mr. Justice Avory.—This is an application for a writ of *certiorari* to remove into this Court, with a view to its being quashed, an order of the justices in and for the city of Leicester acting as the compensation authority under and pursuant to section 19 of the Licensing (Consolidation) Act, 1910, whereby the licence of the Hen and Chickens inn in the said city was refused subject to the payment of compensation under the said Act.

The only ground relied upon in support of the rule on behalf of the applicant was that the proceedings of the said compensation authority were vitiated by reason of the fact that four of the justices sitting were disqualified by interest.

The licence in question was an old on-licence within the meaning of section 18 of the said Act, the renewal of which could not be refused by the licensing justices except upon one or more of the grounds specified in the second part of the second Schedule to the Act. The four justices who are suggested to have been disqualified from sitting on the compensation authority had sat as the licensing committee for the said city at the general annual licensing meeting on February 10, 1926, for the purpose of considering, *inter alia,* applications for renewal of licences, and, being of opinion that the question of the renewal of the licences of the Hen and Chickens and of three other licensed houses required consideration on grounds other than those on which the licences could be refused by them, adjourned these four applications to March 10, 1926, and gave notice, through the Chief Constable, in compliance with section 16 of the Act, of the objection to the renewal of these licences, and required the applicants to attend personally on the adjourned date —the grounds of objection being in each case :—

(1) That having regard to the character and necessities of the neighbourhood and the number of licensed houses in the immediate vicinity, the licence which is now held in respect of the said premises is unnecessary.

(2) That in the interests of the public the renewal of the licence is not desirable.

At the adjourned meeting on March 10, 1926, these four justices, sitting as the licensing committee, decided, after hearing evidence on oath, to refer the matter of the renewal of these licences to the compensation authority under section 19 of the Act, and made their report in which they set out the evidence that had been given in respect of each of the houses and the grounds of objection as hereinbefore stated, and suggested that these licences should be refused on these grounds, by which I understand them to mean that in their opinion a *prima facie* case had been made before them for the refusal.

On May 19, 1926, the four justices who were objected to sat with ten others at the principal meeting of the compensation authority, and, evidence on oath having been given, and counsel on behalf of the owners and a solicitor on behalf of the tenant having been heard, the licence of the Hen and Chickens was refused, subject to compensation.

It is not suggested that the licensing justices who had referred the matter to the compensation authority were represented by counsel or solicitor at the hearing, or that they did anything more than sit and vote upon the question of the renewal ; but the contention on behalf of the applicant is that the fact of the objection to the renewal having been initiated by the justices themselves of itself disqualified them from taking part in the decision of the compensation authority.

The right of the justices themselves to start an objection, particularly of the nature of the objections in this case, has been recognized ever since the decision in *Rex v. Howard* (18 *The Times* L.R., 690 ; [1902] 2 K.B., 363), and, as was said in that case : "In starting an objection justices do not take sides or assume the position of parties, but are merely taking the steps which the Legislature has prescribed for the better discharge of their licensing duties, which are administrative in character, but have to be performed in a quasi-judicial manner." If the applicant were right in his contention it would follow that the licensing committee would be disqualified from referring the matter to the compensation authority or from sitting as members of the compensation authority. It is suggested that this contention of the applicant is supported by the recent decision of the House of Lords in *Frome United Breweries Company v. Bath Justices* (42 *The Times* L.R., 571 ; [1926] A.C., 586), but the ground of the decision in that case was that the licensing justices had themselves actively opposed the renewal of the licence before the compensation authority and instructed a solicitor to do so on their behalf, and in the opinions delivered by the Lord Chancellor and Lord Sumner the right of the licensing justices, who have referred the matter, to sit as members of the compensation authority and to take part in the argument and if necessary to be represented, is expressly

recognized ; and, although the case of *Rex v. Howard* (*supra*) was cited in the argument, there is no trace of any dissent from that decision, which has been followed in practice ever since 1902.

If it is conceded that the licensing justices have the right to initiate the objection and to refer the matter to the compensation authority, and if it is further conceded that the same justices have the right to sit and vote on the matter at the meeting of the compensation authority, it appears to be a contradiction in terms to say that they are disqualified because they initiated the objection.

It is suggested in the applicant's affidavit that the clerk to the licensing justices gave some promise that if alterations were made in the premises the licensing justices would not oppose the renewal at the meeting of the compensation authority. In view of the affidavit of the clerk to the justices I do not think any such promise was made, but if it had been made with the authority of the justices it would negative any idea of bias on their part against the applicant.

I think there is no ground for the contention that in the circumstances of this case these justices were disqualified by reason of interest ; and the rule should be discharged with costs.

MR. JUSTICE SALTER.—I agree. As this appeal raises a point of much practical importance, I will give my reasons.

So far as bias and likelihood of bias are concerned, I can see little difference between those who give notice of intention to oppose the renewal of a particular licence and those who give notice that they object to the renewal of that licence. There may be some difference in degree, but I can see none in kind. Neither an objector nor an opponent is a "party" to any "litigation," but each is a person who has publicly expressed an opinion that the particular licence should not be renewed and a desire that it shall not be renewed. If he is then called upon to decide, on evidence, whether that licence shall be renewed or not, it seems to me that he must approach his task with a mind definitely predisposed to non-renewal.

In the case of the *Bath Justices* (41 *The Times* L.R., 346 ; [1925] 1 K.B., 685, and 42 *The Times* L.R., 571 ; [1926] A.C., 586) the licensing justices had a right as citizens (a right recognized but not conferred by the statute) to appear before the compensation authority and be heard as supporters or opponents of the renewal of the licence under consideration. They also had a statutory right to sit as members of the compensation authority. But, inasmuch as there was likelihood of bias, the House of Lords held that both these rights should not be exercised in the same matter. In the present case also the licensing justices as a body have a right, like any other body of citizens, to object to the renewal of the licence now in question, and they have a statutory right to sit on the compensation authority. Since there is in this case, as I think, a clear likelihood of bias, it follows that they are not qualified to sit on the compensation authority, if the principle of the *Bath Justices* case (*supra*) is applicable to this case. I think it is not applicable. In my opinion this case cannot be distinguished from the *Bath Justices* case (*supra*) on the ground that the likelihood of bias is stronger in one case than the other. The distinction is that, in that case, Parliament had not sanctioned what was done ; in this case it has. This case is governed by the reasoning in *Rex v. Howard* (18 *The Times* L.R., 690 ; [1902] 2 K.B., 363). That case was relied on and cited at length by Lord Justice Bankes in the Court of Appeal in the *Bath Justices* case (*supra*), and there is nothing in the judgments in the House of Lords to suggest that it was not rightly decided. It is true that there is a difference—I think a great difference—between the objection in that case and the objection in this. The course taken by the justices in that case was carefully calculated to avoid any suggestion of discrimination or of a view unfavourable to any particular licence. That is very different from selecting a particular licence for objection. That case was partly decided, and, I think, might have been wholly decided, on the ground that there was no evidence whatever of any likelihood of bias. The justices had been careful to avoid it. But it was also decided on the ground applicable here—namely, that some risk of bias is inseparable from the machinery which Parliament has set up.

The Master of the Rolls, in *Rex v. Howard* (*supra*), after dealing with the practice of the licensing justices to initiate objections to renewals, says, at page 377 :—"I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson v. General Council of Medical Education and Registration* (43 Ch.D., 366) and *Allinson v. General Council of Medical Education and Registration* (10 *The Times* L.R., 304 ; [1894] 1 Q.B., 750) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities ; and secondly that, rightly understood, the two capacities are not incompatible in the sense in which in those two cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them."

The second ground is not so fully applicable to this case as it was to the facts of that case, but the first ground is, I think, decisive of the present case. The right of licensing justices "to be at one and the same time objectors and judges, in the sense in which they are judges in such matters," is recognized by Parliament. It was there held that the licensing justices who have initiated objections to the renewal of licences are qualified to determine finally, on evidence, whether those licences shall be renewed or not. If they were so qualified before the Licensing (Consolidation) Act, 1910, they cannot have lost the qualification because the renewal of old on-licences is now determined in two stages by a preliminary tribunal and a final tribunal, of both of which they are members.

I think this rule should be discharged, not because there was no likelihood of bias, but because this decision was reached in a manner contemplated and sanctioned by Parliament, and cannot, therefore, be set aside.

[Solicitors—Messrs. Field, Roscoe, and Co., for Mr. W. J. Day, Leicester ; Mr. B. Wilkinson, for Messrs. Parsons, Son, and Skillington, Leicester.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P., and Hill, J.) } 1927. Jan. 13.

BROADBENT v. BROADBENT.*

Husband and Wife—Maintenance—Jurisdiction of justices—Order—Discharge—Adultery of wife—Proof—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51), s. 2.

Observations upon the administration of the jurisdiction conferred on justices by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, to discharge a maintenance order on proof of the wife's adultery.

This was an appeal from an order of the justices of the City and County of Kingston-upon-Hull, made on November 22, 1926.

The appellant, Hilda May Broadbent, appealed from an order of the justices discharging a maintenance order made in her favour on August 15, 1919. The ground of the discharge was that since the date of that order she had committed an act of adultery. The grounds of appeal were, (1) that particulars of the date and place when and where the act of adultery was alleged to have been committed were not furnished to the appellant in time to enable her to meet the charge; and (2) that the appellant had a complete answer to the charge, in that she could have produced evidence to show that on September 5, 1926, the date on which the act of adultery was alleged to have been committed in a lane near Skelton, in Cleveland, she was on duty as a telephone operator at the post office in Skelton.

One of the witnesses called by the respondent, Harold Broadbent, before the justices in support of the charge of adultery, admitted that he knew the name of the man with whom the respondent was alleged to have committed adultery, but refused to disclose it.

By section 7 of the Summary Jurisdiction (Married Women) Act, 1895, ". . . If any married woman upon whose application an order shall have been made under this Act . . . shall . . . commit an act of adultery, such order shall upon proof thereof be discharged." The section was amended by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, but the amendment did not affect the subject-matter of this report.

The Hon. Victor Russell appeared for the appellant; and Mr. R. F. Burnand for the respondent.

The PRESIDENT said:—This case raises questions and presents points which illustrate the difficulty in which justices are placed in dealing with the jurisdiction which is given them under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, under which, for the purpose of discharging a maintenance order, they may proceed to try a charge of adultery. Hardly a sitting of this Court occurs in which there is not grave reason shown for doubting whether the present procedure is satisfactory.

The statutory effect of adultery under the Summary Jurisdiction (Separation and Maintenance) Acts is to enable justices, if they are satisfied that adultery has taken place, to discharge an order for payment of money. The parties are then left in a most anomalous position. The wife in the present case is found guilty of adultery. My own view of the matter is that that does not preclude her from taking proceedings in a Court of Record—in this Court—to try the question whether she has been guilty of adultery. Likewise, it does not preclude the husband from taking proceedings in a Court of Record in which he can assert and newly establish his charge of adultery.

The situation is that, for a limited purpose, a woman may be found guilty of adultery by justices. In this Court and in every Court which has exercised in this country a jurisdiction such as this Court exercises, the utmost care has been taken to secure that so grave a matter as a conviction of adultery shall not take place without full compliance with all the ordinary requirements of the administration of justice. The first of them is that the accused party shall have notice of the charge. The charge here was a charge against a woman, separated from her husband for 12 years, that since the separation order she had been guilty of adultery.

The evidence is that the only notice which the incriminated party, the wife, had of what the charge really was, was a notice communicated to her by a letter addressed to her solicitors dated November 20, 1926, a Saturday, received on November 22, the Monday, and communicated to her when she was actually in the Court of Summary Jurisdiction for the Division of Hull—80 miles away from her home and from the place where, as I understand, it is alleged that adultery had been committed. The communication stated a date, and that the alleged adultery was at Skelton, which is at least a township—it seems to be a fairly extensive place—and was adultery with a man unknown.

When one considers a case of that kind with the experience which those who sit in this Court or practise in this Court necessarily have, it seems impossible that there should have been a satisfactory trial of that charge, if the facts are as they are said to have been. If it had been clear that the wife's solicitors, upon going into Court, had applied for an adjournment, or if at any period of the case the wife's solicitors had applied for an adjournment, it seems to me a refusal to adjourn would have been a failure in the administration of justice, and would have necessitated the discharge of an order made without adjournment.

As the case has proceeded, those who are in charge of the husband's interests have realized that something ought to be done to secure that the elementary requirements of justice should be observed. The time, place, and the person concerned are now ascertained, and, with the means of investigation and of the production of evidence to deal with the matter fully, it cannot be said that upon a re-hearing before the justices it is not practicable to do justice.

It is a grave difficulty when a case of this kind has been once heard and a decision has been arrived at, even by one of the ordinary tribunals of the land, that the same Court should come to a contrary decision; but the justices have reposed in them by the statute the duty, in proper cases, of re-hearing and considering anew upon all the facts before them the charge upon which they have to decide. It would be desirable, I think, upon the re-hearing of this case, that there should be a reconstituted Court. Professional persons who understand the administration of justice from experience will see the value of that. If there is a re-hearing upon the charge as it has now been formulated, and if it takes place before a newly constituted Court, in the division in which this juris-

* Reported by CLIFFORD MORTIMER, Esq., Barrister-at-Law.

diction lies, I trust that justice may be done between these parties.

I think that the proper course will be to set aside the order with a view to the re-hearing of the husband's summons before a petty sessional court of the division in which the summons was issued.

MR. JUSTICE HILL.—I agree with every word that my Lord has said, and I only want to emphasize that, in my judgment, this case will not be properly re-heard until the preliminary particulars of the time, the place of adultery, and the alleged adulterer have been given to the wife, because his name is now known to one of the witnesses.

[Solicitors—Messrs. Smith and Hudson, for Mr. G. S. Williamson, Hull ; Messrs. Collyer-Bristow and Co., for Messrs. Laverack, Wray, and Co., Hull.]

Court of Appeal. (Bankes, Scrutton, and Lawrence, L.JJ.) 1926. Dec. 17.

REPUBLICA DE GUATEMALA v. NUNEZ.*

Practice—Interpleader—Trial of action or issue—Appeal—Common Law Procedure Act, 1860 (23 and 24 Vict., c. 106), s. 17—Appellate Jurisdiction Act, 1876 (39 and 40 Vict., c. 59), s. 20—Rules of the Supreme Court, Order LVII., Rules 11, 13.

Although no appeal lies in an interpleader matter where a decision has been given by a Judge in a summary manner, yet where, instead of deciding the matter summarily, the Judge directs the trial of an action or issue, an appeal lies from the judgment given on the trial, whether such trial has been held with or without a jury.

Conflict of Laws—Debt—Assignment—Validity—Deposit in English bank—Assignment made abroad—Invalidity by foreign law—Validity by English law—Which law applicable.

In 1906 the defendant's father, when President of the Republic of Guatemala, deposited a sum of money with London bankers. The President was afterwards deposed and imprisoned, and by letters written in prison in the year 1921 he admitted that the money belonged to the Republic, and he ordered the bankers to place the amount at the exclusive disposal of the Government of Guatemala. The defendant gave notice to the bankers that his father had assigned the money to him by a letter written in 1919 during the defendant's infancy, and, when a demand was also made upon them on behalf of the Republic of Guatemala, they declined to hand over the money. The Republic then brought an action against the bankers, and they brought the money into Court, and an interpleader issue was directed between the Republic as plaintiffs and the ex-President's son as defendant. The plaintiffs alleged that the money had been misappropriated from the Republic by the defendant's father, and that the assignment to the defendant in 1919 was invalid by the law of Guatemala owing to non-compliance with the formalities requisite in the case of an infant donee. The defendant pleaded that the assignment to him in 1919 was valid by the law of England, and that the letters of 1921 had been written by his father under duress.

Held, that the plaintiffs had failed to prove that the money had been misappropriated from the Republic, and that, although the assignment of 1919 to the defendant was valid by the law of England, yet, as the law applicable was that of Guatemala, the claims of both parties failed.

Decision of Greer, J. (42 *The Times* L.R., 625), affirmed.

This was an appeal by the defendant from a decision of Mr. Justice Greer (42 *The Times* L.R., 625). There was also a cross-appeal.

The claim, which was in the nature of an interpleader, was by the Republic of Guatemala to recover a sum of £22,096 9s. 10d. which was deposited in or about 1906 by Don Manuel Estrada Cabrera, then President of the Republic of Guatemala, in his own name with Messrs. Lazard Brothers and Co., Limited, bankers, in London. By letters dated July 12 and October 11, 1921, addressed to Messrs. Lazard Brothers and Co., Limited, Don Manuel Estrada Cabrera, who had been deposed in 1920, ordered Messrs. Lazard Brothers and Co., Limited, to place the total amount standing to the credit of his account with them at the exclusive disposal of the Government of Guatemala. When, however, a demand was made for the moneys by the Guatemalan Consul in London, Messrs. Lazard Brothers and Co., Limited, declined to hand over the fund, as a claim had been made to it by Don Manuel Estrada Cajas Nunez, the son of Cabrera, who relied on a letter from his father dated July 24, 1919, and alleged that the letters of July 12 and October 11, 1921, were obtained by duress while his father was in prison, where he ultimately died.

The plaintiff Republic issued a writ against Messrs. Lazard Brothers and Co., Limited, who brought the money into Court, and Don Manuel Estrada Cajas Nunez was substituted as defendant.

Mr. Justice Greer dismissed the claims of both parties in the action.

The defendant appealed, and there was a cross-appeal by the plaintiff.

Mr. Comyns Carr, K.C., and Mr. Percy Handcock appeared for the plaintiff Republic ; Mr. Birkett, K.C., and Mr. Harold Murphy for the defendant ; and Mr. J. Douglas Young held a watching brief for an interested party.

A preliminary objection taken on behalf of the plaintiffs that no appeal would lie from the decision of a Judge in an interpleader matter was overruled.

The Court gave judgment at the close of the arguments, dismissing the cross-appeal.

LORD JUSTICE BANKES said that, without going into the evidence at length, certain broad points emerged. The issue raised was whether the Republic of Guatemala had established enough to justify the Court in finding in their favour that the money lodged in Court was the property of the Republic in an issue between the Republic and the ex-President. There were a great many difficulties in the case due to the fact that there was a want of evidence upon a number

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqs., Barristers-at-Law.

of points which in themselves were suspicious. His Lordship then referred to the evidence in detail as to the deposit of the money with Messrs. Lazard and Co., and to the facts and correspondence dealing with the assignment of the moneys by the ex-President to his son. Taking the evidence as a whole, he agreed with Mr. Justice Greer that the case made by the plaintiffs did not cross the boundary that divided strong suspicion from convincing proof, and he was of opinion that the cross-appeal failed.

Lord Justice Scrutton and Lord Justice Lawrence agreed.

The Court reserved judgment on the main appeal.

Lord Justice Bankes delivered the following considered judgment :—In this case both parties appeal from a decision of Mr. Justice Greer. As originally commenced, the action was brought on behalf of the Republic of Guatemala against Lazard Brothers and Co., Limited, a company carrying on business as bankers in the city of London, to recover a sum of £22,000 odd, which was alleged to be the property of the Republic and to have been wrongfully misappropriated by a former President of the Republic, and deposited by him with Lazard Brothers and Co. in London. As Lazard Brothers and Co. had, before the action was commenced, received notice of an assignment of the money by the President to a son of his, Manuel Estrada Cajas Nunez, they took out an interpleader summons, and eventually an order was made under which the Republic became plaintiffs in the action and Nunez was substituted for Lazard Brothers and Co. as defendant, and each party was ordered to deliver points of claim. As a part of the order, Lazard Brothers and Co. were ordered to pay the money into Court, and this was done, and they ceased to have any interest in the matter.

From the points of claim as delivered, it appeared that the parties were agreed that the President referred to, Don Manuel Estrada Cabrera, had, in or about 1906, deposited a sum of money with Lazard Brothers and Co. which, with interest, amounted to the sum claimed in this action.

The claim of the Republic to the money rested upon the allegation that it was the Republic's money and that it had been misappropriated by the then President, and reliance was placed on two documents dated respectively July 12 and October 11, 1921, in which the President, in the most formal manner, acknowledged that fact and directed Lazard Brothers and Co. to pay the money to the Republic.

The answer of the defendant to this case was that the money was the President's money, and that the documents relied on were signed by the President after he had been deposed and when he was in prison and while under duress, and that in such circumstances no Court would give any effect to them. The defendant's claim rested upon a document bearing the date July 24, 1919, which was addressed to Lazard Brothers and Co. by President Cabrera, and which was relied on as being a good assignment by the President to the defendant, of which notice had been given by the defendant to Messrs. Lazard Brothers and Co.

The answer of the Republic to this was that the so-called assignment was a nullity according to the law of the Republic of Guatemala, and further, that the document was a forgery in the sense that it had come into existence at some date much later than the date which it bore ; and that it had been antedated with an intention to deceive and to defeat the effect of one or both of the two documents relied upon by the Republic.

These were the issues, on the one side and on the other, which the learned Judge had to try. He decided against both claimants, and both claimants appealed. On the appeal of the defendant Nunez being called on, a preliminary objection was taken, that no appeal lay from the decision of a Judge in an interpleader matter. The objection was founded upon the provisions of section 17 of the Common Law Procedure Act, 1860, and section 20 of the Appellate Jurisdiction Act, 1876, and the decision of this Court in *Van Laun and Co. v. Baring Brothers and Co., Limited* ([1903] 2 K.B., 277). After hearing counsel in support of the objection, we overruled it, and gave our reasons shortly. As the matter is of some importance, I think it better to put my judgment into writing. In this judgment the other members of the Court concur.

There is no doubt that upon the law as it at present stands there is no appeal in an interpleader matter where there has been a decision of the Court or a Judge in a summary manner, and that the provisions of Order LVII., Rule 11, do not confer upon a Judge any power to give leave to appeal in such a case. See *Van Laun and Co. v. Baring Brothers and Co., Limited* (*supra*) ; *Waterhouse v. Gilbert* (1 *The Times* L.R., 540 ; 15 Q.B.D., 569) ; *In re Tarn* (9 *The Times* L.R., 366 ; [1893] 2 Ch., 280). Section 17 of the Common Law Procedure Act, 1860, deals, however, not only with cases disposed of in a summary manner, but also with judgments "in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings." The law with regard to this class of cases is undoubtedly not in a satisfactory state.

Section 17 is taken literally from the Interpleader Act of 1831 when, so far as actions were concerned, the trial would always be before a Judge and jury, and the practice treated the trial merely as the decision of an issue upon which final judgment could only be pronounced on reference back to the Judge at Chambers. Under such a system as this, in spite of the provision in section 17 negativing any right of appeal, the right of challenging the verdict of the jury on any of the accepted grounds was recognized, the trial of the issue being treated as an intermediate stage between the order for the trial and final judgment.

The practice up to the passing of the Supreme Court of Judicature Act, 1873, is fully discussed by Mr. Justice Pickford (as he then was) in *Cox v. Bowen* ([1911] 2 K.B., 611), and he also refers to the changes made by that Act and by the rules made thereunder. He points out that under the present practice a trial by a Judge alone is just as possible as trial by a Judge and jury, and that, with the object of doing away with the necessity of going back to the Judge at Chambers, Order LVII., Rule 13, was introduced. That enables the Court or a Judge finally to dispose of the whole matter of the interpleader proceedings.

What effect these changes have had upon the right to challenge the decision of a Judge in an interpleader matter who tries an action or issue without a jury has never been satisfactorily determined. Two cases were decided in the Court of Appeal in 1884, *Robinson v. Tucker* (14 Q.B.D., 371) and *Dawson v. Fox* (14 Q.B.D., 377). In both of them the issue had been tried by a Judge and jury, and in both, therefore, the question of the right of appeal where the issue had been tried by a Judge alone did not arise. In both cases, however, the Lords Justices composing the Court treated the question as if no distinction existed between a trial by a Judge with a jury and a Judge alone, and held that, in spite of there no longer being any necessity to go back to the Judge,

who had directed the issue, for a final judgment, an appeal lay. The first Court consisted of Sir Baliol Brett, Master of the Rolls, and Lords Justices Bowen and Fry, and the second of Sir Baliol Brett, Master of the Rolls, and Lords Justices Cotton and Lindley.

An opportunity occurred in the following year when, in *Waterhouse v. Gilbert* (*supra*) the full Court, consisting of Sir Baliol Brett, Master of the Rolls, and Lords Justices Baggallay, Cotton, Lindley, Bowen, and Fry, sat to deal with the question of the right of appeal from a summary decision in an interpleader proceeding, to put the matter right, if the *dicta* in *Robinson v. Tucker* (*supra*) and *Dawson v. Fox* (*supra*) did not meet with their approval. Nothing, however, was said upon the point, and I think, therefore, that this Court should act upon the views expressed in these two cases and hold that an appeal lies. The objection, therefore, fails, and the appeal must proceed. I think it highly desirable that the difficulty occasioned by the retention of section 17 in its present form should be got rid of as speedily as possible.

In the course of the hearing of the defendant's case counsel for the Republic endeavoured to introduce the question of possible claims to the money by creditors under the bankruptcy of President Cabrera on the ground that in an interpleader matter it was permissible to rely upon a *jus tertii* to defeat the defendant's claim. Upon objection being taken by the defendant's counsel the learned Judge ruled that in view of the state of the pleadings the Republic ought not to be allowed to go into this question in this action. He was quite right, in my opinion, in so ruling, and the matter was not proceeded with, and the necessary evidence to support any such claim was not given. No notice of appeal against this ruling was given, and I merely mention the point because at one time Mr. Comyns Carr seemed inclined to rely on it before this Court, though I gathered that the claim to the right to do so was not persisted in.

The question which formed the main portion of the arguments addressed to us was whether it was the law of the Republic of Guatemala or the law of this country which was to be applied in order to decide the questions in issue between the parties. Upon the question whether the moneys referred to were always the property of the Republic and never the property of President Cabrera, it was apparently accepted by both parties that the law to be applied was the law of Guatemala, and in the absence of evidence to the contrary it was assumed that the law of that Republic was the same as the law of this country.

Mr. Justice Greer, in a very careful judgment, deals fully with the matters which were brought before him in the Court below in support of the claim of the Republic. He decided against the claim, and we have dismissed the appeal from that judgment, and have given our reasons for so deciding. Upon the appeal of the defendant Nunez the question what law is to prevail is all important, because according to the law of Guatemala the document upon which the defendant relies as an assignment is null and void, whereas according to English law it is valid. Upon this point the appellant's counsel relied upon the statement of the law in Dicey's Conflict of Laws, Rule 153, that "An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt) is valid. . . ." A number of authorities were quoted to us in support of the proposition that a chose in action has a location or a quasi-location which determines the law applicable to the contract, and it was contended that the *dictum* of Mr. Justice Day in *Lee v. Abdy* (17 Q.B.D., 309, at p. 312) that a chose in action has no locality is not well founded. So far as the rule laid down in Mr. Dicey's book is concerned, Mr. Justice Greer points out in his judgment, as Mr. Justice Cozens-Hardy had done already in *In re Maudslay, Sons, and Field* (16 *The Times* L.R., 228 ; [1900] 1 Ch., 602) that the authorities quoted in support of the rule do not bear out the statement, although Mr. Justice Cozens-Hardy said that he agreed with it. I am quite prepared to assent to the argument of the appellant's counsel that the weight of authority is that a chose in action has a locality or quasi-locality which may determine the law applicable to the contract (see *Commissioner of Stamps v. Hope* (7 *The Times* L.R., 710 ; [1891] A.C., 476 ; *In re Maudslay, Sons, and Field* (*supra*) ; *Embiricos v. Anglo-Austrian Bank* (21 *The Times* L.R., 268 ; [1905] 1 K.B., 677, at p. 685) ; *Clare and Co. v. Dresdner Bank* (31 *The Times* L.R., 278 ; [1915] 2 K.B., 576, at p. 578) ; and *New York Life Insurance Company v. Public Trustee* (40 *The Times* L.R., 430 ; [1924] 2 Ch., 101)). It is unnecessary, in my opinion, to discuss the question whether the rule laid down in Mr. Dicey's book can ever apply. It finds support in some circumstances and cases, of which *Lebel v. Tucker* (L.R., 3 Q.B., 77) may be an example, and in cases where the dispute arises upon the original contract itself. Where the appellant's argument fails, in my opinion, is in not appreciating the distinction which, I think, exists between cases where the dispute arises on the original contract and where, as here, the dispute is not in reference to the original contract at all but is one of priorities. Chief Justice Marshall draws pointed attention to the distinction between the two cases in a passage in his judgment in *Harrison v. Sterry* (5 Cranch, 289, at p. 298), where he says :—

"The law of the place where a contract is made is, generally speaking, the law of the contract ; *i.e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic."

One branch of this dispute illustrates this distinction very clearly. It seems to be accepted that the claim of the Republic to the money must be governed by the law of Guatemala. There is plenty of authority that this is so. In *Hooper v. Gumm* (L.R., 2 Ch., 282) the rival claimants were American mortgagees of a vessel when she was in America and subsequent purchasers, for value without notice, of the vessel when she was in England. Lord Chelmsford, the Lord Chancellor, at p. 286, says :—

"As the Edward Everitt was built expressly for sale in this country, and the plaintiff Hooper advanced his money upon her, knowing the object, and for the express purpose of furthering it, he may fairly be considered to be in the same situation as a vendor. His legal title to the ship would, of course, be determined by American law ; but the contract of sale and the effect of the interruption of the title of a *bona fide* purchaser for valuable consideration must be governed by the law of England, where the contract was made."

And Lord Justice Turner, at p. 289, says :—

"Some question was raised in the course of the argument before us as to the law by which this case ought to be decided ; and though this point was not much gone into on either side on this occasion, it was more fully discussed when the case was argued before the late Lord Justice" [Lord Justice Knight Bruce] "and myself ; and it may be right for me therefore to say that, in my opinion, the law of this

country ought to govern the decision of the case, for the purchase of the ship, on which the rights of the question depend, was made and completed in this country. In saying this, however, I must not be understood to mean that the shipping law of America is not to be regarded in deciding the case ; on the contrary, I think that great regard must be paid to it. In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase in question was made, and in order to ascertain this, resort must be had to the American shipping law. The rights of the parties stood upon that law at the time when this purchase was made, and I apprehend that where rights are acquired under the laws of foreign states, the law of this country recognizes and gives effect to those rights, unless it is contrary to the law and policy of this country to do so."

In concluding his judgment the Lord Chancellor says :—

"In the competition between the parties, the plaintiff had disabled himself from standing merely on his legal title, and the claim of the defendant as a purchaser for valuable consideration without notice must prevail."

In *Liverpool Marine Credit Company v. Hunter* (L.R., 3 Ch., 479) Lord Chelmsford, L.C., at p. 483, says this :—

"The transfer of personal property must be regulated by the law of the owner's domicile, and if valid by that law ought to be so regarded by the Courts of every other country where it is brought into question."

There are other authorities to a like effect. In *North Western Bank v. Poynter, Son, and Macdonalds* ([1895] A.C., 56, at p. 75), Lord Watson says :—

"When a movable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is *prima facie* one of English law, and ought to be so treated by the Courts of Scotland. In this case the respective rights of Page and Co. and the appellant bank depend on transactions which took place between them in England. I see no reason to doubt that had there been any conflict between the laws of Scotland and England upon the questions arising in this case, it would have been proper for your Lordships to consider and apply the law of England."

I also refer to the judgment of Mr. Justice North in *In re Queensland Mercantile and Agency Company, Limited* (7 *The Times* L.R., 10, 194 ; [1891] 1 Ch., 536). In that case there were rival claimants to a sum of money which, if the contract between the Queensland Company and the debenture holders was the only matter to be considered, belonged clearly, according to the law of Queensland, to the debenture holders, yet it was held as between the rival claimants to belong to a company which, according to the law of Scotland, had acquired a prior title to it.

In the present case two rival claimants are, by our interpleader procedure, brought face to face. The original debtor has dropped out. There is no dispute on the original contract. It is a question as between two persons who, for present purposes, must be considered as resident and domiciled in Guatemala at the time when their respective titles are alleged to have accrued. So far as the claim of the Republic is concerned, it does not appear to be disputed that that must be ascertained according to the law of Guatemala. What difference in principle is there for the present purpose between that claim and the claim of the defendant ? If, instead of claiming as assignee of his father, he was claiming as beneficiary under his father's will, the case would be unarguable. I do not think that the alleged distinction between the two cases is established. Both on principle and on authority I consider that the judgment of Mr. Justice Greer on the point is correct. The defendant's appeal must be dismissed, with costs. There must be a set off of costs. The money in Court must remain in Court to abide the order of the King's Bench Division.

Lord Justice Scrutton.—This appeal raises a question of some difficulty. Freed from the picturesque facts which do not assist the Court to determine the dry question of law, the problem which emerges is this. One Cabrera, domiciled in Guatemala, and being in Guatemala at the time, deposited in an English bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England, but which having been demanded in England could be recovered by suit against the debtor in whatever jurisdiction he could be found. (See *Clare and Co. v. Dresdner Bank* (31 *The Times* L.R., 278 ; [1915] 2 K.B., 576) and *Leader, Plunkett and Leader v. Direction der Disconto-Gesellschaft* (31 *The Times* L.R., 83), cited therein.)

Some years afterwards one Nunez, also a Guatemalan subject, claimed the deposit from the English bank. On being asked on what title he claimed, he produced a document passing between himself and Cabrera in Guatemala, both parties being then domiciled in Guatemala, purporting to be an assignment or a donation from Cabrera to Nunez of the right to recover the debt from the English debtor. It was proved that if the effect of this document was to be determined by the law of Guatemala the document was invalid. It was practically certain that if the effect of the document was to be determined by English law, apart from the question whether English law would determine the question by the law of Guatemala, the document was a valid assignment.

Mr. Justice Greer held that English Courts should decide the question according to the law of Guatemala, and therefore held that Nunez had no claim to the money. Nunez appeals.

The nature of the invalidity by the law of Guatemala is stated by Mr. Justice Greer at page 12 of his judgment, summarizing the evidence of Echevarria, the only witness called on Guatemalan law. It is this, that a donation or assignment without consideration can by the law of Guatemala only be made by a public document, that is, by a written contract or document made before a Notary on stamped paper, both parties being present and both signing the document. If not so made the donation is a nullity. Further, where the donee is an infant he cannot accept the donation, which must be made to and accepted by a next friend appointed by the Judge on the infant's behalf.

In the present case there was no public document, stamp or notary, but only a plain writing signed by the donor and not by the donee. At the time of the donation Nunez was an infant both by Guatemalan and English law, and there was no next friend.

It will be seen therefore that if Guatemalan law, being both the law of the domicil of both parties and the *lex loci actus,* is to be applied, the document was a nullity. If English law, as the law of the *situs* of the debt assigned, or the *lex loci solutionis* of the contract to pay, is to be followed, the document was effective.

It is to be observed, however, that in any case it is English law which the English Courts enforce ; the question is whether English law directs them to ascertain the validity of the assignment by the law

of Guatemala, or by the law of England applicable to such documents.

On the question of the law applicable to an assignment of personal property invalid by the law of the country where the transaction takes place, or by the *lex domicilii* of the parties to the transaction but valid by the law of the country where the property is, or is deemed to be situate, the English authorities are scanty and unsatisfactory. Mr. Justice Channell in *Dulaney v. Merry and Son* (17 *The Times* L.R., 253 ; [1901] 1 K.B., 536) said that he had not found " any clear case of a transfer, good according to the law of the domicil of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate." Mr. Dicey (5th ed., p. 569) has not found any clear case in reference to individual assignments by gift or sale as to the validity of an assignment good by the *lex domicilii* of the owner but bad in the country where the goods are situate. Conversely, I have not been able to find nor could counsel refer me to any clear statement of the principles governing the question whether a transaction in personal property, as distinct from land, invalid by the law of the country where the transaction takes place, may be valid by the law of the place where the property is situate. Mr. Foote points out at page 293 of his Private International Law that in most of the judgments where general statements are made the transaction took place in the country where the property was, and a conflict between the *lex loci actus* and the *lex loci rei sitae* was not dealt with.

There seem to me, however, in this case to be two clear matters which help to a conclusion.

First, in cases of personal property the capacity of the parties to a transaction has always been determined either by the *lex domicilii* or the law of the place of the transaction ; and where, as here, the two laws are the same it is not necessary to decide between them. In *Lee v. Abdy* (17 Q.B.D., 309) an assignment was made in Cape Colony by husband and wife of a policy issued by an English company, and it was assumed for the purposes of the case that such an assignment was invalid by the law of the Colony, husband and wife not being capable of entering into such a transaction. A Divisional Court, composed of Mr. Justice Day and Mr. Justice Wills, held that on that assumption the assignment, though valid by the law of England, could not be enforced against the company in England. Neither Judge draws a distinction between the *lex domicilii* and the *lex loci actus*. The Court of Appeal in *Sottomayor v. de Barros* (3 P.D., 1), a case of marriage, laid down in general terms : " It is a well-recognized principle of law that the question of personal capacity to enter into *any* contract is to be decided by the law of domicile " ; and Lord Halsbury says in *Cooper v. Cooper* (13 App. Cas., 88, at p. 99) that incapacity to contract by reason of minority is regulated by the law of domicil. Lord Macnaghten (p. 108) in the same case is more doubtful, treating the question as not finally settled, but with a preponderance of opinion in favour of the *lex domicilii*. " But," he says, " when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper " (the infant) " could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled." Lord Watson (p. 105) declines to decide the point as the two laws are the same. The opinion of the Court of Appeal in *Sottomayor v. de Barros* (*supra*) in favour of the *lex domicilii* was criticized by the same Court in *Ogden v. Ogden* (24 *The Times* L.R., 94 ; [1908] P., 46) and by Sir James Hannen in the later *Sottomayor* case (5 P.D., 94). But most of the authorities seem to agree that capacity to contract depends either on the *lex domicilii* or the *lex loci actus*, and here they are the same. (See also Lord Eldon in *Male v. Roberts* (3 Esp., 163) as to infancy.)

It seems to me, therefore, that Nunez being a minor, incapable by the law of his domicil or the law of the place where the transaction takes place, of receiving a valid donation, so that a gift to him, without the intervention of a next friend judicially appointed to receive it, would be void and a nullity in Guatemala, cannot claim that he has received a good title to the deposit by such an invalid donation.

This view would support the judgment of Mr. Justice Greer, but is not the express ground on which he puts his decision, which is, I think, that a contract void in the place where it is made by reason of the omission of formalities required by the law of that place, is void elsewhere, the case of void contracts being distinguished from that of contracts merely inadmissible in evidence by reason of the absence of formalities, such as the requirements of stamp laws, not invalidating the contract itself.

This seems to me a second point on which the authorities are fairly clear ; namely, that where a transaction is invalid or a nullity by the law of the place where the transaction takes place owing to the omission of formalities or stamp, it will not be recognized in England. In *Bristow v. Sequeville* (5 Ex., at p. 279) Baron Rolfe agrees " that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here," distinguishing that from a case where the contract is not void, but only not admissible in evidence. To a similar effect are the judgments of Lord Ellenborough in *Clegg v. Levy* (3 Camp., 166) and of Lord Kenyon in *Alves v. Hodgson* (7 T.R., 241), which is explained by Chief Baron Pollock and Baron Rolfe in *Bristow v. Sequeville* (*supra*) as being a decision that if the transaction be not a valid contract at the place where it is made it is no contract at all. It seems to me that the principle laid down in *Colonial Bank v. Cady* (6 *The Times* L.R., 329 ; 15 App. Cas., at p. 283) that the effect of a transaction must be determined by the law of the place where it was effected has the same result. The negotiable instrument cases of *Alcock v. Smith* (8 *The Times* L.R., 222 ; [1892] 1 Ch., 238) and *Embiricos v. Anglo-Austrian Bank, Limited* (21 *The Times* L.R., 268 ; [1905] 1 K.B., 677) appear to proceed on the same principle. In each case a bill of exchange accepted and payable in England and therefore representing an English debt was dealt with in another country ; in *Alcock's* case (*supra*) by execution in Norway ; in *Embiricos'* case (*supra*) by purchase for valuable consideration in Vienna after theft and forgery of endorsement. In each case the foreign transaction would not have legal effect in England, but in each case it was held that being valid by the *lex loci actus* the English law would give effect to it. I cannot think the suggested difference between the piece of paper and the chose in action represented by it is satisfactory. I refer to the judgment of Mr. Justice Romer in the former case at page 255, and to that of Lord Justice Kay at page 267.

In the present case the private unstamped donation made in Guatemala from one Guatemalan subject to another was a nullity by the law of Guatemala. I think it was therefore a nullity by the law of England.

Reliance was, however, placed on the opinion of Mr. Dicey as stated in Rule 153 of his work on the Conflict of Laws, to which great weight

is, of course, added by the opinion of Mr. Justice Cozens-Hardy in *In re Maudslay, Sons and Field* (16 *The Times* L.R., 228 ; [1900] 1 Ch., at p. 610) that it is right. That rule says : "An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid. . . ."

It is to be observed, however, firstly, that in that case the question was whether the English Courts would give effect to seizure in France of a French debt as against English debenture holders administering an English company's affairs ; that is to say, the *lex loci actus*, and, if debts have a situs, the *lex loci rei sitae* were the same, and the learned Judge's opinion was therefore not necessary for the decision. Secondly, while Mr. Justice Cozens-Hardy thinks the opinion of Mr. Dicey right, he also thinks that the authorities cited by the author for that opinion do not support it, and Mr. Justice Greer, after consideration, has come to the same conclusion. It is therefore necessary to consider how far decided cases support the rule. As quoted by Mr. Dicey they are :

(1) *Innes v. Dunlop* (8 T.R., 595). This was a Scotch assignment of a Scotch bond on which the assignee sued in his own name in England, and not in the name of the obligee. The defendant demurred and, it was held, thereby admitted the assumpsit and the consideration, the action not being on the bond, but in assumpsit. The defendant therefore failed. This appears merely to decide a pleading point.

(2) *O'Callaghan v. Thomond* (3 Taunt., 82), where an assignee of an Irish judgment sued in his own name in England by virtue of Irish proceedings under an Irish statute. Here the law of the place of the debt and of the transaction were the same, and no principle favouring either was stated. The assignee was allowed to sue.

(3) *In re Queensland Mercantile and Agency Company, Limited* (7 *The Times* L.R. 194 ; [1891] 1 Ch., 536; 8 *The Times* L.R., 177; [1892] 1 Ch., 219). Here a Queensland company had Scotch shareholders who owed unpaid calls. An English company held debentures of the Queensland company charging the unpaid calls. A creditor of the Queensland company sued it in Scotland and arrested the unpaid calls. The law of Scotland gave such arrestment the effect of an assignment, taking priority over the claim of debenture holders without intimation. The English Court gave effect to the Scotch law. Here it will be seen that the law of the *situs* of the debt, the unpaid calls, and the law of the place of the transaction the effect of which was being considered, the arrestment, were the same, and it was therefore unnecessary to decide which would prevail in case of difference. Mr. Justice North treated the law of the place where the debt was situate as overriding the law of the domicil of the creditor. He did not deal with the *lex loci actus*, which was also the *lex loci rei sitae*. The Court of Appeal did not deal with the case on these lines at all, but on the lines that the Scotch Court was administering the *jus gentium* and the English Court would not interfere. This appears to have no relevance to the point under discussion here.

(4) *Alcock v. Smith* (*supra*). This case I have already referred to, and in it a transaction valid by the *lex loci actus* was given an effect which it would not have in the country where the debt was situate.

We were also referred to *Kelly v. Selwyn* ([1905] 2 Ch., 117), where, in the administration in England of the English estate of an English testator, priority was given to an English assignment, later in date but prior in notice, over an earlier New York assignment for which the law of New York did not require notice. Priorities have been said to be questions for the *lex fori*, *The Colorado* (39 *The Times* L.R. 216; [1923] P., 102), and I think this is the ground of decision.

It seems to me, therefore, that the authorities cited by Mr. Dicey do not support the proposition that a transaction as to an English debt, void by the law of the country where it takes place, and by the law of the domicil of the parties to it, will be treated as valid in the country where the debt is deemed to be situated. In my opinion, both the capacity of the parties to enter into such a transaction and the validity and effect of such a transaction in form and results must be determined by one or other of these laws ; and in this case they are the same. For these reasons I think the judgment of Mr. Justice Greer dismissing the claim of Nunez should be affirmed on the grounds (1) that Nunez as an infant was not by the law of Guatemala capable of himself receiving a valid donation, and (2) that the transaction, apart from infancy, was void as not carried out in the way required by the law of Guatemala.

I should add, though I do not decide the case on this ground, that I am not satisfied that the same result would not be obtained by treating the document containing the donation as a fraudulent document, and declining to enforce it. It is dated July 24, 1919, and Nunez swore that it was executed on that day. Mr. Justice Greer has not accepted his evidence. I think he was right, for I can see no reason why Cabrera, who was a competent lawyer, should, when President in July, 1919, execute a document in a way which he must have known to be invalid by the law of his country ; and I think his letter to the bank in February, 1920, when he was still President, is inconsistent with his having assigned the debt six months before. I also agree with the Judge's view that the date when the document was put forward in New York shows that it must have come into existence before the earliest assignment to the Republic, which the Judge has very properly held to be invalid as made under duress. I imagine that the donation to Nunez was made while Cabrera was in captivity, informally, because he could not get at a notary, but with the genuine intention of assigning to Nunez. But the fact remains that it was wrongly dated, and I think that early date must have been intended to deceive some person or Court, and to represent the document to be what in fact it was not, a document executed on July 24, 1919. I doubt whether any Court should enforce such a document, but I do not decide against the claim of Nunez on that ground.

The result is that both claims on the fund in Court fail ; the Court has notice that the trustee in bankruptcy of Cabrera claims the fund, and the fund must remain in Court till that or any other claim made to the Court is disposed of.

Lord Justice Lawrence.—I concur in the judgment delivered by Lord Justice Bankes on the question of the right to appeal. I have already given my judgment concurring with the other members of the Court that the plaintiffs' appeal fails and ought to be dismissed.

The effect of the dismissal of the plaintiffs' appeal, in my opinion, is that the money on deposit at Lazard's Bank in London must, at the date of the purported gift to the defendant, be taken to have been the property of his father, and that the only question to be determined on the defendant's appeal is whether such gift was valid. Mr. Justice Greer, after seeing the defendant in the witness-box, has found as a fact that the letter of July 24, 1919, is a genuine docu-

ment, and in my judgment there is no valid ground for disturbing that finding. In these circumstances I am of opinion that the learned Judge was right in deciding that, if the defendant's claim is to be determined according to the law of England (using that expression in its local or territorial sense), the letter of which express notice in writing was given to the bank on August 4, 1921, operated as an absolute assignment of the bank's debt, effectual in law to pass the legal right to such debt, from the date of such notice, to the defendant by virtue of section 25 (6) of the Supreme Court of Judicature Act, 1873 (now replaced by section 136 of the Law of Property Act, 1925), notwithstanding that the assignment was not made for valuable consideration.

The case of *In re Westerton* ([1919] 2 Ch., 104), to which the learned Judge referred in support of his decision, is directly in point, and was, in my opinion, rightly decided.

The defendant contended that his claim ought to be determined according to the law of England and not according to the law of Guatemala, basing his contention on Rule 153 of Dicey, and the main questions which were debated before this Court were, firstly, whether that rule correctly states the law, and, secondly, whether, on the facts, the defendant's case falls within it.

In considering this rule in connexion with the defendant's claim it is, I think, important to bear in mind that the rule does not purport to deal with contracts to assign, testamentary dispositions, or so-called universal or general assignments, to each of which cases different rules are applicable.

Although I have not been able to discover any direct decision affirming the correctness of the rule, I am of opinion that the weight of judicial opinion in England is in favour of the view that it expresses the true principle when applied to a particular assignment *inter vivos*, such as the one in question here.

There are many cases—some of which have been cited at the Bar—which show that a debt may have, and frequently has been recognised by the Court as having, a local situation or quasi-situation ; as an example I need only refer to the recent case of *New York Life Insurance v. Public Trustee* (40 *The Times* L.R., 430 ; [1924] 2 Ch., 101).

Whenever a local situation can properly be attributed to a debt it seems to me logically to follow that the same principle should be applied to its assignment as is applicable to the transfer of goods, and I concur in the opinion expressed by Mr. Justice Cozens-Hardy in *In re Maudslay, Sons and Field* (16 *The Times* L.R., 228 ; [1900] 1 Ch., 602), that rule 153 is correct and is a necessary consequence from the admission that a debt has a locality or quasi-locality.

The principle that a transfer of goods made according to the *lex situs* is valid is, in my opinion, well established (see rule 152 of Dicey and the cases referred to in the comments on such rule).

Mr. Justice North, in *In re Queensland Mercantile and Agency Company, Limited* (7 *The Times* L.R. 194 ; [1891] 1 Ch., 536), after stating that there is a well known rule of law " that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled," applied that rule to an assignment (by legal process or arrestment) of debts. This case was affirmed on appeal (8 *The Times* L.R., 177 ; [1892] 1 Ch., 219) on a different ground, but no doubt seems to have been cast in the Court of Appeal either upon the correctness of the rule as stated by Mr. Justice North or upon its applicability to an assignment of a debt.

Mr. Justice Channell, in *Dulaney v. Merry and Son* (17 *The Times* L.R., 253 ; [1901] 1 K.B., at p. 541), states : " It seems clear that a transfer of movables here good by our law would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicil of the owner, but there has not been quoted to me, nor have I found, any clear case of a transfer, good according to the law of the domicil of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate." That was a case of a general assignment to a representative of the assignor's creditors, and the learned Judge held that it was valid notwithstanding that it was not registered in accordance with the requirements of the law of England. I only cite that case (the decision in which does not, in my opinion, bear on the question here) for the purpose of showing that in arriving at his decision the learned Judge did not intend to cast any doubt on the applicability of the *lex situs* to the case of a particular assignment of movables.

The case of *Alcock v. Smith* (8 *The Times* L.R., 222 ; [1892] 1 Ch., 238) seems to me also to support the correctness of rule 153.

Mr. Justice Greer, however, held that rule 153 is too widely stated, and that it does not apply to a case like the present, where the assignment of the debt was made in the place where both parties to it were resident and domiciled. In so deciding the learned Judge relied upon the decision in *Lee v. Abdy* (17 Q.B.D., 309), and especially on the concluding words of the judgment of Mr. Justice Day on p. 313. In that case an assignment of an English policy of assurance in the Cape of Good Hope to the wife of the assignor was held invalid as being contrary to the law of the place where both the parties to it were domiciled. Mr. Justice Day apparently decided the case on the grounds that a chose in action has no locality, and that the assignment existed (if at all) only by virtue of a contract between the assignor and assignee and held that as there was no valid contract to assign there was no valid assignment. In my opinion the learned Judge was wrong both in stating as a general proposition of law that a chose in action has no locality and also in holding that the validity of the assignment (which, for all that appears in the report, may have been a voluntary assignment) depended upon the existence of a prior valid contract to assign, and then deciding the case as if it were one of contract. Mr. Justice Wills, on the other hand, based his judgment on the proper law of the original contract between the assignor and the assurance company, holding that in the special circumstances the parties to that contract must be presumed to have intended that if the contract were assigned it would be assigned according to the law of the Cape. In my opinion the reasons given by the learned Judges for their decision afford no assistance in determining the questions which have arisen in the present case, as it is clear that the Court declined to treat the debt of the assurance company as having a local situation in England, and apparently did not base their decision on the fact that the assignment was from a husband to his wife—a transaction which by the law of their matrimonial domicil they were disabled from carrying out.

In the present case the debt is connected in so many ways with England that there is no difficulty in arriving at the conclusion that it has its situation

or quasi-situation in England. The contract with the bank was made in England—the nature and extent of the bank's obligations under the contract fall to be determined by English law—the debt is payable in England where the bank is resident and domiciled, and England is the place where the debt is properly recoverable.

In the case of a debt so situated I am unable to appreciate why, on principle, an assignment valid according to the *lex situs* should be rendered ineffectual merely because it was made in Guatemala, where the parties to it were domiciled, and because it did not comply with the requirements of the law of Guatemala. If intention has anything to do with it, I should have thought that the presumed intention of the parties to the assignment was that the assignment should be operative, and that, as it was to operate on a debt in England, it should be governed by the law of England and not by the law of Guatemala, according to which it was a nullity and passed nothing. The assignor must have contemplated that his written order to the bank to transfer the debt to the defendant would be obeyed.

If the case had been one of contract and the defendant was seeking to enforce here a contract to assign the debt made in Guatemala it may well be that he might have to establish that the contract was valid according to the law of Guatemala, but in my opinion that raises a different question from the one which has to be determined here.

Then it was contended that even if the assignment operated to transfer the legal right to the debt, yet the beneficial rights ought to be ascertained in accordance with the law of Guatemala, and as according to that law the beneficial interest in the debt did not pass out of the ownership of the assignor his representatives are not entitled to it.

In support of this contention the case of *Colonial Bank v. Cady* (6 *The Times* L.R., 329 ; 15 App. Cas., 267) was cited. In my opinion that case has no application to the facts of the present case: There the owners of the shares had never intended to part with them, and the sole question was whether they were estopped from saying that their broker had not their authority to dispose of the certificates. It was held, affirming the decision of the Court of Appeal. that in the circumstances they were not so estopped and that the bank had not acquired a title to the shares. It appears that on that point the principles of the American law did not differ in any material respect from those by which an English Court would be guided in similar circumstances. Lord Herschell. at page 283, says : "I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here."

In the present case there was a clear intention on the part of the assignor to transfer the debt to the defendant, and in those circumstances I am of opinion that so far from the *Colonial Bank* case (*supra*) being an authority in favour of the respondents it supports the defendant's case that the assignment, if it operated at all, operated to pass to the defendant both the legal right to and the beneficial interest in the debt (see also Westlake, 7th Ed., 153).

There remains to be considered the vital question whether the fact that the defendant was an infant at the date of the assignment renders it ineffectual.

The solution of this question, in my opinion, depends, first, upon whether the impediments placed by the law of Guatemala in the way of an infant's acceptance of a voluntary assignment are only matters of form, or whether they are matters of substance and demonstrate the infant's incapacity to accept such an assignment ; and secondly, upon whether the defendant's capacity to accept the assignment ought to be determined according to the law of England or according to the law of Guatemala.

In Cowell's Interpreter "capacity" is defined as "an ability or fitness to receive. In law it signifies when a man or body politick is able to give or take lands or other things, or to sue actions."

According to the law of Guatemala as found by the learned Judge, a voluntary assignment to an infant is a nullity unless his father or mother or some representative appointed by the Judge attends before the notary at the time of the assignment to notify to the assignor his or her acceptance of the assignment on behalf of the infant.

In my opinion this requirement of the law of Guatemala cannot properly be termed a mere formality. It seems to me to be a matter of substance. The assignment has no operation unless a third person over whom the infant has no control accepts it on his behalf. Unlike the case of an adult, the infant cannot himself go before a notary and accept ; he is powerless to compel anybody to accept on his behalf ; he has no voice in the question whether the assignment should be accepted or not ; it may be accepted or refused on his behalf without consulting him and even against his wishes.

In these circumstances I have come to the conclusion that according to the law of Guatemala the defendant was in the present case disabled from accepting the assignment of the debt, and therefore if his capacity to take is to be determined according to the law of Guatemala the assignment ought to be held to be invalid, whereas if the capacity to take is to be determined by the law of England the assignment ought to be held valid.

This brings me to the final point whether the capacity of the defendant is to be determined by the law of England or by the law of Guatemala.

Westlake in his Private International Law (see 7th Ed., para. 52) seems to favour the view that the weight of authority is in favour of the proposition that when the capacity of a person to act in any given way is questioned on the ground of his age the solution of the question will be referred in England to his personal law. Foote in his International Law (see 5th Ed., p. 100), on the other hand, seems to be of opinion that the better opinion is that in such a case the law of the place where the act is done is the proper law to decide all questions of capacity.

As in the present case the *lex domicilii* and the *lex loci actus* are the same, no useful purpose would be served in discussing which of these two views is the right one.

Dicey in his Conflict of Laws (see p. 560), on the other hand, seems to consider that rule 151, which states that a person's capacity to assign (and therefore, I assume, a person's capacity to take) a movable is governed by the law of his domicil, is in case of conflict subject to rule 153, and submits that where in fact a good title to a movable is acquired under the *lex situs* it will be treated as valid in England even though the person (*e.g.*, a minor) conferring a title under the *lex situs* was incapable of giving a good title under his *lex*

domicilii (see p. 561). If this principle be sound it would, in my opinion, apply to the converse case of a minor accepting an assignment under the *lex situs* although incapable of accepting under his *lex domicilii*, and would operate so as to confer a valid title to the debt on the defendant.

I have, however, been unable to find any authority, with the possible exception of the cases of *Worms v. De Valdor* (49 L.J., Ch., 261) and *In re Selot's Trusts* ([1902] 1 Ch., 488), which bears out Dicey's opinion upon this point. The two cases to which I have alluded, even if correctly decided, do not, in my opinion, touch the present case, where the incapacity was due to the minority of the defendant; at the most they tend to show that the Courts here will not recognize an incapacity unknown to the law of England.

In the absence of any binding authority I decline to accept as sound the proposition that the English Courts will treat as valid an assignment of a movable where the assignee is, owing to his minority, incapable of taking, both under his *lex domicilii* and under the *lex loci actus*.

In the result I have come to the conclusion that the gift to the defendant, who, by his personal law and by the law of the place where it was made, was disabled from accepting it, cannot properly be treated as valid in England, notwithstanding that the subject matter of the gift was situate here.

In my opinion, therefore, the appeal fails on the sole ground of the defendant's incapacity to accept the assignment.

[Solicitors—Messrs. Stephenson, Harwood, and Tatham; Mr. J. R. Cort Bathurst; Messrs. Freshfields, Leese, and Munns.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Viscount Finlay, Lord Wrenbury, Lord Darling, and Lord Warrington of Clyffe.)
1927. Jan. 18.

BRITISH AMERICA NICKEL CORPORATION, LIMITED, AND OTHERS v. M. J. O'BRIEN, LIMITED.*

Companies—Debentures—Rights of debenture-holders—How far majority can bind minority.

The power of a majority of a special class, such as debenture-holders, to bind a minority must be exercised for the purpose of benefiting the class as a whole and not individual members only.

This was an appeal from a judgment of the Supreme Court of Ontario (First Appellate Division) affirming a decision in favour of the respondents by the Trial Judge (Mr. Justice Kelly).

Mr. Maugham, K.C., and Mr. Glyn Osler, K.C. (of the Canadian Bar), appeared for the appellants; Mr. W. N. Tilley, K.C., and Mr. G. W. Hewitt (both of the Canadian Bar) for the respondents.

Viscount Haldane, in delivering their Lordships' judgment, said:—This is an appeal against a judgment of the Court of Appeal of Ontario, affirming the judgment of Mr. Justice Kelly, by which it was found in favour of the minority of a class of secured debenture-holders of the appellant corporation that the minority were not bound by resolutions passed by the majority of the class of such debenture-holders. The latter had purported to exercise a power conferred on such a majority by the terms of a trust deed. The resolutions in question sought to modify the rights of the debenture-holders as an entire class.

Before their Lordships proceed to consider the somewhat involved circumstances in which the question arises, it will be convenient that they should refer to the principle to be applied in weighing the outcome of these circumstances.

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by section 13 of the Companies (Consolidation) Act, 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, this restriction of such powers, when conferred on a majority of a special class, in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities. It is that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connexion with a class, but only under a general title which confers the vote as a right of property attaching to a share. The distinction does not arise in this case, and it is not necessary to express an opinion as to its ground. What does arise is the question whether there is such a restriction on the right to vote of a creditor or member of an analogous class on whom is conferred a power to vote for the alteration of the title of a minority of the class to which he himself belongs.

It was decided by the Judicial Committee in 1887, in *North-West Transportation Company, Limited v. Beatty* (3 *The Times* L.R., 789; 12 App. Cas., 589) that where a contract, fair in its terms and within the powers of a company, had been entered into by the directors with one of their own number, as a vendor to them, and was therefore voidable, it could not be assailed. The reason was that it had been ratified by the shareholders at a general meeting. At this meeting the ratification was actually obtained by the aid of the votes of the vendor director himself and his nominees, which produced a majority of shareholders' votes at that general meeting. The vendor in exercising his votes had thus a direct personal interest. It was held that the affirmance of the voidable contract, being matter only of internal policy, was binding on the company, and further that every shareholder, including the vendor, had a right to vote on such a question, notwithstanding that he might have a personal interest in the subject matter in conflict with the interest of the company itself. As its constitution enabled the vendor individually to acquire shares freely he was entitled to the votes which these carried and to qualify a majority at the meeting. Having regard to the constitution of the company this could not be said to be oppressive so as to invalidate the voting. There the question arose, not as regarded a class of creditors, but of shareholders.

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

In *Burland v. Earle* (18 *The Times* L.R., 41 ; [1902] A.C., 83) the question before the Judicial Committee was whether it was *ultra vires* for a company to carry its profits to reserve instead of dividing them, and to invest them in a manner which, although not *ultra vires,* was objectionable. It was also a question with shareholders only. A minority of shareholders sued the others, the company itself not being a plaintiff, to compel the company and its directors to distribute accumulated profits, and also to compel the appellant Burland to hand over certain funds invested in his sole name. It was held that the question, being in no way one of *ultra vires* action, was one of internal management only, and that any action that could be taken required that the company itself should be plaintiff. It would have been otherwise had the acts complained of been of an *ultra vires* or actually fraudulent character, as had been explained by Lords Justices James and Mellish in *Menier v. Hooper's Telegraph Works* (L.R., 9 Ch., 350), where the majority of the shareholders had improperly appropriated to themselves property which belonged to all the shareholders equally. It was laid down in *Burland v. Earle* (*supra*) that a shareholder is not debarred from using his voting power as a shareholder to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote, following in this the decision in *North-West Transportation Company, Limited v. Beatty* (*supra*).

It has been suggested that the decision in these two cases on the last point is difficult to reconcile with the restriction already referred to, where the power is conferred, not on shareholders generally, but on a special class, say, of debenture-holders, where a majority, in exercising a power to modify the rights of a minority, must exercise that power in the interests of the class as a whole. This is a principle which goes beyond that applied in *Menier v. Hooper's Telegraph Works* (*supra*) inasmuch as it does not depend on misappropriation or fraud being proved. But their Lordships do not think that there is any real difficulty in combining the principle that, while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

The distinction, which may prove a fine one, is well illustrated in the carefully worded judgment of Mr. Justice Parker in *Goodfellow v. Nelson Line* (*Liverpool*), *Limited* (28 *The Times* L.R., 461 ; [1912] 2 Ch., 324). It was there held that while the power conferred by a trust deed on a majority of debenture-holders to bind a minority must be exercised *bona fide,* and while the Court has power to prevent some sorts at least of unfairness or oppression, a debenture-holder may, subject to this, vote in accordance with his individual interests, though these may be peculiar to himself and not shared by the other members of the class. It was true that a secret bargain to secure his vote by special treatment might be treated as bribery, but where the scheme to be voted upon itself provides, as it did in that case, openly for special treatment of a debenture-holder with a special interest, he may vote, inasmuch as the other members of the class had themselves known from the first of the scheme. Their Lordships think that Mr. Justice Parker accurately applied in his judgment the law on this point.

Their Lordships now turn to the facts in the appeal before them. The appellant Nickel Corporation was constituted under the law of the Dominion of Canada. The corporation was the owner of valuable mining properties in the province of Ontario and of plant there and elsewhere. In 1913 the appellant corporation had bought from M. J. O'Brien, now represented by the respondent company, and from one John R. Booth, mining properties, and had given them, as part of the purchase price, bonds secured on these properties amounting to approximately $3,000,000. On a reorganization, to be presently referred to, these bonds were exchanged for bonds secured under a trust deed. The Nickel Corporation had an authorized capital of $20,000,000, divided into 200,000 ordinary shares of $100 each. Before the reorganization the Corporation had issued debenture stock to the amount of $10,000,000, secured by floating charges. The appellant Trust Company was the trustee of a deed which constituted the floating security, and is also trustee of the securities in question in this appeal.

By contract of March 10, 1916, the British Government had agreed to purchase the Nickel Corporation's output of nickel up to a large amount for a period of ten years. On March 15, 1916, the Nickel Corporation, being desirous of reorganizing its finances and of putting them on a more satisfactory footing, executed a mortgage deed of trust in favour of the second appellant as trustee, to enable it to issue bonds. These bonds were issued at 6 per cent. interest, in two series, A and B, of $3,000,000 each, specially secured on assets of the Nickel Corporation, and ranking *pari passu,* with a difference only in the period for redemption. The bonds were held substantially as follows:—

	$
J. R. Booth, A Bonds .. .. .. (Mr. Booth had held bonds in the older form, which were now paid off.)	2,184,000
J. F. Booth, A Bonds	147,000
Frances D. Anderson, A Bonds ..	38,000
C. A. Masten, A Bonds..	6,000
M. J. O'Brien, Ltd., A Bonds	625,000
	$3,000,000
The British Government, B Bonds ..	3,000,000
	$6,000,000

The British Government had, as already stated, bought the output of nickel by the appellant corporation, and it appears to have been desirous to strengthen the position of the corporation by aiding it to raise a loan.

The trust deed of March 15, 1916, provided power to a majority of the bondholders, consisting of not less than three-fourths in value, to sanction a reconstruction of the corporation, to enter into a scheme for selling its assets, to sanction any modification of the rights of the bondholders against the corporation or its property, either under the trust deed or otherwise, to accept other securities of the corporation in lieu of the bonds, or to consent to an issue of securities constituting a prior charge, together with other powers.

The effect of the war was to disorganize the markets of the appellant corporation, so that it was mainly by the aid of purchases of its stock by a Norwegian nickel group, and by the cooperation of the British

Government, that the appellant corporation carried on its business between 1916 and 1919. The Norwegian group purchased both debenture stock and ordinary stock in large amounts. As the corporation was indebted to its bankers in the end of 1920, at a meeting of the First Mortgage Bondholders authority was given for the creation of a prior lien bond for $500,000 having priority over the First Mortgage Bonds, and this was issued to the bank.

In February, 1921, the Nickel Corporation made default in payment of the half-year's interest due to the respondents on the First Mortgage Bonds. A scheme for reconstruction was prepared on behalf of the corporation and was laid before a meeting of the First Mortgage Bondholders on March 31, 1921. The object of this scheme was to compel the holders of the First Mortgage Bonds to exchange them for an amount of new "A" Income Bonds equal to the principal of the former bonds. The corporation was also to be at liberty to issue $6,000,000 of First Income Bonds at 10 per cent. interest and at 20 per cent. premium, to be a first charge on the property of the corporation. Provision was made for the issue of the "A" Income Bonds, already referred to, to rank subsequently to the First Income Bonds. The bank and the Norwegian creditors were, by means of these issues, to have their claims reduced. The corporation was also to be enabled to issue "B" Income Bonds to the amount of $12,500,000, ranking *pari passu* as to principal with the "A" Income Bonds. There was also given power by extraordinary resolution to sanction the exchange of the "A" Income Bonds into other securities, and the British Government was to be relieved of its obligation to purchase nickel.

It was further provided by the scheme that a committee of four persons (one appointed by the First Mortgage Bondholders other than the British Government; one by the Debenture Stockholders; one by the bank, the Canadian Bank of Commerce, and a certain Dr. Eyde, representing the Norwegian interests; and one by the British Government) should have power to modify the scheme without confirmation by extraordinary resolution of the bondholders.

Mr. John R. Booth's vote was necessary in order to gain the required majority of bondholders, and it was secured by a promise to give him $2,000,000 of the Ordinary stock of the Nickel Corporation. This stock was at the time of little value, but it was evident that if the price of nickel rose it might become of value. The promise to Mr. Booth was made some months before the new scheme was submitted to the bondholders.

The respondents protested against the adoption of the scheme, but it was carried by the prescribed majority at the meeting of March 31, 1921. The respondents then applied for an interim injunction, but the Court allowed the resolutions to be carried into effect, on the terms that if at the trial of the action it should be found that they ought not to have been carried into effect, the appellant Trust Company should pay to the respondents the amount of these bonds with interest.

At the trial in the Supreme Court of Ontario Mr. Justice Kelly held that what was really done was that the majority at the meeting did not act in the *bona fide* exercise of the rights which the majority might exercise, but in consideration of what would benefit the Nickel Corporation and the personal interests of those whose votes were to be secured. The vote had been influenced by special negotiations in advance of the meeting. He also thought that it was outside the powers of the majority to confer on a committee, not necessarily representing the interests of the First Mortgage Bondholders, powers which belonged to these bondholders alone, and to authorize the substitution for their security of something which was not a satisfactory security. He therefore gave judgment for the respondents, the plaintiffs.

There was an appeal to the Court of Appeal, where Mr. Justice Ferguson delivered the judgment. He agreed with Mr. Justice Kelly in holding that the votes neither of Mr. Booth nor of the British Government would have been given for the scheme had they been influenced only by what was most in the interest of the bondholders. Both of these may, he thought, have acted honestly if mistakenly. But what really moved them was not a legitimate consideration of the improvement of their security, but that they felt that a refusal to approve the scheme would result in serious loss to other persons who had lent to or invested in the corporation. They wished to give these persons a chance, even if a risk to the bondholders had to be taken in doing it. This the Court of Appeal held to have been improper. On that ground they affirmed the judgment of Mr. Justice Kelly, and they affirmed it also on the ground that there was no power in the majority of the bondholders to delegate their power of binding the minority.

Their Lordships are of opinion that judgment was rightly given for the respondents in this appeal. In the first place, it is plain, even from his own letters, that before Mr. J. R. Booth would agree to the scheme of 1921 his vote had to be secured by the promise of $2,000,000 Ordinary stock of the Nickel Corporation. No doubt he was entitled in giving his vote to consider his own interests. But as that vote had come to him as a member of a class he was bound to exercise it with the interests of the class itself kept in view as dominant. It may be that, as Mr. Justice Ferguson, of the Court of Appeal, thought, he and those with whom he was negotiating considered the scheme the best way out of the difficulties with which the corporation was beset. But they had something else to consider in the first place. Their duty was to look to the difficulties of the bondholders as a class, and not to give any one of these bondholders a special personal advantage, not forming part of the scheme to be voted for, in order to induce him to assent. On this ground by itself their Lordships are of opinion that the resolutions cannot stand. They think, in the second place, that the appointment of a committee of four persons, with power to modify in a very extensive fashion the security of the mortgage bondholders, was *ultra vires*. As has been pointed out, the appointment of the majority of this committee was not entrusted to the mortgage bondholders themselves. They might have acted together by a proper majority, but neither in form nor in substance was any power given to that majority to delegate. It was only under the provisions of the deed of mortgage and trust of March 15, 1916, that the scheme of May 31, 1921, could be made, and the former contained no provision authorizing it. Other points referred to in the judgments were raised in criticism of the scheme, but it is not necessary for their Lordships to enter on them.

For the reasons given they will humbly advise His Majesty that this appeal should be dismissed with costs.

[Solicitors—Messrs. Blake and Redden; Messrs. Lawrence Jones and Company.]

Judicial Committee of the Privy Council.
(Lord Shaw of Dunfermline, Lord Wrenbury, Lord Phillimore, Lord Blanesburgh, and Sir John Wallis.)
1927. Jan. 21.

GARDNER v. HIRAWANU AND OTHERS.*

Landlord and Tenant—Lease—Native uncleared land—Covenant by lessee to cultivate—Felling of trees—Alleged actionable waste.

A lease for 42 years of uncleared native land in New Zealand contained a covenant by the lessee to cultivate the land in a husband-like manner and to keep it clear of noxious weeds. About three years after the grant of the lease the lessee felled the timber and sold it and then sold the lease. The reversioners, alleging that to fell the timber so early was to fell it, not for the purposes of cultivation, but with a view to making money by its sale, sued the lessee for actionable waste.

Held, that as the covenant to cultivate imposed upon the lessee an obligation to cut the timber, and as the reversioners had no right to complain of the clearance being made at such an early period of the lease as was most to the benefit of the lessee, the action failed.

This was an appeal from New Zealand.

Mr. Michael Myers, K.C. (of the New Zealand Bar), appeared for the appellant; Mr. Farwell, K.C., and Mr. F. O. Langley for the respondents.

Lord Wrenbury, delivering their Lordships' judgment, said:—On August 26, 1921, the appellant became assignee and registered proprietor of a lease dated December 20, 1919. In the latter part of the year 1923 she sold and assigned the lease to one Wharawhara Topine, owner of an adjoining block. The reversioners in May, 1923, sued the appellant for damages for acts done by the appellant in January and February, 1923, whereby as they alleged the reversionary interest had been depreciated. The action was by order of July 7, 1925, removed into the Court of Appeal for argument. By order dated October 23, 1925, it was remitted to the Supreme Court, and on February 10, 1926, that Court gave judgment for the reversioners for £600 and costs. This is an appeal from that judgment.

The lease of December 20, 1919, was a lease of about 228 acres of native uncleared land in the Provincial District of Taranaki, in the North Island of New Zealand, for a term of 42 years from August 20, 1919, at a rent of 4s. 2d. an acre for the first 21 years, and afterwards at a yearly rent equal to 5 per cent. of the Government unimproved valuation to be made about July, 1940, with a further 5 per cent. of the rent for the costs and expenses of the Land Board. It contained covenants as follow:—

"3. The lessee will at all times during the said term repair and keep in good and tenantable repair and condition the said land and all improvements for the time being thereon and will at the end or sooner determination of the said term so deliver up the same (fair wear and tear and damage thereto by fire earthquake or tempest excepted).

"4. The lessee will during the said term cultivate manage and use the said land in a husband-like manner and will at all times keep the same free and clear of noxious weeds and will comply with the provisions of 'The Noxious Weeds Act, 1908,' or any amendment thereof to which an occupier is liable."

The land was unimproved and uncleared native land covered with bush, and as to about 40 acres contained millable trees (totara matai, white pine and rimu)—millable trees are hereinafter called timber. Early in 1923 the appellant sold the timber to a firm of saw millers. In January and February, they cut and removed it, and in payment for it gave the appellant sawn timber of the value of £600. The respondents alleged that the act of felling and removal was wrongful; that their reversionary interest was materially and injuriously affected thereby; and they sued for damages for its depreciation. The judgment under appeal upheld this contention and awarded £600 and £162 8s. costs.

The land, as has already been stated, was uncleared land. When cleared it was adapted for pasturage, but until cleared it could not be brought under cultivation. The reversioners are, no doubt, justified in saying that the timber is part of the land; that a lessee, by virtue of his lease, acquires only a special property in it; that he has not a general right to cut down and destroy it; that the general property remains in the reversioners; that the special property of the lessee is determined by severance; and that if the timber is severed from the land the property, in the absence of some further right contained in the lease, vests in the person entitled to the first estate of inheritance. The question is whether under this lease on the facts of this case the reversioners have not granted to the lessee a larger right of property—nay more, whether they have not imposed upon the lessee an obligation to cut the timber in pursuance of the lessee's covenant to "cultivate, manage and use the land in a husband-like manner."

In the case of *In re Rotoiti, No. 5 Block* ([1923] N.Z. L.R., 619), Mr. Justice Hosking pointed out that in New Zealand the clearing of bush country is well known as coming within the class of improvements for the purposes of the Land Acts and the legislation relating to the valuation of land, and drew attention also to the fact that a covenant to comply with the provisions of the Noxious Weeds Act, 1908 (a covenant which is contained in art. 4 of this lease), would be fanciful unless clearance of the surface of the land was contemplated. Their Lordships find that in the present case the acreage of the demised land was small; that upon the evidence it was capable of carrying only about 1½ sheep to the acre, and as a farming proposition was not practical unless all the land was cleared. Mr. Chas. Phillip Smith, a witness for the plaintiffs (the reversioners), said in re-examination: "The only reasonable way to enjoy the land is by felling the bush: by that I mean, the land as a whole. That is the only method in which you could enjoy the land." The plaintiffs' evidence, in fact, comes to this: not that it would have been wrong to fell the timber at some time, but that to fell it so early and before clearing the bush elsewhere was to fell it, not for the purpose of cultivation, but with a view to making money by its sale, and that this was not justifiable. In their Lordships' opinion this contention cannot be supported. The covenant to cultivate, manage and use in a husband-like manner imposed upon the lessee an obligation to cultivate, importing and creating an obligation to improve the land—that is to say the whole of the land—by clearance, with a view to cultivation. If the lessee unduly deferred the clearance of the land the lessors might, no doubt, complain of breach of

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

covenant ; but they have no grievance if the lessee proceeds to perform his obligation to make clearance at such early time as is most to his own benefit. The right of the reversioners is that the demised land shall be so dealt with that all of it shall be brought under cultivation, and that at the expiration of 42 years they shall regain possession of the land not depreciated by any act which the tenant was not entitled to do upon the land. If the timber might legitimately be cut at some time during the 42 years the reversioners cannot complain of acceleration, although they might complain of delay in developing the land by clearance.

In their Lordships' opinion Article 4 of the lease "may be substantially described as that of a grant by implication arising from the nature of the subject matter in order to give effect to an evident intent that the tenant shall have the reasonable enjoyment of the subject matter." The quotation is from the judgment in *In re Rotoiti* (*supra*). It was the intention of the lease that the tenant should have the use of all the land for pastoral purposes, and clearing the land was a necessary act in order to achieve that intention. Indeed, their Lordships go further and say that Article 4 extends beyond the grant of a right, and creates in the lessee an obligation to make during the 42 years a clearance of the land, including the felling of the timber in dispute. The very detailed and careful judgment of Mr. Justice Hosking in *In re Rotoiti* (*supra*) is, in their Lordships' judgment, right. The majority in the Supreme Court do not dispute the correctness of that decision. They distinguish the present case on a ground which is, in their Lordships' opinion, erroneous. Chief Justice Stout says : "There were no circumstances in this case which showed that the tenant who became the assignee of a [*quaere,* meaning "the"] lease obtained the lease for the purpose of farming." Mr. Justice Sim, Mr. Justice Reed and Mr. Justice Adams say : "The evidence makes it clear, we think, that the cutting of the timber was not done for any such purpose" (viz., the purpose of securing the profitable enjoyment of the land), "but for the purpose of making an immediate benefit out of the timber." The learned Judges here fail to give effect to the covenant to cultivate. It was impossible to cultivate without clearing. The tenant owed the duty of clearing, and as has been pointed out acceleration of the date at which the clearing is done is a thing which affected the reversioners not at all, although delay in so doing might have been a breach of covenant. The tenant having a right or being under an obligation to fell the timber, is not bound to burn it, as according to the ordinary practice he would burn the bush. He may dispose of it in the best way which circumstances allow. If he cuts and sells the timber early in his occupation he does not thereby deprive the reversioners of 42 years later of anything. The act will, no doubt, affect the price which the lessee will obtain for the lease if he sells it, but that is a matter with which the reversioners are not concerned. It is unnecessary to consider whether the tenant would be entitled to cut and sell the timber upon the eve of the expiration of the term, say, when 41½ of the 42 years of the term had expired. The case suggested is one which could not arise if the tenant performed the obligation to "cultivate, manage and use the land in a husband-like manner." A compliance with that covenant necessarily involved that the timber should have been cut and removed from the land many years before that time, and, as their Lordships have already pointed out, the date of its removal is matter of indifference to the reversioners, provided that the date shall be such that the covenant to cultivate is performed. Their Lordships are of opinion that the judgment of the minority Judge, Mr. Justice Ostler, is right, and that this appeal succeeds. The action should be dismissed with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

[Solicitors—Messrs. Blyth, Dutton, Hartley and Blyth ; Messrs. Mackrell, Maton, Godlee and Quincey.]

Chan. Div. (Eve, J.) } 1927. Jan. 21.

FORSTER v. NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN AND CLERKS.*

Trade Unions—Political objects—Expenditure of general funds on such objects—Statutory provision for making of rules—Alleged breach of statutory restrictions—Complaint to Registrar as to breach of rules—Cause of action—Trade Union Act, 1913 (2 and 3 Geo. V., c. 30), ss. 1, 3 (1) (3).

By s. 3 (1) of the Trade Union Act, 1913, restrictions are imposed on the application of the funds of a trade union for the political objects specified in subsection (3), unless the furtherance of those objects has been approved as an object of the union and by a resolution of the nature mentioned in subsection (1) and unless rules approved by the Registrar of Friendly Societies are in force providing that any payments in furtherance of those objects are to be made out of a particular fund, referred to in the Act as the political fund of the union. It is also provided that any member may, by appropriate notice, obtain exemption from any obligation to contribute to the political fund ; and no prejudice, disability, or disadvantage is to attach to the non-contributing member by reason of his claiming that exemption.

A valid resolution was passed by the defendant trade union under the section, and rules approved by the Registrar of Friendly Societies providing for the matters referred to in subsection (1) were in force.

In an action by a non-contributing member against the union for an alleged breach of the statutory restrictions by expending part of their general funds on the political objects to which the section applies,

Held, that as the conditions precedent imposed by the section had been complied with, the statutory restrictions had ceased to operate, and the action failed, the plaintiff's only cause of action (if any) being for a breach of the rules.

Semble, where a non-contributing member has made to the Registrar of Friendly Societies under s. 3 (2) a complaint of a breach of the rules and the Registrar has dismissed the complaint,

* Reported by W. E. Hurt and G. F. L. Bridgman, Esqs., Barristers-at-Law.

such member has no cause of action for the breach of the rules which was the subject of the complaint to the Registrar.

This was an action brought by Mr. John Ferdinand Forster, of 67, Rattray-road, Brixton, S.W., against the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, of which he was a member, for an injunction "to restrain the defendants, their servants or agents, from applying directly, or in conjunction with any other trade union, association, or body, or otherwise indirectly, any of the general funds of the union in the furtherance of the political objects to which section 3 of the Trade Union Act, 1913, applies; and, in particular, from paying any contributions or sums to a body of persons known as the Trades Union Congress, so long as that body expends its funds, or part thereof, in the furtherance of such political objects or intends to do so."

The defence was a general denial of the allegations.

Mr. R. M. Montgomery, K.C., Mr. J. W. Manning, K.C., Mr. W. F. Swords, and Mr. W. H. Williams appeared for the plaintiff; Mr. Wilfrid Greene, K.C., Sir Henry Slesser, K.C., Mr. J. H. Stamp, and Mr. Arthur Henderson for the defendant union.

Mr. MONTGOMERY, in opening the case, said that the plaintiff had been a member of the union since February 6, 1905. His complaint was that the union, contrary to law, had applied in the years between 1921 and 1926, and, so far as was known, would continue to apply, unless restrained by the Court, some of its funds indirectly to political purposes to which only the separate political fund of the union could legally be applied. The general funds of the defendant union were, as the plaintiff alleged, applied indirectly to those political objects by means of affiliation fees paid to the Trades Union Congress, a body which had existed since 1872, or thereabouts, when, he (counsel) imagined, it was not very political in character. Since 1921, at any rate, it had been a political body. The money which had been paid in affiliation fees by the defendant union and by many other unions had been expended on political objects, to which objects, by law, only the political fund of the defendant union was applicable. There was, owing to the way in which the defence had been put forward, very little dispute about the main facts of the case, which were comparatively simple.

Broadly speaking, the plaintiff asked his Lordship to say that the defendant union was not entitled, under the present constitution of the Trades Union Congress, to pay affiliation fees out of its general funds to that congress; whereas the defendant union claimed the right to pay those fees to the congress out of its general funds. Of course, if the affiliation fees paid from the union to the congress had been paid out of the defendants' political fund no question would have arisen.

The distinction between the general fund and the political fund of a trade union arose owing to the enactments in the Trade Union Act, 1913.

In section 3, subsection (1), it was provided:—

"The funds of a trade union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of the political objects to which this section applies. . . ."

The political objects to which the section applied were stated in subsection (3) to be the expenditure of money (*inter alia*)—

"(*b*) On the holding of any meeting or the distribution of any literature or documents in support of any . . . candidate or prospective candidate."

"(*e*) On the holding of political meetings of any kind, or on the distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act."

Those statutory objects were to be discovered by going back to section 1, subsection (2), of the Act:—

"For the purposes of this Act the expression 'statutory objects' means the objects mentioned in section 16 of the Trade Union Act Amendment Act, 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members."

Counsel went on to say that the Trades Union Congress was an association or body of persons representing or constituted by some 200 trade unions, having a total membership, it was said, of over 4,000,000 persons. It met annually for a period of about a week, and the practice adopted by the affiliated unions, including the defendant union, was to send delegates to the annual general meeting of the congress. Those delegates appointed a general council which carried on the business of the congress for the year until its next annual meeting. The general council was, therefore, really the permanent executive of the congress.

The expenses incurred by the congress during the year were defrayed by means of affiliation fees paid by the trade unions out of their general funds.

The congress was a political body. It obtained certain fees from the delegates who attended, no doubt for the purpose of defraying the expense of the meeting which took place yearly. It also obtained money from the sale of various documents which it prepared and printed, but the great bulk of its income came from the affiliation fees of the constituent members, the trade unions.

From 1922 onwards in each year—at any rate until April 1, 1926, there being some question raised by the defence about the position after that date—the congress appointed, jointly with the Labour Party, another executive body. The Labour Party was the newest and at the present time, as represented in Parliament, the second in importance of the three great political parties of this country. The executive body appointed by the Trades Union Congress in conjunction with the Labour Party was known as the National Joint Departments, or National Joint Council.

The constitution and duties of the congress were stated in its 1922 report of the annual congress held at Southport. It would be seen that the matters dealt with were essentially political, and it was decided that the expenditure of the National Joint Departments was to be met equally by the general council of the Trades Union Congress and the executive committee of the Labour Party.

Large funds were expended by the general council, mostly through the agency of the National Joint Departments, in various ways, and those funds were obtained mainly from the affiliation fees.

A considerable amount of the expenditure of the general council—and from April, 1922, until April, 1926, of the National Joint Departments—had been upon the preparation and printing for circulation to the public, or to certain classes of the public, and in some cases upon the cost of the actual circulation to the public, of large quantities of year-books, pamphlets, booklets, and leaflets of a political character.

The Trades Union Congress also financed through the medium of a company, the Victoria House Printing and Publishing Company, Limited, formed in 1899, a political newspaper called the *Daily Herald*. It was the expenditure of money of the defendant union through the Trades Union Congress on political literature or documents which formed the gravamen of the charge against the defendant union in the present action.

When the defendant union paid affiliation fees to the Trades Union Congress it knew, or ought to have known—in fact it obviously did know—that there was the prospect, indeed the certainty, that the affiliation fees would be expended upon the production, for circulation to the public, of political literature. He proposed to show that various documents were political documents, the main purpose of which, in the great majority of cases, could not possibly be said to be the furtherance of statutory objects. He would also contend that money expended upon the preparation and printing of political documents was money expended upon the distribution of political documents within the meaning of the clause to which he had referred—namely, section 3, subsection (3), clause (*e*), of the Act of 1913.

He rather gathered from certain admissions which had been made that the Trades Union Congress had been inclined to proceed on the basis that money expended upon distribution did not include money expended upon the preparation of printing for circulation to the public, but merely included money expended upon actual physical circulation to the public. It would, of course, make sheer nonsense of the provision to say that money might be expended upon the preparation, the printing and the publishing of a document for the purpose of circulation, but must not be used to pay the newsboy who ran round and distributed it. That was what no Parliamentary legislation could possibly have been expected to enact. Money expended upon the distribution, he contended, included money expended upon the steps that took place before actual circulation. It might not include money expended upon printing a document not intended for circulation, but it must include the cost of preparation for circulation as well as the circulation itself. The Trades Union Congress had had the point in mind during certain of its activities in connexion with the circulation of literature to the public.

He referred to various documents as showing that it was clear to the defendant union that the affiliation fees which they paid would be expended upon political literature. The congress had resolved in 1922 that, in order to enable the Labour movement to acquire and run its own newspaper the annual affiliation fees should be increased from 1d. to 3d. per member. Counsel read the report of a speech by Mr. J. H. Thomas as showing that it was clearly contemplated that some of the money should be expended upon the *Daily Herald*.

Mr. GREENE said that he did not object to the report being read, but he was not responsible for Mr. Thomas's views, neither did they represent the facts.

Mr. MONTGOMERY also said that the report of the congress proceedings of 1924-1925 showed how closely the defendant union was in touch with the congress and knew what it did, for Mr. J. Turner, a member of the general council of the congress, was stated to be the representative of the defendant union.

Mr. GREENE said that Mr. Turner represented a group, including the defendant union.

Mr. MONTGOMERY referred to the defendants' annual report for 1922, which said that the organized Labour movement of the country, as represented by the general council of the congress, had taken over the responsibility of financing the *Daily Herald*, which was now the mouthpiece of the Labour movement, and recommended that it should be regularly taken by the members. The congress report for 1924 mentioned a resolution to institute a vigorous campaign on behalf of the Industrial Workers' Charter, which had for its object the nationalization of property and other matters of a political nature.

The "charter," said counsel, had stood ever since as defining the objects and purpose of the Trades Union Congress, and in recent years it was set out in what were called the "Standing Orders" of the congress.

Counsel read some of the measures which were to be taken to further the objects of the congress.

Mr. GREENE.—Would carrying litigation to the House of Lords be a political object?

Mr. MONTGOMERY.—It depends upon the case.

Counsel submitted that his first proposition was established—that some of the uses to which the affiliation fees would be put were known to the defendant union to be the expenditure of money upon literature in support of the objects of the general council of the Trades Union Congress. He then proceeded to deal with the spending of the money, and said that he was greatly assisted in that respect by the frank way in which the defence had dealt with the case. They had made a large number of admissions on matters which would otherwise have required a good deal of detailed evidence to prove. The defendant union admitted that the Labour Year-books, 1925-1926, were prepared by and at the expense of the National Joint Departments, and were distributed by way of sale to the public by and (except as mentioned) at the cost of the Labour Party at a commercial price calculated to cover carriage or postage. The gross proceeds of sale were paid to the National Joint Departments, who refunded to the Labour Party the amount disbursed by them for postage, carriage, and packing. It was admitted, said counsel, that the cost of preparing the year-books was borne as to half by the congress, whose funds were provided by the affiliation fees of the defendant union and other trade unions.

Referring to certain of the publications of the Trades Union Congress, Mr. MONTGOMERY read passages from a pamphlet entitled "From Nursery School to University," and said that it contained a foreword by Mr. Ramsay MacDonald, and in effect the pamphlet explained the policy of the Labour Party on educational questions. The hope was expressed that it would "put before the public ideas which would influence general opinion." A greatly increased expenditure on education was advocated with larger grants from the Treasury. Under "General Policy" it was stated, after referring to various municipal services, that the "best argument for socialism in this country is not that it can be based on abstract, economic principles, but that the experiments we have made in the direction of socialism have been successful."

In a leaflet headed "Mines for Nation Campaign" the nationalization of mines was advocated "to save the lives of men," the management of the mines being vested in pit committees. In the Trades Union Congress Report of 1920 the share of the congress in the expenses of the nationalization of the mines campaign was stated to be £1,500, although he (counsel) could not say that all that money had been spent on leaflets. That expenditure continued, and

in the 1922 report reference was made to a balance of £249 in respect of the campaign. Another publication, entitled "Russia and International Unity," advocated the organization and union of the working classes as the only thing to prevent another war and to create an "insuperable barrier to capitalist oppression."

A report of a delegation to Russia to inquire into the Zinovieff letter stated that there "never was a Red letter." The whole publication was nothing but a political document. In another pamphlet Mr. George Lansbury wrote that if we could live on rice we could do without sleep. Another pamphlet was called "The Camera Cannot Lie."

MR. JUSTICE EVE.—That is not quite a truthful statement. You never found a lady who said that it didn't lie.

Mr. MONTGOMERY.—I think that perhaps it is meant to be sarcastic.

Counsel, continuing, said that those pamphlets were included in a list which was published at the expense of the Trades Union Congress to advertise leaflets which dealt with a number of subjects and were published by the Labour Party.

Another pamphlet, "Labour Exposes Pensions Scheme," set out a speech in the House of Commons by Mr. John Wheatley, M.P., in which he described the widows' pensions scheme as a "deceptive concoction." There were a number of other leaflets on the same subject by members of Parliament. Other publications dealt with the coal industry and advocated the nationalization of the mines, with the liquor trade, with the "Attack on Trade Unions," and with "Unemployment Insurance by Industry."

Counsel dealt with other admissions by the defence. One had reference to a number of "Weekly Notes for Speakers." A formidable bundle was produced, upon seeing which his LORDSHIP said: "I don't want to see those."

Mr. MONTGOMERY next referred to the *Labour Magazine*, which, it was admitted, had been printed and published down to March, 1926 (but not circulated), by the Trades Union Congress. From that date the congress had agreed to contribute to the cost of production and advertising (but not of distribution) based on the proportion of non-political matter to the whole publication. Counsel contended that the Trades Union Congress had been spending, since April, 1926, money upon the distribution of a political document, although, in fact, that document might contain advertising or non-political matter. He submitted that it did not make the least difference to its coming within the prohibition of the section that the expenditure was based upon a comparison between the two parts of the magazine. The document was political, and must be taken as a whole.

Counsel also referred to the "Labour Press Service," which, he explained, consisted of four newspaper pages, two of which were left blank. Those four pages, he said, were sent to various parts of the country and were there made up into local Labour newspapers.

Mr. GREENE.—Like a parish magazine.

Mr. MONTGOMERY.—Yes, if you like.

Turning to the subject of the *Daily Herald*, which was subsidized by the congress, counsel put in several copies of it and said that there could be no doubt that it was a political newspaper and, therefore, came within the prohibition of distribution of political literature or documents. He said that he could understand his friend denying that it was literature, but not that it was a document.

His LORDSHIP.—Am I to understand that the funds of the Trades Union Congress are made up of the affiliation fees of the unions, plus the contributions from the delegates?

Mr. MONTGOMERY.—Yes; and plus sales.

His LORDSHIP.—What is the amount of the defendant union's contribution?—About £450 a year.

At 3d. a member?—Yes.

Mr. MONTGOMERY, continuing, went into details in proof of the allegation in the statement of claim that part of the affiliation fees paid by the defendant union in 1924 and 1925 to the Trades Union Congress had gone to support the *Daily Herald*, which was conducted for the main purpose and object of furthering labour or socialistic political views; and that such moneys expended in supporting that newspaper were expended for political objects contrary to the provisions of the Trade Union Act, 1913.

During the year ending December 31, 1922, the Trades Union Congress paid £4,000 for grants to or for the *Daily Herald*. During the year ending July 31, 1923, £35,800, and during the following year £28,047 16s. 8d., were paid by the congress to the development fund of that newspaper. The congress paid to or for the *Daily Herald* in October, 1924, the sum of £2,500; in March, 1925, £1,000; in May, 1925, £2,000; and in July, 1925, £5,000. Moreover, during 1922 the congress, through the National Joint Departments, expended £536 7s., and during 1923 and 1924 £1,907 17s. 2d. to or for the support of the *Labour Magazine* in furtherance of defined political objects.

During 1924 the Trades Union Congress paid £520 towards "the Labour and Socialist International," an organization engaged in furtherance of the same objects. During the year ending July 31, 1922, the congress paid £1,749 19s. 2d., in addition to the sum paid by the Labour Party towards the cost of the "Mines for the Nation Campaign." In or about October, 1924, the congress paid considerable sums of money towards the Parliamentary General Election expenses of Labour Party candidates. In particular, £3 each was paid towards the General Election expenses of J. J. Lawson, the Labour Party candidate for the Chester-le-Street Division of Durham; of A. Shepherd, the Labour Party candidate for the Darlington Division; and of one Adams, the Labour Party candidate for the Brixton Division. The Trades Union Congress also paid large sums of money for the production and distribution of political literature in support of the candidature of the last-named candidate.

Calling attention to the financial statement of the congress for the year ending July 31, 1922, counsel said that on the income account side there was a large balance of £24,000; and that on the expenditure side there was, roughly speaking, the same. The affiliation fees for 1921 were £10,000; and for 1922 £22,000. In substance, there was no income for that year worth troubling about except the affiliation fees. In 1923 the affiliation fees amounted to £40,000.

His LORDSHIP.—That was after the rise in the levy?

Mr. MONTGOMERY.—I think the first account which I quoted was after the rise too.

Continuing, counsel said that in 1923 there was a Labour Party payment to the *Daily Herald* of £2,500. Again there was practically no income except the affiliation fees. In the following year there was a curious change in the accounts, and the congress affiliation fees were shown to be £20,000, as against £40,000, a very big drop indeed.

Mr. GREENE.—I am told that the reason for the drop in the fees was the fact that many unions had paid in advance, and therefore the subsequent annual contributions were very much smaller.

Mr. MONTGOMERY said that the plaintiff wrote to the general secretary of the Trades Union Congress on December 22, 1924, complaining of the grants made to the Labour candidates at Chester-le-Street and Darlington, and pointed out that the expenditure was political. He received a reply that if he desired to raise any matter with the general council he must do so through the head office of his own union. Accordingly he wrote to the secretary of the defendant union in January, 1925, stating that the expenditure in connexion with the Socialist candidates was not trade union but political. He also stated that further political expenditure for 1924 included the following grants:—Labour and Socialist International, £520; National Joint Departments, £6,050; and the *Daily Herald,* £28,047. Mr. Forster also wrote that the "Industrial Workers' Charter" was a Socialist programme, which meant, in effect, that in future the Trades Union Congress was to finance propaganda on behalf of the Socialist Labour Party. "Having signed an exemption form against all expenditure of this kind," he continued, "I should like to know whether I am to be allowed to deduct Trades Union Congress fees from my contribution."

In reply, he was informed that the letter would be placed before the National Executive Committee at their next meeting; and, later, he was told that that had been done and that the same was duly noted.

Mr. Forster then wrote stating that that meant that the committee had no intention of dealing with the matter, and that he must take other means of dealing with it. He again asked whether he could deduct Trades Union Congress fees from his contributions, because, in his opinion, the expenditure was political. He further said that they must grant him that right or pay the fees out of the political fund of the union.

In March, 1925, the plaintiff wrote to the Registrar of Friendly Societies asking for a decision on the point.

Mr. MANNING read the long judgment of the Chief Registrar, in which he said:—

"The words 'political objects' in the Trade Union Act have a very carefully defined meaning, and do not include many of the things that would be described as political in ordinary language. Thus, I do not find, in the items which you have marked in the report and statement of accounts of the Trades Union Congress, payment to anything which is a political object within the meaning of the Act."

The payment to the two candidates, the Registrar added, as part of their election expenses, was the supposed value, assessed he did not know how, of certain pamphlets of a trade union nature used during the election generally. He would not be prepared to hold that that was expenditure on a political object without a good deal more evidence.

The Registrar stated that it seemed to him that the definition of "political objects" in the Act ought to be viewed in the light of the decisions from which it sprang. To put it as shortly as possible "political," as it was used in the section, was not the adjectival form of "polity," but the adjectival form of "party politics." Section 3 (1) of the Act recognized that there were two batches of political objects, one of which had to be paid for out of the political fund, the other of which might be paid for out of the general fund. The first class, therefore, was a special class, and did not embrace everything which could be described in the ordinary way as "political." The definition dealt with the placing of the bundle of party political hay in front of the elector's nose.

Mr. MONTGOMERY.—He might have said "carrots."

His LORDSHIP.—The same thought occurred to me.

Mr. MANNING continued to read the judgment, in which the Registrar said that a trade union had, by section 1 of the Act, power to apply its funds for the purposes of the statutory objects and any other objects authorized by its constitution, subject to the provisions of the Act as to the furtherance of "political" objects; and that right, conferred by the Act itself, was not, in his opinion, cut down by the fact that a political party had adopted some or all of the statutory objects. The "political" objects, therefore, which were contrasted by the proviso with "statutory" objects must be those party-political objects which were not also statutory objects. In those, indeed, he thought that they had at last found those "other political objects" which, under section 3 (1) might be legally furthered by a trade union out of its general fund.

Dealing with the *Daily Herald,* the Registrar said that he found that out of its 50 columns only 11 concerned "statutory objects," and only 4½ "political objects"; while as regarded the campaign for the "Industrial Workers' Charter," the contents of the charter were almost entirely, if not entirely, statutory objects. On his findings he did not think that any order ought to be made. If it was desired to prevent the Trades Union Congress or its general council from intervening in elections or otherwise spending its funds on political objects on the ground that such intervention or expenditure was outside its objects as expressed in its standing orders, or on some other ground, this, he imagined, could be effected by another kind of proceeding.

Mr. MONTGOMERY, commenting on the Registrar's judgment, said that the Registrar was answered by the Act itself, which enacted in section 1 (1) that

"The fact that a combination has under its constitution objects or powers other than statutory objects within the meaning of this Act, shall not prevent the combination being a trade union for the purposes of the Trade Union Acts, 1871 to 1906, so long as the combination is a trade union as defined by this Act, and, subject to the provisions of this Act as to the furtherance of political objects, any such trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorized under its constitution."

Counsel pointed out that the combination must be for any lawful purpose if that purpose was authorized by the constitution of the trade union itself. With regard to the definition of "statutory objects," it did not have the wide sweep which the Registrar attached to it, and certainly as to the "Industrial Workers' Charter" he (counsel) would have thought that there was in it nothing relating to statutory objects.

His LORDSHIP.—By section 1 (1) there may be a combination, a trade union, notwithstanding that it has objects other than statutory objects?—Yes.

And those objects may include political objects?—Yes.

Mr. MONTGOMERY said that in section 3 (3), (*a*), (*b*), (*c*), (*d*), (*e*), of the Act were found the political objects to which the general funds of a trade union were not to be applied. There were many political objects which were lawful, and to which trade unions, if their constitution allowed them to do so, were entitled to apply their funds, but the Registrar of

Friendly Societies had endeavoured to force the words to a use of which they were incapable.

Counsel next dealt with the pleading of the defence to the present action that, by reason of the Registrar's decision, the matter was *res judicata*. He submitted that that contention could not be upheld.

His LORDSHIP asked what would be the alternative to the affiliation of the defendant union with the Trades Union Congress. He did not see how the union could control the action of the congress.

Mr. MONTGOMERY replied that if the union paid affiliation fees to another body, which must be expected to spend its funds for political purposes, such money should be paid out of the political fund of the union.

Referring to the *Daily Herald*, counsel insisted that that newspaper was a political document, in spite of the fact that it published general news and advertisements of frocks, soap, and pickles.

In conclusion, Mr. MONTGOMERY said that he did not think that he could call any witness who would assist his Lordship about any fact which was not admitted.

Mr. MANNING went through the various items in the statement of claim and also in the defence. The defendant union denied that the effect of section 3 of the Trade Union Act, 1913, was accurately stated by the plaintiff. The furtherance of the political objects defined in section 3 (3) of the Act had been approved by the defendant union by a resolution now in force. The union also denied that it had made any payments in furtherance of those objects otherwise than out of its political fund, and that the Trades Union Congress was engaged in the furtherance of such objects.

The union did not admit the close association between the Labour Party or Parliamentary Labour Party and the congress, as was alleged. It did not admit that the *Daily Herald* was conducted for the main purpose or object of furthering Labour or Socialistic political views, or that moneys expended in supporting that newspaper were, in truth or in fact, being expended for political objects contrary to the provisions of the Act of 1913. The union said that the *Daily Herald* (so far as its objects were not those which were common to all daily newspapers) was conducted primarily for the purpose of furthering the general objects of the trade unions, and the contributions thereto of the Trades Union Congress were made in furtherance of such general objects. The union did not admit that the congress expended through the National Joint Departments, or at all, the sums of money mentioned in the statement of claim.

An amended defence stated that the National Joint Departments were absolutely discontinued on April 1, 1926; and that the services previously performed for the Trades Union Congress by those Departments were now performed by the separate staffs of the congress, except that the *Labour Magazine* was now published and distributed by the Labour Party. The Trades Union Congress contributed to the cost of producing and advertising it (but not of distributing it) on terms that had not been yet finally agreed upon further than that the contribution of the congress was to be based only upon non-political matter.

With reference to other allegations, the defendant union denied that the Labour and Socialist International was an organization engaged in the furtherance of the defined political objects. It added that the Trades Union Congress ceased in 1923 to be affiliated to that International, and the payment of £520 mentioned by the plaintiff was a final payment of fees in respect of the previous affiliation. No further payment to the International was contemplated. The defendant union did not admit that the "Mines for the Nation Campaign" was conducted in furtherance of the defined political objects, and it denied that £1,749 19s. 2d. paid by the congress towards the cost of that campaign was so paid.

The union admitted that in the course of the General Election in October, 1924, the congress expended £1,702 7s. 6d. in printing and distributing a political pamphlet, but it denied that the congress at any time paid any money for the production, publication, or distribution of political literature in support of the candidature of certain Labour candidates. The sums of £3 mentioned by the plaintiff were book entries representing the value of the copies of the publication supplied by the congress to the candidates named. It was no part of the objects of the Trades Union Congress to distribute political literature, and the defendant union did not contemplate that the congress would distribute any.

The defendant union claimed the right to pay its affiliation fees to the congress out of its general funds, and it denied that such moneys, if so paid, would be applied for the defined political objects contrary to the provisions of the Act of 1913, or at all.

Finally, the union pleaded that in 1925 the plaintiff complained to the Registrar of Friendly Societies, pursuant to section 3 (2) of the Act, of all matters complained of in the present action, and that the Registrar, after hearing the plaintiff by his counsel, determined that the defendant union had committed no breach of its approved rules. The union contended that the Registrar's determination was binding and conclusive on the plaintiff.

His LORDSHIP, referring to the pamphlet headed "If we could live on rice we could do without sleep," said that there seemed to be nothing political in that; it appeared to be a domestic matter.

Mr. MONTGOMERY said that the leaflet was, in fact, most political in character. The only thing non-political about the pamphlet was its title.

Mr. GREENE said that he was going to submit that the action was misconceived. It had been framed upon the Act and not upon the rules of the union.

His LORDSHIP said that counsel for the plaintiff should consider the point. If what was complained of was only a breach of the rules and not of the statute, it might be that he (his Lordship) had no jurisdiction.

Mr. MANNING said that section 3 (1) began with the prohibition against the funds of a trade union being applied, either directly or indirectly, in the furtherance of certain political objects, unless the furtherance of those objects had been approved by a certain resolution and unless rules were in force containing certain provisions. There must be implied in that a further condition that no moneys of the trade union, other than the political fund, should be expended in the furtherance of the specified political objects. That must have been the intention of the Legislature.

His LORDSHIP.—I agree. The Legislature, as a rule, discourages interference by the Court in domestic legislation, and the Legislature foresaw that there was a line between what is described as political and what is described as social, and it cut the knot by saying that if it was thought that the union was overstepping the mark and acting contrary to the

rules one could go to the Registrar of Friendly Societies and he would decide whether it fell on one side of the line as a social matter or on the other side as a political matter. Otherwise it would take a week to go through these things and decide which, if any, of these matters was political and which non-political.

I cannot help thinking that the Legislature intended to make it a domestic matter and to leave it to a domestic tribunal to decide, because they left it so wide. But you say that I must treat this matter, notwithstanding that the conditions precedent have been complied with, as one in which there are these restrictions which should be enforced by injunction.

Mr. MANNING said that that was so. He pointed out that section 3 (2) of the Act said that if any member of a trade union alleged that he was aggrieved by a breach of any rule made in pursuance of the section he might complain to the Registrar of Friendly Societies. It might be that in many cases it would be only a breach of a rule, and in many cases a member of the trade union could only appeal to the Registrar. In this case, however, there was not only a breach of the rules made in pursuance of the section, but a violation of the prohibition in subsection 1.

His LORDSHIP.—Suppose there is a breach of any rule : a member must not complain of the rule, because that has been approved by the Registrar. Suppose the Registrar said that there was a breach in respect of the £3, and that the union must not, in future, contribute to the election expenses of any candidate : what step could be taken in this Court?

Mr. MANNING said that if the Registrar had made an order to remedy the breach of the rule the matter would have been at an end.

His LORDSHIP.—Here the Registrar said: "I make no order, because there has been no breach."

Mr. MANNING.—Many matters are brought before the Court other than those which were brought before the Registrar. I am endeavouring to establish that in certain cases what is complained of may be not only a breach of a rule, but also an infringement of the provisions in subsection 1. In one aspect, no doubt, there was a breach of the rules made by the defendant union, but in another aspect there was a breach of the provisions in the subsection. The complaint may be twofold.

His LORDSHIP.—Is not the only matter which is not provided for in this section the position of a man who wants to become a member of the union and who is met with this : that he must, as a condition of admission, agree to subscribe to the political fund? An action might lie on that part of the subject.

Mr. MANNING.—That is dealt with in section 3 (1) (*b*).

His LORDSHIP.—He has a statutory right to say that that is a breach which he can restrain by action, because it is not provided for by section 3 (2), which only deals with members. He is not a member, and recourse to this Court must be open to him.

Mr. MANNING said that, although the Registrar of Friendly Societies gave a reasoned judgment in the case in which the plaintiff complained, the Registrar was not bound to do so.

His LORDSHIP.—The Registrar could not compel anybody to come before him.

Mr. MANNING.—He determined the case as an arbitrator, with less powers than an arbitrator. Where you find a prohibition against the expenditure of funds, except political funds, that is a matter that this Court can deal with. A distinction can be drawn between the rules in many cases, breaches only being dealt with by the Registrar, but in this case infringements of the restrictions in section 3 (1) were involved.

His LORDSHIP.—That would be a matter of election, and the plaintiff did elect.

Mr. MANNING.—Only in regard to some of the matters taken before the Registrar. The scope of the case before your Lordship is much wider than that before the Registrar, and has to do with many documents which we say are political. It therefore covers fresh ground.

His LORDSHIP.—If you elect to go before one tribunal I do not see how you can go to another.

Mr. MANNING said that the general rule seemed to be clear that the jurisdiction of this Court was not taken away when a particular Act was silent on the subject or when the language was doubtful. The Registrar at the end of his judgment threw out the suggestion that the plaintiff could seek his remedy elsewhere, but that it was not his duty to advise him what course he should take.

Mr. MONTGOMERY here said that, in order to avoid any risk of the action being decided upon a point of pleading, he had come to the conclusion that he should ask his Lordship to give him leave to amend paragraph 6 of the statement of claim by adding some words after the word "indirectly."

The paragraph would then read:—

"The defendant union, contrary to the provisions of section 3 of the said Act, has, in conjunction with other trade unions, associations, or bodies, and indirectly, and contrary to the rules of the defendant union, made in pursuance of section 3 (1) (*a*), applied a part of its funds in the furtherance of the said defined political objects, and such payments have been made otherwise than out of the political fund of the defendant union."

His LORDSHIP.—That would show that the allegation was a breach of the rules, as well as a breach of the section. If that be so, and it is only a breach of the rules, it may be that I have no jurisdiction.

Mr. GREENE.—In ordinary circumstances I should not take an objection, but the circumstances of this case are not ordinary. Were it not for the fact that this action is being maintained in a particularly malignant manner by means of subscriptions raised through a newspaper of a distinctly political colour, I should not resist the application to amend, but in the circumstances I do resist it. On its merits it is an application which I submit ought to be refused. In the first case the plaintiff goes to the Registrar and says of the defendant union : "You have broken the rules." He fails in that, and then casts about to see what he can do. He says : "I will deliberately found my case on a different cause of action altogether," and, although it is pointed out in the defence what his cause of action ought to be, he deliberately does not amend, and now his counsel put in the forefront of their argument that his claim was not *res judicata* ; that it was not the same as before the Registrar. He (counsel) submitted that it was not open to his friends to amend after they had rejected and repudiated any suggestion that the plaintiff was suing on the rules.

Mr. MONTGOMERY said that he did not know what justification his friend had for the first statement he had made. In the interests of justice, and to prevent subsequent litigation and duplicate litigation, the

amendment should be allowed, so that the case might be argued from both points of view.

His LORDSHIP.—Although the power to allow amendment is very wide, this amendment would set up an entirely new cause of action.

Mr. MONTGOMERY.—It is an additional cause of action. It is merely a point of law arising on identical facts, and it would be a pity to duplicate litigation, because that is what it means.

His LORDSHIP, in refusing the application to amend the statement of claim, said: I am very reluctant at any stage of the proceedings to refuse an application to amend, but in considering such an application the Court is bound to take into account the nature of the proposed amendment; the time at which the application is made, having regard to the antecedent steps in the action; and, in particular, the question whether the defendants may be materially prejudiced by allowing the amended matter to be introduced into the action and not into another action hereafter to be brought.

In this case the antecedent circumstances are such as to lead to the impression that the attitude which was adopted, and has been maintained down to the present moment, was not an attitude taken by inadvertence or through misapprehension.

The matter complained of in the action as it was constituted was a breach by the defendant union of the statutory restrictions alleged to be imposed upon the defendants, and still subsisting, in reference to the application of its funds; and the action was brought and has been conducted down to the present moment as an action to restrain the defendant union from committing, or continuing, a breach of those statutory restrictions. That is quite clear not only from the pleadings but also from the exhaustive argument addressed to me on the part of the plaintiff. Throughout, it has been maintained—and for that matter it is still maintained—that the plaintiff has a cause of action founded on a breach of statutory restrictions by the defendant union.

In the defence the pleader raised this case, that the statutory restrictions were no longer subsisting, and that such restrictions as were imposed on the union were not so imposed by statute, but by the rules adopted in pursuance of the requirements of the statute, and the plaintiff's only cause of action was founded on a breach of the rules.

It was quite obvious, continued his Lordship, that no one could have read the defence without appreciating that the line which the defendants were adopting was of that nature. *Res judicata* was argued on the footing that the relief sought here was not that sought before the Registrar of Friendly Societies; and it was only when the section came to be minutely examined that those acting on the part of the plaintiff applied for leave to make an amendment which would mean the substitution of another cause of action for the cause of action which the defendants in their pleading said was the only cause of action. I think that, in the face of those facts, it is difficult to say that the amendment is one which ought to be acceded to at this time.

With regard to the position of the defendants, the plaintiff, before he brought this action, elected to submit a substantial portion, but not the whole, of the matters upon which he relied to the adjudication of the Registrar of Friendly Societies. It is impossible to read the Act of 1913 without appreciating that if, in response to his application to the Registrar, the Registrar had come to the conclusion that there had been a breach of the particular rule, and had made an order for the remedying of that breach, the defendant union would have been compelled under the Act to obey that order. It would not have been open to them to take any proceedings in this Court to set the order aside, nor could the Court have entertained any application contrary to the decision of the Registrar. The plaintiff elected to take that course, and when he embarked on this action he had the advantage of knowing that, by the decision of the Registrar, there had not been a breach of the rules in question.

Having put the defendants in the position of possibly being subject to an order against which they could not appeal, the plaintiff, availing himself in this action of an alleged breach of the statute, has not framed his action so as to raise a question settled by the Registrar, and that has put the defendants in a very unfair position. They have had to run the risk of defending an application against which they could not appeal, and now have been brought to the Court to defend the action.

If I allowed the amendment they might again be put in peril in regard to many of the matters disposed of by the Registrar. I think, therefore, having regard to the circumstances that have taken place, to the matters which were within the knowledge of the plaintiff many months ago, and to the extent to which any amendment might prejudice the position of the defendants, that it is my duty not to allow the amendment.

His LORDSHIP then proceeded to give judgment on the case made by the pleadings.

He said: The plaintiff's claim to relief in this action is based on the alleged breach by the defendant union of the provisions of section 3 of the Trade Union Act, 1913. That this is so appears quite clear from paragraphs 4, 5, and 6 of the statement of claim. The first question which I have to decide is whether he has established any such breach. By subsection (1) of the section in question restrictions are imposed on the application of the funds of a trade union for the objects specified in subsection (3), unless the furtherance of those objects has been approved as an object of the union by a resolution of the nature mentioned in subsection (1) and unless rules approved by the Registrar of Friendly Societies are in force providing that any payments in furtherance of those objects are to be made out of a particular fund, referred to in the Act as the political fund of the union. It is also provided that any member may, by appropriate notice, claim and obtain exemption from any obligation to contribute to the political fund; and, putting it shortly, no prejudice, disability, or disadvantage is to attach to the non-contributing member, or any person intending to become a member, by reason of his claiming that exemption.

It is admitted that a valid resolution has been passed, and that rules approved by the Registrar of Friendly Societies providing for all and each of the matters referred to in paragraphs (*a*) and (*b*) of subsection (1) were, at the date of the writ, and still are, in force. In these circumstances all the conditions precedent have been complied with, and, in my opinion, the statutory restrictions have ceased to operate. I cannot accept the view that, by the wording of this section, any implication is raised that, after fulfilling all the conditions mentioned in the section, the restrictions still apply as statutory restrictions. On the contrary, it seems to be that from that time forward it was a question of the rules and not of the statute. The procedure adopted by the defendant union has been in accord with, and not in breach of, the Act, and no such cause of action as the plaintiff

has advanced was subsisting when the writ was issued.

If the facts on which the plaintiff relies constitute a misapplication of the general funds of the defendant union, his cause of action is a breach of the rules, the rule in particular being rule 45, subrule 2. Now this appears to have been the plaintiff's own opinion when he first desired to raise the question, because, so soon as he became aware of the matters of which he complained, he availed himself of his statutory right under section 3 (2) of the Act and laid a complaint before the Registrar of Friendly Societies. In considering the case one must not omit to notice what was the effect of this procedure on the plaintiff's part so far as the defendant union was concerned. Had the complaint resulted in the Registrar's making an order for remedying the breach of which the plaintiff complained, the union would have had no alternative but to give effect to that order, the provisions of section 3 (2) making it quite clear that there would have been no appeal, and by no procedure in this Court could the union have evaded the duty statutorily imposed upon it of giving effect to that order.

Now the question, which is not really raised as the record stands in this action, except in so far as the plea of *res judicata* has been raised by the defence, is whether in these circumstances, even assuming that the plaintiff had brought this action on the footing that there had been a breach of the rules and not merely a breach of the Act, the plaintiff could have maintained this action. The Legislature has provided a remedy of which a member of a union may avail himself, and which, if he does avail himself of it, puts the union at the risk of being compelled to carry out, or to remedy, the matters of which he has complained. Did the Legislature contemplate that the complaining member, having carried in his complaint, and having failed to satisfy the Registrar that there was any proper foundation for it, was to be allowed to commence an action and seek relief in connexion with the same matters, exposing the union to further litigation? I very much doubt whether that is the position of the member.

According to the construction which I put on section 3 (2) of the Act, the Legislature contemplated that the matter, dealt with as it has now been dealt with by the rules, should be determined by the tribunal indicated in that subsection, and did not contemplate that it should be open to the member, after he had submitted the matter to the Registrar and had failed to convince the Registrar, to resort to the Courts. Whether the subsection left him entitled to elect whether he would go to the Registrar or to the Court has not been argued; but, assuming that there was such an option, it appears to me that this plaintiff adopted an attitude which showed what his election was, and that it is not open to him, having failed before the Registrar, to proceed by action in this Court. That does not arise on the pleadings as they stand.

The relief sought for in this action is not founded on any breach by the defendant union of the rules, but on an alleged breach of the statute; and, no such breach having been established, I have no alternative but to dismiss this action, and to dismiss it with costs.

[Solicitors—Messrs. Rhys Roberts and Co., for Mr. Horace A. Davies, Cardiff; Messrs. Shaen, Roscoe, Massey, and Co.]

Judicial Committee of the Privy Council.
(Viscount Cave, L.C., Lord Shaw of Dunfermline, Lord Wrenbury, Lord Phillimore, and Lord Blanesburgh.)
1927. Jan. 21.

DOUGHTY v. COMMISSIONER OF TAXES.*

Revenue—Income-tax—Capital sales and sales producing income—Distinction.

The appellant and a partner converted their partnership as drapers into a private limited company in which they were the sole shareholders. The Commissioner of Taxes claimed that the amount of £15,025, which was the difference between the value of their stock-in-trade as shown in their last balance-sheet and the value at which it was computed when the company took it over, was a profit assessable to income-tax.

Held, that if a business was one purely of buying and selling, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income-tax, but that in the present case there was merely a slump transaction. The Crown was not entitled to take a bookkeeping entry as conclusive evidence of the existence of a profit, and the sum in question was not assessable to income-tax.

This was an appeal from a judgment of the Court of Appeal of New Zealand of March 31, 1926, reversing a decision of Chief Justice Stout.

Mr. A. M. Latter, K.C., Mr. Michael Myers, K.C. (of the New Zealand Bar), and Mr. Cyril L. King appeared for the appellant; Mr. Farwell, K.C., Mr. F. O. Langley, and Miss Joan Clarkson for the respondent.

Lord Phillimore, in delivering their Lordships' judgment, said:—This is an appeal from the judgment of the Court of Appeal of New Zealand reversing the decision of Chief Justice Stout on an application by the Commissioner of Taxes seeking to assess the appellant to income-tax in the sum of £6,010 in respect of income for the year ending March 31, 1921.

On the proceedings taken in respect of this assessment a case was stated by the Commissioner which, according to the practice in New Zealand, was traversable and was accordingly traversed by the present appellant in his answer, and the matter came in the first instance before a magistrate and was decided in favour of the Commissioner. His decision was, however, appealable both on grounds of fact and law to a Judge of the High Court, in this case Chief Justice Stout. The decision of the Chief Justice is final on fact, but not on a matter of law.

The circumstances are these. The appellant and one Arthur John George carried on business at Wellington as wholesale soft goods merchants and drapers in partnership. On June 25, 1920, they converted their partnership into a private limited company, of which they were the only two shareholders. The company had a nominal capital of £175,000 in £1 shares, 100,000 of which were ordinary, 25,000 were A preference shares, and 50,000 were B preference shares.

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

The arrangement, which was embodied in an agreement dated June 25, 1920, was that the partners as vendors should sell to the company and the company should purchase as from January 20 then past, the goodwill of the business, the leaseholds, plant, machinery, book debts, the benefit of pending contracts, all cash bills and notes, and generally all property to which the vendors were entitled in connexion with the business.

Part of the consideration for the sale was the allotment to the vendors of £76,000 paid-up shares, £30,000 ordinary shares to George and £30,000 to the appellant, and £16,000 B preference shares to George. The residue of the consideration was the undertaking by the company to satisfy all the liabilities and engagements of the firm.

The vendors contracted not to carry on the business of a draper independently of the company, and they stated that they had in certain proportions subscribed the memorandum of association for all the 175,000 shares in the company, each thus according to his proportion rendering himself liable to that extent for the debts of the company.

The last balance-sheet of the old partnership stood as follows :—

Liabilities.	£	*s.*	*d.*
Capital Account	48,774	12	0
Sundry creditors	10,366	17	5
Deposits at interest	2,238	7	6
Bills payable current ..	36,053	12	2
	£97,433	9	1

Assets.	£	*s.*	*d.*
Furniture and fittings ..	513	18	4
Cash at bank	106	11	3
Cash on hand and customs	432	7	11
Sundry debtors	45,151	17	0
Bills receivable current ..	5,896	3	3
War loans	1,974	12	6
Stock in hand	43,357	18	10
	£97,433	9	1

This should be corrected in one respect, as £7,800 was due for unpaid income-tax, thereby reducing the capital account from £48,774 12s. 0d. to £40,974 12s. 0d.

The partners having fixed the price at which they sold, if it could be called a sale, their business to the company, it remained to adjust the figures on the last balance-sheet in accordance with this arrangement, £76,000 being evidently more than the sum standing to the credit of the capital account; and, in order to effect this, the item on the asset side "stock in hand £43,357 18s. 10d.," was replaced by an item "stock and goodwill £78,383 6s. 10d."

It appears from the evidence of the accountant who made out these accounts that he suggested that the figure for goodwill might be taken as £20,000, and that this view was accepted by the outgoing partners. This left as the residue of the item £58,383 6s. 10d., or £15,025 8s. 0d. as the difference between the value of the stock-in-trade as shown in the partners' last balance-sheet and the value of the stock-in-trade as it might be deemed to be taken over by the company; and the Commissioner for Taxes claimed that this was a profit and to levy income-tax upon it.

By the law of New Zealand each partner is severally liable to tax in respect of his share of the profits of a partnership, and the appellant Doughty's share of this supposed profit was fixed at £6,010, in respect of which he was assessed to income-tax as already stated.

The appellant puts his case in two ways. He says (1) that if the transaction is to be treated as a sale, there was no separate sale of the stock, and no valuation of the stock as an item forming part of the aggregate which was sold, and (2) that there was no sale at all but merely a readjustment of the business position of the two partners, and an application for their benefit of the law of New Zealand allowing the formation of private companies with limited liability.

Income-tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income-tax.

It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy-farming business or a sheep-rearing business, where the principal objects are the production of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connexion with the sale and winding-up of the business gives no indication of the profit (if any) arising from income; and the same might be said of a manufacturing business which was sold with the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

But upon the evidence in this case, it would appear that no such separate sale was effected. It was a transfer of all the assets of the partnership for 76,000 shares, some preference, some ordinary, all taken at their face value of £1 each, with an obligation, measured by a number of shares not paid up, to discharge the liabilities of the partnership. If these several items were not worth £76,000, then the shares were not worth their face value. Then as the vendors were the takers of the shares, they would gain nothing. They may have estimated in June that their stock was in the previous January worth more than the sum at which it had been put in their balance-sheet, but they did not, by so estimating it, make it more.

So far as the matter is a question of fact, the judgment of the Chief Justice was conclusive, and, if the question be to any extent a question of law, their Lordships desire to express their agreement with the conclusion drawn by the Chief Justice.

The authorities to which their Lordships have been referred, when carefully examined, show where the distinction is to be drawn between capital sales and sales producing income.

Some of these authorities are cases in which a company is dealing with land. In *Miramar Land Company, Limited v. Commissioner of Taxes* (26

N.Z.L.R., 723), decided in the year 1907, a company was formed for the purpose of dealing in land ; and it acquired one property, of which it immediately sold a small portion, and a few months afterwards sold the rest in one block, and then it went into liquidation. It was held that the business of the company was one of dealing in land, and that the profit ultimately acquired was none the less a profit upon dealing, because when the last part of the profit was acquired, the company ceased from carrying on business.

So in the case of *Californian Copper Syndicate v. Harris* (5 Tax Cas., 159), decided in 1904, a company formed to buy copper-bearing land in County California, bought the land for cash, improved it, and then re-sold it in two portions to the Fresno Company for 300,000 shares of the nominal value of £1 each. The whole capital of the Fresno Company was 400,000 shares, of which 75,000 were subscribed for in cash, 300,000 went to the Californian Company, and 25,000 were unallotted. It was held that the transaction was a sale in the line of the company's business, resulting in a profit, and not a mere change in the mode of investment, and therefore that the profit was taxable to income-tax. In that case the Primary Commissioners said that it seemed clear to them that the property had been bought in order to be sold.

On the other hand, in *Tebrau (Johore) Rubber Syndicate, Limited, v. Farmer* (5 Tax Cas., 658), decided in 1910, this case was distinguished, and the particular transaction in this latter case was held to be a case of appreciation of capital and not one resulting in a profit taxable to income-tax. The facts were that the company was formed to purchase land in Malay and develop it by cultivating rubber trees. Two estates were bought, and much planting had been done ; but the capital was insufficient, and the undertaking was (after existing for rather more than a year) sold to a second company (the old company being wound up). The consideration for the sale was £2,500 in cash and 36,000 £1 shares of the new company. It was held that the first company was not formed to deal in land as a business, and that this was a case of realization of an investment.

Then there are some difficult cases where the business is anent breeding stock. In the Australian case of *Commissioner of Taxation for Western Australia v. Newman* (29 Commonwealth L.R., 484), decided in 1921, a pastoralist put an end to his business and sold the whole station with stock and plant as a going concern, and it was held that the transaction was not the carrying-on of a business but the winding-up of a business, and that the profit made on the winding-up was not a profit taxable as income ; and in another Australian case, *Hickman v. Federal Commissioner of Taxation* (31 Commonwealth L.R., 232), decided in 1922, another pastoralist who put an end to his business and sold his property, with all the improvements and the cattle upon it, was held not to be liable to the war-time profits tax in respect of the moneys realized by the sale of his cattle, even though in that case a separate price was realized for the cattle. It is stated in the judgment of Chief Justice Stout that these cases have been since covered by legislation.

In the case of *Anson v. Commissioner of Taxes* ([1922] N.Z.L.R., 330) the view of the Court was that Anson, who carried on a sheep farm, was carrying it on as a dealer in buying and selling sheep, and the Court said : "Every individual animal (with the negligible exception of the rams kept for breeding purposes) is part of the taxpayer's stock-in-trade. It is true that he does not, while his business is carried on, sell all of his stock-in-trade at once ; he always retains a part thereof. But in this respect his business is not different from that of other merchants. In the case of most trades it is only when the business is wound up or transferred that the entire stock-in-trade is disposed of. Normally a trader retains and carries over to the succeeding year a standard quantity of stock. But this permanent quantity does not for that reason cease to be stock-in-trade. . . ." This being so in the view of the Court, it did not make any difference whether the stock-in-trade was sold progressively or all at once by way of clearing sale or otherwise in connexion with a transfer or a winding-up of the business. Whether his profit was derived from a single sale of all his stock-in-trade at once, or from repeated sales in the ordinary way of his business, his profit was taxable income, and was assessable accordingly.

In that case the item of profit was arrived at by taking the value of the stock as it stood in Dr. Anson's books for one year and comparing it with the same item of value in the previous year, and it seems to have been assumed that this particular piece of farming could be treated by itself, and that all the items of buying and selling of animals and profits, if any, from sale of wool, with the *per contra* items of wages and fodder and such like, could be taken as balancing each other, so that the difference between the values of the sheep stock in the two years represented the actual profit.

It would be difficult to arrive at the profit in this way if it were the case of a farmer in England ; but the trade of a pastoralist is one with which the New Zealand Courts would be familiar, and which it would be more easy for the New Zealand Judges than for their Lordships to appreciate.

The reported cases on this branch of income-tax law are so involved in detail that it is not always easy to see on which side of the line they fall. The case of *Commissioner of Taxes v. Melbourne Trust, Limited* (30 *The Times* L.R., 685 ; [1914] A.C., 1001), is an authority for holding that in certain cases what seems like a distribution of assets is in truth an application of profits. The case, however, nearest the present is that of *J. and M. Craig (Kilmarnock), Limited v. Cowperthwaite* ([1914] S.C., 338). There, on a transference from one company to another, one-third of the value of each item, other than stock-in-trade, as it stood in the books of the selling company, was treated as its value for transfer purposes, and the balance of a slump price, which, with an undertaking to discharge liabilities, formed the consideration, was inferentially attributable to the stock. It was held, however, in that case that no sum could be pitched upon as the actual price of the stock, and no claim to assess a profit could be based upon such a foundation.

Their Lordships would repeat that if a business be one of purely buying and selling, like the present, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income-tax ; but their view of the facts (if it be open to them to consider the facts) is the same as that of Chief Justice Stout—that is, that this was a slump transaction.

The other ground on which the appellant's case may rest is that the transaction which led to the claim for tax was not a sale whereby any profit accrued to the two partners. The case of *Craig (supra)* is an authority for saying that the Crown is not entitled to take a mere bookkeeping entry as conclusive evidence of the existence of a profit. The two partners made no money by the mere process of having their stock-in-trade valued at a high rate

when they transferred it to a company consisting of their two selves.

If they over-estimated the value of the stock, the value of the several shares became less. The capital of the company would be to this extent watered. As already observed, they could not, by over-estimating the value of the assets, make them more.

Their Lordships will humbly advise his Majesty that this appeal should be allowed, and that the judgment of Chief Justice Stout should be restored, and that the appellants should have the costs below and of this appeal.

[Solicitors—Messrs. Shaen, Roscoe, Massey and Co.; Messrs. Mackrell, Maton, Godlee, and Quincey.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. Jan. 14.

THE JUPITER.*

Ship—Foreign ship in English port—Action for possession—Foreign parties—Writ *in rem*—Comity of nations—Immunity of foreign sovereign State from jurisdiction—Declaration of foreign sovereign State as to facts—Whether conclusive.

In an action between foreign parties for the possession of a foreign ship, which had been arrested in a British port, the defendants put forward a declaration made by the representative in this country of a foreign sovereign State asserting that the vessel at the material time was the property of that foreign sovereign State and had been sold by it to the defendants. It was contended that such a declaration was conclusive of the facts therein stated.

Held, that where such a declaration was not made for the purpose of securing the immunity of the foreign sovereign State from jurisdiction, it was not conclusive, and the Court was at liberty to investigate the truth of the facts therein stated.

This action was brought by the Compagnie Russe de Navigation à Vapeur et de Commerce, and Messieurs Claude M. A. A. E. Bourgeois, and Leonidas Tcheloff and Gregoire Margoline, on behalf of themselves and others, trading as the Compagnie Russe de Navigation à Vapeur et de Commerce, for a declaration that they were the owners of the steamship Jupiter, for possession thereof, or, alternatively, for judgment for the value of the vessel and damages. The action was brought *in rem*. The Cantiere Olivo Società Anonima, an Italian firm, had entered an appearance to the writ, but the defence was really conducted by and on behalf of the Union of Socialist Soviet Republics.

The facts were shortly as follow:—The Compagnie Russe, under its Russian name of "Ropit," carried on business in Russia before the revolution, having a head office in Petrograd, its ships being registered at Odessa. In 1917 the head office was transferred to Odessa. At the beginning of 1919 the business was apparently moved to France, and the ships traded from Marseilles. After a time issues arose between the company and its shipmasters, with the result that the French Courts appointed an administrator, and to this office the plaintiff Bourgeois eventually succeeded.

In September, 1922, owing to the general depression of the shipping industry, the Jupiter was laid up at Dartmouth in the charge of the master, a Captain Lépine. In March, 1924, while the vessel was so laid up, the master handed her over to the representatives in London of the Soviet Government. That step, he told the Court, was taken from patriotic motives. The plaintiffs alleged that he was influenced by bribes or threats.

In those circumstances an action was instituted in the Admiralty Division by the Compagnie Russe, claiming possession of the Jupiter. The Soviet Government, who defended the action, successfully pleaded "sovereign rights and privileges," and Mr. Justice Hill, on May 29, 1924, set aside the writ and stayed all proceedings in the action on the ground that the Jupiter was a Russian ship, and that the Russian Government, having asserted property in the vessel and declared its unwillingness to submit to the jurisdiction, could not be impleaded in the British Courts (*The Jupiter,* 40 *The Times* L.R., 673).

On July 17, 1924, the Court of Appeal upheld the judgment of Mr. Justice Hill (40 *The Times* L.R., 815; [1924] P., 236).

The Russian Government claimed to be the owners of the vessel under a decree for the nationalization of Russian merchant ships, and also asserted that the plaintiff company had no legal existence by reason of the operation of a Soviet decree for the liquidation of Russian private companies.

In September, 1924, the Arcos Steamship Company, Limited, on behalf of the Soviet Government, sold the Jupiter to an Italian company, the Cantiere Olivo Società Anonima. On October 8, 1924, the plaintiffs issued the writ in the present action, claiming against the Italian purchasers a declaration that the plaintiffs were the lawful owners of the vessel and that possession should be given to them, or, alternatively, judgment for the value of the ship, and damages.

The Soviet Government at once moved to stay proceedings in this action also, but the President, Lord Merrivale, who was upheld on appeal by the Court of Appeal (*The Jupiter* (No. 2), 41 *The Times* L.R., 321; [1925] P., 69), dismissed the motion, holding that the Russian State was not impleaded by the action, which was against an Italian company, and that the Admiralty Court had jurisdiction to entertain a claim by one foreigner against another foreigner for possession of a foreign ship that was within the territorial jurisdiction.

Mr. G. P. Langton, K.C., and Mr. K. S. Carpmael appeared for the plaintiffs; Mr. C. R. Dunlop, K.C., Mr. H. C. S. Dumas, and Mr. H. Murphy for the defendants.

Mr. Justice Hill.—In this action the plaintiffs claim possession of the steamship Jupiter. The ship at the date of the writ and arrest was lying at Dartmouth. The writ was originally issued in the name of the Compagnie de Navigation à Vapeur et de Commerce, which was stated in the writ to be a corporate body according to the laws of France, with their head office at 255, Rue St. Honoré, Paris. By subsequent amendments, three persons were added as plaintiffs, M. Bourgeois, M. Tcheloff, and M. Margoline, who were expressed to be suing on behalf of themselves and others, trading as the Compagnie Russe de Navigation à Vapeur et de Commerce. Appearance was entered by an Italian company—the Cantiere Olivo Società Anonima. The defence has been conducted in the name of that company by representatives of the Union of Socialist Soviet Re-

* Reported by A. W. Grant, Esq., Barrister-at-Law.

publics, commonly known, and hereinafter referred to, as the U.S.S.R. Three main questions have to be determined : first, whether the plaintiffs, or any of them, have given any authority to sue ; secondly, whether the plaintiffs, or any of them, had and have any such title to, or interest in, the ship as to give them the right to maintain an action of possession. The burden of those two issues is upon the plaintiffs. The burden of the third issue is upon the defendants. The third question is, assuming that any of the plaintiffs would otherwise have had any such title or interest, whether its acquisition has not been prevented, or its enjoyment destroyed, by a change in the property in the ship by virtue of Governmental Acts of the U.S.S.R., or its predecessors in sovereignty, the Italian company resting its right upon a transfer from the U.S.S.R., as owners, and alleging that the Jupiter had become the property of the U.S.S.R. The first question was raised upon motion to set aside the writ, and was referred by the Court of Appeal to this Court. Now that the facts have been ascertained, it is clear that no retainer has been given by the first-named plaintiffs. There is no such corporate body according to the laws of France as the Compagnie Russe de Navigation à Vapeur et de Commerce. There is, or was, a corporate body of which the head office and seat of control were in Petrograd, under a style of which the French title is a translation, known for short as Ropit. It never established a branch in France ; see the French decree of April 23, 1925. It was in controversy whether it is an existing corporation. If it is non-existing, it cannot sue. If it is existing it has given no authority to sue. The name of the Compagnie Russe de Navigation à Vapeur et de Commerce ought to be struck out of the writ as a separate plaintiff. A retainer by Messrs. Bourgeois, Tcheloff, and Margoline was not disputed. Affidavits were filed by each of them. This disposes of the question referred to the Court by the Court of Appeal.

I now pass to the issues in the case, and first as to the right of the remaining plaintiffs to sue, either on their own account or in a representative capacity. So far as is necessary for this part of the case, the facts are as follow :—In 1917 the Jupiter was one of a fleet of steamers owned by the Petrograd company —Ropit. The ships were registered at Odessa, and the management of them was entrusted to a managing director stationed at Odessa. In December, 1917, the Jupiter was at Odessa (see evidence of Alexieff), and was there also on January 26, 1918, and March 4, 1918, and remained there till April 9, 1919 (see admissions under date June 4, 1926). I am not quite sure that she was not there throughout all that period, but those are the specific dates mentioned in the evidence. I shall have later on to consider what was the political position of Odessa between November, 1917, and March, 1918 ; but for the present purpose it is enough to say that there was no settled form of Government there at that time. From March, 1918, to October or November, 1918, Odessa was in the occupation of the Austrians. From October or November, 1918, to April, 1919, Odessa was in the occupation of the French, together with General Denikin. On April 9, 1919, the Jupiter went to Constanza and thence to the United Kingdom, and thence to America (see evidence of Alexieff). She was never again in a Russian port (admissions under date June 4, 1926). Between August 28, 1920, and September 30, 1920, she was lying at Bordeaux (see admissions under date July 16, 1926). Except for this period she does not appear to have been in any French port. From Bordeaux she made a voyage to America and thence to the United Kingdom (see evidence of Lépine). She arrived in the United Kingdom in December, 1920, and was then laid up at Plymouth until September, 1922, and at Dartmouth from September, 1922, until March, 1924. On February 1, 1924, his Majesty's Government recognized the U.S.S.R. as the *de jure* rulers of those territories of the old Russian Empire which acknowledged their authority. On March 9, 1924, Jacob Lépine, who had been master of the Jupiter since August 30, 1920 (see his affidavit), handed the ship's papers to representatives in England of the U.S.S.R., and the U.S.S.R. took actual possession of the ship. Then followed a writ *in rem* for possession, which was set aside on the ground that it impleaded the U.S.S.R. (*The Jupiter*, 40 *The Times* L.R., 673, 815 ; [1924] P., 236). The Jupiter remained in the actual possession of the U.S.S.R., and in September, 1924, a contract of sale of the ship was entered into between the Arcos Steamship Company, Limited, and the Cantiere Olivo Società Anonima. The Arcos Steamship Company, Limited, was acting on behalf of the U.S.S.R. By this contract the Arcos Company guaranteed the buyers against claims by third parties. Actual possession was transferred to the buyers. On October 8, 1924, while the Jupiter still lay at Dartmouth, a claim for the return of the ship was made by the plaintiffs on the Cantiere Olivo Società Anonima, and was refused (see admissions under date June 14 and 18, 1926). The writ in the present action was issued on the same day.

When the Jupiter left Odessa in April, 1919, a number of other ships, which formed part of the Ropit Fleet, left at the same time. A number of them proceeded to France. By the summer of 1920 some persons were carrying on business in France under the style of Ropit, or of its French equivalent—the Cie. Russe de Navigation à Vapeur et de Commerce. They were managing from an office in Marseilles the Ropit ships which had left Odessa. I was given no precise information as to who those persons were. It would appear from the decrees of the French Courts that they included some who were shareholders in the Petrograd company, and the names of a few such shareholders were given by M. Bourgeois in his evidence. It would also appear from the decrees that Admiral Kanine was taking an active part in the management (see especially the decree of September 23, 1921, at page 35 of copy decrees). According to the evidence of M. Kriloff, Admiral Kanine had been a director of the Petrograd company. M. Alexieff, in his evidence, spoke of the management of the ships being in Admiral Kanine, under authority of Mr. Lefter, who had been managing director at Odessa of the Petrograd company, and who at about this time appears to have been carrying on business in the name of Ropit, at Sebastopol, then in occupation of General Wrangel. The French decree of December 3, 1920, throws doubt upon the authority of Admiral Kanine as derived from Mr. Lefter. All I can say is that there were in France a number of persons actually carrying on business under the name of the company, and actually managing the ships. The managing office was at Marseilles. There was also an office at Paris, which I gather was the head office. These persons had no communication with Petrograd, and did not act under any orders from any one in Petrograd. Nor did they recognize the authority of the Soviet Republics. Jacob Lépine was appointed master of the Jupiter on August 30, 1920 (see his affidavit). He had been in the service of Ropit for 26 years. He had left Odessa in another Ropit ship,

the Possadinky (see his evidence), and the French decree of June 8, 1920, shows that he was still master of that ship as late as June 8, 1920. It was not in so many words stated in evidence by whom he was appointed to the Jupiter. It is rather unfortunate that, instead of the master being called before me on the trial of this case, use was made of his affidavit, and there was cross-examination of him upon the original motion on the first application, and a cross-examination, of course, which was not directed to many of the points which called for elucidation when it came to the final trial of the case ; but I must make the best of the material I have got from him. He said that at Marseilles he was ordered to take over the command. Alexieff, who was appointed chief engineer of the Jupiter in September, 1920, said that he was appointed by the Marseilles office of Ropit. Lépine said that he was paid by the Direction in Paris. A number of his receipts were put in, dating from May, 1921, to March, 1924. They relate to payments for wages, food, allowances, and other laying-up charges. They read, "Received from the Marseilles office of the Russian Steam Navigation and Trading Company." I do not know whether they were copies or originals, as they were receipts given to a firm of agents in England.

Mr. Dunlop.—My friend reminds me that the originals were here in Russian, and I think we gave your Lordship the translations.

Mr. Justice Hill.—Then the receipts from the Marseilles office of the Russian Steam Navigation and Trading Company are a translation. On May 13, 1922, he signed an agreement adopting an agreement concluded in Marseilles on March 1, 1922, and expressed to be "between the Board of Ropit and the staff of the steamers." All I can definitely say is that Lépine was appointed master of the Jupiter by persons carrying on business in France under the style of Ropit or its French equivalent, and until March, 1924, he was paid by, and acted under the orders of, those persons, or of persons in France appointed under the French decrees to be presently mentioned. This at any rate is clear, that he was not appointed by the Petrograd office of Ropit, or by any one having the authority of the Petrograd company, if the Petrograd company still existed in 1920, nor was his appointment ever ratified and adopted by the Petrograd company. It is also clear that until the U.S.S.R. took possession in March, 1924, Lépine was in no sense the servant of the U.S.S.R.—he was not appointed or paid or controlled by it.

It is in my opinion important to understand the position of Lépine. One point made for the defendants was that the person in possession of the Jupiter in March, 1924, was Captain Lépine. This was put in different ways. One suggestion was that having been appointed master by the Petrograd company, and being unable to communicate with his principals, he possessed as *negotiorum gestor* of the Petrograd company. This suggestion falls to the ground when it is found that he never was appointed to the Jupiter by the Petrograd company. Another suggestion was that at common law the master of a ship has possession of it, as a bailee. Mr. Dunlop cited *Moore v. Robinson* (2 B. and Ad., 817), which accepted and applied *Pitts v. Gaince* (1 Salkeld, 10). But at the present day it is, in my opinion, impossible to regard the master as the bailee of a ship. In former days, when the master on a foreign voyage passed altogether beyond the control of the owners, and perhaps sold the outward cargo and brought a homeward cargo on owners' account, it might be possible to regard him as bailee of ship and cargo. Similarly, in the seventeenth century, the master seems to have been treated as the employer of the crew and responsible for the wages of the crew, and to have been responsible for their negligence (see Marsden, 6th Edition, page 63, note (*e*)). But to the conditions of modern commerce these considerations are quite inapplicable. The point is discussed by Pollock and Wright on Possession in the Common Law, at pages 60 and 138-9. After stating the rule that where an owner delivers a thing to a servant to be by him kept, used, carried or applied in the course of his employment as a servant . . . the master's possession continues, they add "it may be that it will sometimes as against strangers be treated as a possession in cases where the servant's charge is to be executed at a distance from the master and where the manner of the execution is necessarily left in a great degree to the discretion of the servant."

In my judgment, Captain Lépine never was in possession of the Jupiter nor had he at any time the right to possession. He was a custodian merely. The person for whom he was custodian was in actual possession. The question is for whom was Captain Lépine custodian ? This brings me to the decrees of the French Tribunals. It is by virtue of these decrees that Messrs. Bourgeois, Tcheloff, and Margoline contend that they had actual possession, and the right to possession, of the Jupiter in March, 1924, when, as they say, their servant, the master, wrongfully allowed the representatives of the U.S.S.R. to take possession. Lépine, as I have said, became master of the Jupiter on August 30, 1920. Four days later, on September 3, 1920, upon his application, the Commercial Tribunal of Marseilles appointed Maître Pelen "provisional administrator with power and mandate to watch over the interests of the Compagnie Russe de Navigation à Vapeur et de Commerce in the exploitation of the Jupiter." The Jupiter at the time was at Bordeaux, and not at Marseilles. Some question was raised before me as to the jurisdiction of the Marseilles Court, but upon the evidence I am satisfied that the decree of the Marseilles Court would be recognized as binding in France. A similar order had been made on June 8, 1920, with regard to six other Ropit ships, including the Possadinky, of which Lépine was the master, and it would appear from later decrees that similar orders were made with regard to other Ropit ships. There were a number of subsequent decrees, but the decree of August 30, 1920, was the only one made while the Jupiter was in France. The effect of these later decrees may be summarized as follows. I think it would be well to go through them, though it may be that the rights of the plaintiffs, if any, depend upon the decree of August 13. On October 3, 1920, Admiral Schramschenko and others, including Admiral Kanine, claiming to act in the name and on behalf of the Compagnie Russe de Navigation à Vapeur et de Commerce moved to set aside the decrees obtained by the masters of thirteen ships (of which the Jupiter was not named as one), but the Court rejected the motion and confirmed Maître Pelen as provisional administrator, and directed that he should consult with Admiral Kanine, and if necessary form a shareholders' committee of inspection. On appeal, the Court of Appeal, on June 20, 1921, confirmed this decree. On August 9, 1921, on the motion of John Cockerill, Limited, as creditors of the Compagnie Russe de Navigation à Vapeur et de Commerce, the Commercial Tribunal of Marseilles extended the powers of Maître Pelen as administrator of the ships (including by name the Jupiter) and extended his administration to other property of the company out-

side Russian territory. This decree was expressed to be made "in order to provide for the payment of the creditors of the company and the protection of the interests both of the navigating staff and the shareholders." On August 12, 1921, the Commercial Tribunal of Marseilles, by decree reciting *inter alia* that the Tribunal had appointed Maître Pelen provisional administrator of the ships, appointed M. Jaujon administrator with Maître Pelen. In his application Maître Pelen had included the Jupiter in the list of ships of which he was provisional administrator. On September 23, 1921, there came before the Commercial Tribunal at Marseilles a number of applications to vary the decrees of August 9, 1921, and August 12, 1921. These applications were on the part (1) of the captains interested, (2) of Admiral Kanine, (3) of the members of the Committee of Inspection which it appears had been constituted on January 28, 1921. Maître Pelen, M. Jaujon, and John Cockerill, Ltd., were also parties. The Jupiter is one of the ships enumerated in the judgment. A decree was made confirming Messrs. Pelen and Jaujon as "provisional administrators of the Ropit, but to discontinue their functions on the reconstruction of the said company," and directing them to form a board of directors to take the place of the Committee of Inspection, the board to be composed of the two provisional administrators, one member to be chosen by the captains of the ships, and two members to be chosen by shareholders. The board was given the widest powers, and especially those enumerated in the decree of August 9, 1921, and one of the provisional administrators was to be a party to all financial engagements and important transactions. Then follows a group of decrees of June 13, 1922, January 3, 1923, and January 25, 1923, the effect of which is that a M. Batellet was directed to be substituted for Messrs. Pelen and Jaujon as provisional administrator. From these decrees it appears that M. Tcheloff had been appointed by the captains as a member of the board of directors, and Messrs. Brodsky and Margoline had been appointed by the shareholders. The decree of January 25, 1923, conferred on M. Batellet all the powers conferred on Maître Pelen by the decree of August 9, 1921, and did away with the board of directors. From the recitals of the next decree it appears that in fact M. Batellet never acted, and that Messrs. Pelen and Jaujon continued to act as provisional administrators, and that Messrs. Tcheloff, Brodsky, and Margoline were anxious to continue as members of a board of directors. The decree is dated April 10, 1923. It appoints M. Bourgeois provisional administrator, in place of M. Batellet, of the property situated outside Russian territory of Ropit, and declares that the board of directors, consisting of the provisional administrator and of the Russian members appointed either by the shareholders or by the captains, shall have the fullest powers as regards the management of the affairs of the company, and in particular those referred to in the judgment of August 9, 1921, but the provisional administrator is to be a party to all financial engagements and important transactions. This is the last of the decrees before March, 1924. It is, however, necessary to add that on April 23, 1925, the U.S.S.R. applied to the Commercial Tribunal at Marseilles to cancel the decree of April 10, 1923, and allow the U.S.S.R. to retake possession of the vessels of Ropit. This was refused and the refusal was confirmed by the Court of Appeal on December 23, 1925. I mention this decree because the recital states that the provisional administration was for the purposes of attending to the interests of the shareholders of Ropit and the members of the crews, and to safeguard the interests of creditors, until it is possible for the legal owners of the property of Ropit to re-enter into possession of their property. I should add that M. Bourgeois was still provisional administrator in March, 1924, and so continues. Of the three elected directors, M. Brodsky is dead. But M. Tcheloff and M. Margoline were directors in March, 1924, and so continue. M. Bourgeois gave evidence before me. He said that he administered the Jupiter as he did the other ships; he paid the wages, &c.; he rendered his accounts annually to the Court. It appears from the decrees themselves that the provisional administrator was accountable to the Court.

What is the effect of the decrees as to the possession of the Jupiter? On this point I had the benefit of the evidence of French advocates. M. Allenes, called by plaintiffs, had no doubt that a provisional administrator has legal possession of property which he has to administer. He said that the decree of September 3, 1920, gave the administrator legal possession of the Jupiter. He said that the later decrees had the same effect. But these were made at a time when the Jupiter was not in France. The decree of September 3, 1920, was made while the Jupiter was in France. There may be difficulties in this Court's recognizing a right to possession given by a French Court to a ship which was neither French nor in French territory, and which never after the right was conferred came within French territory. But no such difficulty arises as to a decree made while the ship was in the jurisdiction of the Court which made it. If M. Allenes' view of French law is right, the decree of September 3, 1920, gave Maître Pelen the legal possession, the right to possession, of the Jupiter. M. Duhamel, called by the defendants, did not contradict this evidence of M. Allenes. He said that the decrees did not pass the property to the administrator. No one had suggested that they did. Indeed the decrees all proceed upon the assumption that the original company was still existing and that the property was in it, and they provide for administration until the legal owners re-enter into possession. Apart from the evidence of the French lawyers, I should be of opinion that the effect of the decree of September 3, 1920, was to give the appointed administrator the right to possession of that which he was to administer—namely, the ship. I know not how else he was to administer it. I infer from the decrees that there was some controversy between the masters of the ships and the persons carrying on the business in France, and that the administrator was at first appointed to prevent those persons from dealing with the ships as they chose. Afterwards the interest of creditors and shareholders was considered, and the conflicting claims of the masters and the shareholders were met by entitling each to appoint directors to assist the administrator. But throughout the administrator was maintained, under appointment by the Court, and was answerable to it, and all attempts to get rid of a judicial administration of the ships were rejected by the Court. I hold that the decree of September 3, 1920, gave to Maître Pelen the right to possession of the Jupiter, and that this was a possession on his own account and not as agent for the Petrograd company or anyone else. It was a possession under the Court. The administrator was appointed by the Court, could only be discharged by the Court, rendered accounts to the Court, and was answerable to the Court for his administration. His possession was none the less his own possession because it was for the purpose of preserving the ship for the true owners. Maître Pelen continued to be

sole administrator until August 12, 1921. From that date to the appointment of M. Bourgeois on April 10, 1923, he and M. Jaujon were co-administrators. This covers the period of the Jupiter's voyage from Bordeaux to America and thence to the United Kingdom, and her laying up at Plymouth and transfer to Dartmouth, and part of the time she lay there. For the rest of the time at Dartmouth up to March, 1924, M. Bourgeois was administrator. If I must give effect to the decree of September 3, 1920, I think I must equally give effect to the later decrees so far as they merely substitute one person for another as administrator. It seems to me that the jurisdiction of the French Court to make such substitution does not depend on whether the Jupiter was or was not in France at the time they were made. If I am wrong in this, the difficulty would be removed by the addition of Maître Pelen as a plaintiff, in the alternative. The legal position would in that case be this : right to possession of Maître Pelen under the decree of September 3, 1920, and ship in custody of those who at his request were appointed to exercise his rights, because the substitution is made at the instance of M. Pelen. The point is, therefore, one of form and not of substance. The result is that I hold that M. Bourgeois was entitled to possession of the Jupiter in 1924. If so, it is not of much importance whether the right to possession belonged to M. Bourgeois only or to M. Bourgeois jointly with Messrs. Tcheloff and Margoline. The evidence of the French lawyers was not, I think, directed to this point. On the whole I have come to the conclusion, with some doubt, that the right of possession was in M. Bourgeois only. It follows that the custody of Captain Lépine was for M. Bourgeois, as it had previously been for Maître Pelen. Captain Lépine was under the orders of and paid by the administrator for the time being, and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages, who else could have dismissed him ? If he had incurred liabilities for necessaries on account of the ship, who else but the administrator would have been liable *in personam* ? If all this that I have just now said does not apply to the administrator alone it applies to the administrator together with the other members of the Board—namely, Tcheloff and Margoline. But, as I have said, I think it is the administrator alone. The practical effect is just the same in my view, whatever the rights of M. Bourgeois alone were, or those of Bourgeois, Tcheloff, and Margoline ; it is a mere question, who recovers the judgment ? It is quite enough for the plaintiffs if one recovers, or if all three, if they are entitled to recover.

The result of these considerations is that in March, 1924, when Lépine allowed the U.S.S.R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lépine may have acted as a loyal subject of the U.S.S.R, but he betrayed his trust to his employers. *Prima facie* the act of Lépine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court. When this fact—possession and right to possession in this country—is grasped, a good deal of the argument as to the right to sue, based upon a consideration of the cases of *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse and Others* (40 *The Times* L.R., 837 ; [1925] A.C., 112) ; *Banque Internationale de Commerce de Petrograd v. Goukassow* (40 *The Times* L.R., 837; [1925] A.C., 150); and of *Employers' Liability Assurance Corporation v. Sedgwick, Collins and Company* (42 *The Times* L.R., 749 ; [1927] A.C., 95), is not material. If M. Bourgeois had possession, and the right to possession, here, and was dispossessed here, there can be no question as to his right to sue here. Judgment must be pronounced in his favour, unless the Cantiere Olivo Società Anonima can show that the U.S.S.R., who sold the ship to them, had a superior title. It is upon the title of the U.S.S.R. that the Cantiere depend. It is not said the Petrograd company is still the owner of the Jupiter, or that it, as owner, has a superior title to the possessory title of M. Bourgeois, or that the condition of the French decrees, viz., the re-entry of the Petrograd company into possession, has been fulfilled. The defendants' case is that before March, 1924, the Petrograd company had ceased to exist, and that all its property, including the Jupiter, had passed to the U.S.S.R.

Before I deal with that part of the case, it will be well to dispose of the suggestion that, apart from a right by virtue of the French decrees, Messrs. Bourgeois, Tcheloff, and Margoline are in some way entitled to sue in a representative capacity. I am unable to find any facts on which such a claim can be based. Before I can recognize such a claim, I must know whom they represent and find that the persons they represent were entitled to possession of the Jupiter. But the evidence leaves me very much in the dark. I know that there were some shareholders of the Petrograd company in France, but have no satisfactory evidence who they were. And I have nothing upon which I can find that they had or were entitled to possession. Indeed, the main contention of the plaintiffs, possession by the administrator, is inconsistent with possession by other persons. The decrees themselves show that the possession by the administrator was adverse to a possession by the persons in France, whether shareholders or others, who, before the appointment of an administrator, were managing the ships in France.

I now come to the question whether a title superior to that of the administrator has been established. The Cantiere Olivo Società Anonima set up a superior title derived from the U.S.S.R., as owners. Strictly the transfer to the Cantiere was not proved—for the contract of sale contemplated a bill of sale, and the bill of sale was not produced. It was said that it was with the authorities in Italy, and could not be produced. But no certified copy was produced. The point, however, is not material. In any case the Cantiere Olivo have to establish the right of the U.S.S.R., and are entitled to rely on the right of the U.S.S.R., from whom they derive possession, and upon whose title and by whose authority they are defending (see *Biddle v. Bond*, 6 B and S., 225, and *Rogers v. Lambert*, 7 *The Times* L.R., 69; [1891] 1 Q.B., 318). This consideration makes it unnecessary to examine matters to which much evidence was directed, namely, the form of the authority of the Arcos Company to sell, and the form of sale required by Russian law. What is pleaded is that by virtue of a decree of the Soviet Government of January 26, 1918, the Jupiter became the property of the Soviet Government, and that by virtue of a decree of March 4, 1919, the Petrograd company ceased to exist. Evidence was given on the one side and the other by a number of Russian gentlemen, some of them lawyers, upon

matters of law and the constitutional history of Russia since 1917 ; there was also evidence as to what was done in the carrying out of the decrees. My difficulty, in dealing with this conflicting evidence upon matters which are in themselves obscure, is increased by the fact that these witnesses were not even agreed as to the correct translation of documents put in evidence.

But before I come to these witnesses I have to consider the point made by Mr. Dunlop, which, if sound, concludes the matter, and relieves me from any further consideration of the evidence. It is therefore naturally a very tempting proposition. An affidavit by M. Christian Rakovsky, sworn on November 25, 1924, was put in. He stated that he was Chargé d'Affaires for the U.S.S.R., and that at the time of the sale to the Cantiere Olivo Società Anonima the U.S.S.R. was in possession of the Jupiter and the owner, and entitled to the ownership, of such vessel. Mr. Dunlop's contention is that that statement by the representative of the U.S.S.R. is conclusive as to the facts stated and must be accepted by this Court. This contention was before the Court of Appeal on the hearing of the motion to set aside the writ in this action, and was referred to by Lord Justice Atkin (41 *The Times* L.R., at p. 323 ; [1925] P., at p. 78). What authority is there for the proposition that in the Courts of this country the declaration of a foreign sovereign is conclusive evidence that personal property in this country was or is the property of the foreign sovereign ? I believe that that proposition holds good only in the case where the jurisdiction of the Court, or other jurisdiction of the Crown, is sought to be enforced against property, and in such cases is limited to the declaration that the property is the property of the foreign sovereign. It is involved in the principle that a foreign sovereign and his property are immune from the jurisdiction of the Crown, unless the foreign sovereign chooses to submit to it. Professor Dicey, Conflict of Laws, 3rd Edition, page 217, after stating the rule as to the immunity of a foreign sovereign from the jurisdiction, says : "The immunity, moreover, applies to the property of the sovereign to the fullest extent, provided that the property is shown to belong to the sovereign." But where jurisdiction is invited over property in this country as, for instance, by a writ *in rem*, the declaration of the foreign sovereign that the property is his must be accepted, for to investigate the truth of that declaration would be to determine the very question of jurisdiction which is in issue, and to exercise jurisdiction over the foreign sovereign, which the Court cannot do against the will of such sovereign. I have always so understood and in many cases applied the judgment of Lord Justice Brett in *The Parlement Belge* (5 P.D., 197). But what authority is there for saying that where no question of immunity from jurisdiction is involved the declaration of the foreign sovereign as to the ownership of property must be accepted ? And on what principle can such a rule be based ? Let me, first of all, consider it on principle. Suppose the foreign sovereign did not claim immunity and submitted to the jurisdiction, and the question before the Court was whether the property was, or was not, in the foreign sovereign, must the declaration of the foreign sovereign be accepted as conclusive ? If so, then the declaration of a foreign sovereign would have greater weight than a declaration made on behalf of the King. In a question between the Crown and a private person as to the property in chattels here, it surely would not be conclusive if a minister of State made oath that the property was in the Crown. *A fortiori*, is the declaration of a sovereign to be accepted as conclusive when a question as to property is litigated between private persons, and the evidence produced by one of them is a declaration by a sovereign that the property had been in it? Moreover, if the declarations of a sovereign as to the ownership of property, not made for the purpose of securing immunity from jurisdiction, are to be conclusive, there is no reason why the same force should not be given to all other declarations. Why call foreign lawyers to prove the fact or the effect of foreign law, if a simple declaration by the representative of the foreign sovereign would be conclusive ? What was the necessity of the Evidence Act, 1851 (14 and 15 Victoria, c. 99, section 7), so far as foreign acts of State were concerned, if already such acts of State were conclusively provable by a declaration of the representative of the foreign sovereign ? Even if the question in issue be the passing of property locally situate in a foreign country, is it clear that the declaration of the foreign sovereign is conclusive? Undoubtedly property passes according to the law of the place where it is situate. But if it is said to have passed by an act of State of the foreign sovereign, is that not a fact which must be proved in the ordinary way by proof of the act of State, of its application to the property, and of the local situation of the property ? For instance, the property in a ship is said to have passed under a sale by a maritime Court, following a judgment *in rem*. Must not the judgment be proved ? I cannot believe that a declaration by the representative of the sovereign of the Court which condemned the ship must be accepted as conclusive proof. In every such case the question seems to me to be one of fact, to be determined by evidence. The act of State must be proved by lawyers, unless it can be proved as provided by the Evidence Act, 1851. The meaning and the application of the act of State must also be proved by lawyers. The question whether the property or person alleged to be subject to the act of State was within the territory of the sovereign where the act is in question, is equally a matter of fact to be proved by evidence. And on all three points it seems to me that the evidence of the representative of the sovereign carries no more weight than that of any other competent witness.

Mr. Dunlop relied upon what was said by Lord Justice Scrutton in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor and Company* (37 *The Times* L.R., 777, at pp. 782-3; [1921] 3 K.B., 532, at pp. 555-6). The decision in *Sagor's* case (*supra*) is not in point, for the decree of the Russian Socialist Federative Soviet Republic admittedly had, and it was treated as having, the effect of nationalizing the goods in question, which at the time the decree was passed were admittedly within the territory of the R.S.F.S.R. The decision only applied the principle that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country. Lord Justice Scrutton points out that if the Russian Government had itself brought the goods into this country, and by its representative declared that they were the property of the Russian Government, the Courts here could not investigate the truth of the allegation. This I understand to refer to a claim against the Russian Government. It is a statement of the rule that the Russian Government is immune from the jurisdiction of our Courts. It is impossible, he says, to recognize a government,

and yet claim to exercise jurisdiction over its person or property against its will. He says further, and it is on this that Mr. Dunlop relies, "If it (the Court) could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign State." I am not sure that I follow the use of the word "immunity" in this connexion. Immunity, as I understand it, means immunity from jurisdiction. But the words are spoken with reference to an admitted state of facts, namely, that the goods were in the territory of the Russian Government, and while there became subject to an act of State of that Government, whereby they became the property of the Russian Government. In such a state of affairs our Courts could not deny that the Government could confer a good title to the property. It is governed by the general principle that every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of another done within its own territory. In my opinion, nothing that was said in *Sagor's* case (*supra*) establishes Mr. Dunlop's proposition. In *Vavasseur v. Krupp* (9 Ch. D., 351) the Court did not consider an argument directed to show that the shells were not the property of the foreign sovereign, and pronounced it to be fallacious ; though, as the proceedings were really directed against the shells, and the representative of the foreign sovereign declared them to be his property, it would look as if the case might be within the principle of *The Parlement Belge* (*supra*), to which I have already referred. *Vavasseur v. Krupp* (*supra*) was decided the year before *The Parlement Belge* (*supra*). I hold that M. Rakovsky's declaration is not conclusive.

I must consider the evidence to see whether the Jupiter became the property of the U.S.S.R. or of any one of the Republics which together form the Union. The two which are material are the Russian Socialist Federative Soviet Republic—the R.S.F.S.R.—and the Ukrainian Socialist Soviet Republic, which I will refer to as the Ukrainian S.S.R. If I understand the defendants' case, it is put thus : Firstly, that the decrees of the R.S.F.S.R., which were acts of State having legislative effect, made on January 26, 1918, and March 4, 1919, dissolved the Petrograd company and transferred all its property, including the Jupiter, wherever that property was situated, to the R.S.F.S.R.; secondly, that if the decrees did not in themselves dissolve the company and transfer the property, they provided for the liquidation of the company and the transfer of the property, wherever situated, and that long before March, 1924, the liquidation was completed and the transfer made.

These two contentions are independent of the question whether the Jupiter ever was within the territorial sovereignty of the R.S.F.S.R. They are based upon the fact that the head office of the company was in Petrograd, which undoubtedly was within the territorial sovereignty of the R.S.F.S.R.

Thirdly, they say, as an alternative, that in the end of 1917 and the beginning of 1918 political power in Odessa was in the hands of Soviets there, and that they, acting as members of, or recognizing the sovereignty of, the R.S.F.S.R., seized the ships, and thereby made them the property of the R.S.F.S.R., or that their seizure, if made before the decree of January 26, 1918, was nevertheless a seizure for the R.S.F.S.R., and that the decrees, coupled with the seizure, transferred the property to the R.S.F.S.R.

Fourthly, it is said, as a further alternative, that the Soviets at Odessa seized the ships as an independent sovereign, and that the Ukrainian S.S.R., which subsequently came into existence and exercised sovereignty in Odessa, is to be regarded as the successor of those who so exercised sovereignty in Odessa at the end of 1917 and the beginning of 1918.

These third and fourth contentions have regard to the fact that the Jupiter was at Odessa. In considering these, it is vital to remember that from March, 1918, to April 9, 1919, though the Jupiter was at Odessa, yet Odessa was not territorially within the sovereignty of either the R.S.F.S.R. or the Ukrainian S.S.R. (which indeed had not come into existence), or of any persons to whom they can be regarded as successors in title, nor within the sovereignty of any persons who were of Bolshevik principles, or minded to confiscate private property. Whoever the persons were who seized the ships before March, 1918, they exercised no sort of political power in Odessa during the occupation of the Austrians and the French, except possibly for a few days in the autumn of 1918, between the Austrian and the French occupations ; and before the French left the Jupiter had already left Odessa, and was never thereafter within the territory of either the R.S.F.S.R. or the Ukrainian S.S.R.

As to the first contention, it seems to me that the decrees as to shipping enterprises of January 26, 1918, and March 4, 1919, go no further than the decrees as to banking and insurance enterprises, which were considered by the House of Lords in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse and Others* (*supra*), as to banking, and in *Sedgwick, Collins and Co. v. Rossia Insurance Company, of Petrograd* (*supra*), as to insurance. To adopt the words of the Lord Chancellor in the *Rossia* case (*supra*) the decrees for nationalizing shipping companies, which have been put in evidence, were, at least, not stronger than the decrees for nationalizing banking and insurance companies. If so, they did not in themselves dissolve the Petrograd company, but merely at most provided for its liquidation. The question whether they nevertheless transferred at once the property of the company was the second question mentioned by the Lord Chancellor in the *Mulhouse* case (40 *The Times* L.R., at p. 839 ; [1925] A.C., at p. 119), "Have they proved that the property in the bonds in dispute is no longer in the appellant company ?" But the Lord Chancellor (at pages 842 and 129) said it was unnecessary to consider the question, for counsel had deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country. Mr. Dunlop has not refrained from contending that the effect of the decrees was at once to transfer to the R.S.F.S.R. the property in the ships of the company, wherever situate.

Two questions are here involved : First, whether they at once transferred the property ; and, secondly, whether they transferred the property, though it was not locally situate within the territory of the R.S.F.S.R. As to the first, it seems to me that if the decrees only provided for the liquidation of the company, they equally only provided for the ultimate transfer of the property upon the completion of the liquidation. I express this view with some hesitation, because I observe that in *Employers' Liability Assurance Corporation v. Sedgwick Collins and Co.* (*supra*) Lord Sumner treats the *Mulhouse* case (*supra*) as deciding that the decrees as to banking

companies "did not dissolve the companies themselves, but only stripped them of their assets and destroyed their good will by making banking a State monopoly."

If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so.

As to the second question—that is, the question whether the decrees, when they operated, if they did not dissolve the company, provided for the liquidation of it and the transfer of its property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. If the Jupiter was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases : see, for instance, *per* Lord Justice Atkin in *Goukassow's* case (39 *The Times* L.R., at p. 576 ; [1923] 2 K.B., at p. 693) ; *per* Lord Justice Sargant in *Sedgwick, Collins and Company's* case in the Court of Appeal (41 *The Times* L.R., at p. 666 ; [1926] 1 K.B., at p. 15), and *per* the Lord Chancellor in *Sedgwick, Collins and Company's* case in the House of Lords (42 *The Times* L.R., 749 ; [1927] A.C., 95). The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation. I am strengthened in this opinion by the view taken by the R.S.F.S.R. itself, as set forth in two circulars. The first, No. 42, is dated April 12, 1922, and was addressed by the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R.S.F.S.R. abroad. It sets forth that "the *régime* of property rights established by decrees of the Russian Soviet Power regulates property relations on the territory of the R.S.F.S.R. only," and continues : "But relations in connexion with property rights where the objects thereof are outside the territory of the R.S.F.S.R., and are not connected with such territory, cannot be discussed outside the boundaries of the R.S.F.S.R. in accordance with Russian laws, and are determined by local legislation without regard to the nationality of the subjects of such rights, even if such subjects were Russian citizens."

The second, No. 194, is a circular under date September 26, 1923. It is issued by the People's Commissariat of Justice to all District Courts. It was issued after the union of the R.S.F.S.R. and the Ukrainian S.S.R. had been formed, but in terms applies only to citizens of the R.S.F.S.R. It states that "property rights of citizens of the R.S.F.S.R., which have to be enforced outside the boundaries of the U.S.S.R., are to be determined by the laws of the country where such rights are to be enforced." These circulars show that the R.S.F.S.R. recognize and enforce the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular they recognize that the nationalizing decrees do not operate upon property outside the territory of the R.S.F.S.R.

It will be convenient to examine the question whether the Jupiter ever was within the territory of the R.S.F.S.R. when I consider Mr. Dunlop's third contention. But I may at once say that I find, for reasons to be stated presently, that it is not proved that the Jupiter ever was within the territory of the R.S.F.S.R.

As to the second contention, the view that the decrees could not transfer property which was not in the territory of the R.S.F.S.R. applies equally whether the liquidation was completed or not. Moreover, at the date of completion, if completion ever took place, the Jupiter certainly was not in territory of the R.S.F.S.R., even supposing that Odessa was in such territory, from November, 1917, to March, 1918. The liquidation is said to have been completed in December, 1918, at a time when Odessa, where the Jupiter lay, was in the occupation of the French and General Denikin. If it was completed by December, 1918, I am puzzled by the defendants' insistence on the decree of March 4, 1919. The defendants' evidence on this point is that of M. Kriloff and the file of the company at Petrograd, which he produced. These documents show clearly that up to November, 1918, the liquidation of the company had not been completed, but M. Kriloff said that he was a member of the board of Ropit from 1913, that after the decree of January 26, 1918, some of the former directors remained at Petrograd, and other directors were elected from the Petrograd staff of the company and from the staff of the Petrograd agency of the company, that a Commissary was appointed by the authorities—he did not know by whom—and that in December, 1918, they handed over all the books and documents to officials of the Supreme Council, and the board was dissolved. But it is certain that up to this time the ships of the company, other than those which were in Petrograd, or else were in the north of Russia, had not been got into the possession of the R.S.F.S.R., and it therefore would look as if the chief part of the liquidation was still to be done. I am not able to find affirmatively that the liquidation was completed before the Jupiter left Odessa in April, 1919. I do not know that it would be against the interest of the plaintiffs if it were proved that the liquidation was completed in December, 1918. The Jupiter was at that time not within the territory of the R.S.F.S.R., for reasons which I shall presently state, and the result of a completed liquidation might be that the Ropit ships became *bona vacantia,* and the property of the first occupants, who were the persons who brought them to France. It is, however, the view of Mr. Machover and Dr. Idelson that ships in the territory of the R.S.F.S.R. were nationalized before 1924. If so, the Jupiter, had it been within that territory, would have become the property of the R.S.F.S.R.

That brings me to Mr. Dunlop's third contention : Can Odessa be regarded as having at any material time been within the territorial sovereignty of the R.S.F.S.R. ? In March, 1924, and to-day, Odessa is within the territory not of the R.S.F.S.R. but of the Ukrainian S.S.R. It has been within the territory of the Ukrainian S.S.R. ever since that Republic came into existence as a sovereign State. M. Glouschenko said that since the Ukrainian S.S.R. was established it has always exercised jurisdiction over Odessa. M. Poushkine said that a Soviet form of Government was established in Odessa at the end of April, 1919, after the French left, and that thenceforward Odessa was in control of the Ukrainian S.S.R. (except that General Denikin's troops occupied it from August, 1919, till February, 1920). On December 28, 1920, a formal agreement of alliance was entered into between the R.S.F.S.R. and the Ukrainian S.S.R. which recognized the independence and sovereignty of each contracting party. On December 30, 1922, these two Republics as sovereign States entered into a treaty with the White Russian S.S.R. and the Transcaucasian S.S.R., and on July 6, 1923, the constitution of

the four Republics was agreed and the Union—the U.S.S.R.—created. It thus appears that the sovereignty of the Ukrainian S.S.R. and that of the R.S.F.S.R. are quite distinct—though for certain purposes the two Republics act together—and that from April, 1919, the only sovereign of Odessa has been the Ukrainian S.S.R. During the French occupation and the Austrian occupation, whoever was the sovereign, it was not the Ukrainian S.S.R. (which had not come into existence) nor the R.S.F.S.R., nor any form of Soviet authority; during that period there cannot have been any persons exercising political authority to whom the Ukrainian S.S.R. must be treated as successors—still less any to whom the R.S.F.S.R. must be treated as successors.

What was the position between November, 1917, and the occupation by the Austrians in March, 1918? Several witnesses have given an account of what happened. It is perhaps not surprising that they do not agree. The political position was very confused. In the first place, on November 17, 1917, a Ukrainian Socialist Republic—not a Soviet Republic—was proclaimed, and on January 11, 1918, its Government issued a manifesto declaring an independent sovereign State of the Ukrainian people. Mr. Machover said that it had its own army and financial and judicial system. Its seat of Government was Kief. Its representative body was the Rada. On November 4, 1917, the Council of People's Commissaries of the R.S.F.S.R. passed a decree, which is in the nature of a remonstrance and almost an ultimatum to the Ukrainian Rada. The significance of this is that the document recognizes the Ukrainian People's Republic while complaining that the Rada does not recognize the authority of Soviets in the Ukraine. There is also the significant fact that the Ukrainian People's Republic was a party, as also was the R.S.F.S.R., to the Treaty of Brest-Litovsk, concluded with the Central Powers in February, 1918. The witnesses on the one side and the other differ as to whether Odessa was within the Ukraine, and whether the Rada exercised any authority there. The Rada claimed sovereignty over Odessa, and the R.S.F.S.R. refused to admit the claim; there were discussions between the two Governments during 1918, which ended in neither giving way (see Poushkine's evidence). So long as Odessa was in the occupation of the Austrians or French, these discussions related to the future and not the present. There is the evidence of Poushkine and Schvettau that during the Austrian and French occupations (March, 1918, to April, 1919) the Rada exercised some authority in Odessa. But I can find no evidence that it exercised any effective authority from November, 1917, to March, 1918. Mr. Machover said that from November, 1917, to November, 1918, the Ukraine was in a state of civil war with a Soviet or Bolshevik party in most places. I think the proper inference from the evidence of Alexieff and others is that the Soviet or Bolshevik party in Odessa were masters of the town and port from November, 1917, till the arrival of the Austrians in 1918. It is, however, a long step from that fact to saying that that party was exercising the sovereignty of the R.S.F.S.R., whose seat of government was in Petrograd or Moscow. The evidence altogether fails to satisfy me that I ought to take that step.

The conclusion at which I am inclined to arrive is that the persons who seized the ships in Odessa were acting on their own account and independently of any sovereign, or as exercising sovereignty on their own account, imitating, it may be, the proceedings of the revolutionary government in Petrograd, but not acting in obedience to it or as if they were members of the political society ultimately designated as the R.S.F.S.R. At best, I am left in doubt. The defendants have failed to prove that which it was for them to prove. What is their evidence? Alexieff began by saying that in December, 1917, the sailors at Odessa nationalized all the vessels. He then said that this was done by the Council of Nine. He said that a Soviet form of government was already formed in Odessa by October, 1917, and that a Council of Nine was appointed by the supreme organization, the executive of Soviets in Odessa; that the Council of Nine called upon the Union of Sailors to appoint an Economic Commission; and that this Commission took an inventory of the ships and handed over all the documents to the Council of Nine, and the Council of Nine then worked the ships and paid the wages of the crews. He says that the nationalization was completed in February. All that Alexieff says about Petrograd is that the Soviets in Odessa were in touch with Petrograd and sent delegates to a congress of Soviets at Petrograd in 1917—he thinks after the second conference in October, 1917. He made no reference to the decree of January 26, 1918.

M. Glouschenko says there was a Soviet in Odessa after October, 1917, chosen by the various Unions of Workmen and Soldiers, and that it sent delegates to two congresses of Soviets in Petrograd. He says that the decree of January 26, 1918, was published in Odessa on the following day, and was put in force in Odessa by the Council of Nine, which was appointed by the Soviets in Odessa. He also says that at the end of November, 1917, he and three others were sent by the office of the Ropit, whose managing director was still in Odessa, to get money from the Council of People's Commissaries at Petrograd, and that he got it and brought it back to Odessa; and that there was continuous communication between Odessa and Petrograd. He said also that the military force in Odessa was provided by the Soviets in Odessa. I find it very difficult to reconcile this evidence with much of Alexieff's. If the nationalization was begun in December, 1917, how was it done under the decree of January 26, 1918? If Odessa sent to Petrograd and obtained money for the working of the ships, it is remarkable that M. Kriloff, who continued to act at the head office in Petrograd, knows nothing about it. He said: "I do not remember if we asked for money for Odessa or got any." Further, contradicting Glouschenko, he says that in the early part of 1918 there was no post or telegraph or railway communication between Odessa and Petrograd. The file of the Ropit Company supports this. It shows how little Petrograd knew of what was taking place at Odessa. On February 16, 1918, there is a minute of a decision "to get into contact with the South"; and on March 30, 1918, there is a report of all the information received from Odessa, which was meagre, but, so far as it went, agrees rather with Alexieff's account than with Glouschenko's account. It reads as follows: that "on January 6 the Odessa section of the Sailors' Union proclaimed the entire fleet of the Russian company the property of the union. Later on the democratic organizations and the professional unions of Odessa acknowledged that the Sailors' Union is to be regarded as a transitory measure to the nationalization of the fleet of the Black Sea and the Sea of Azof. To safeguard the same as a national property, on January 12 a Council of Nine was formed for the general management of the affairs of all waterways and transport in the region indicated above. This Council of Nine was composed of representatives

of the following democratic organizations," and he mentioned them. "The said Council of Nine proposed to Ropit that they should continue their service under the council's control and guidance, which the Odessa administration consented to do. The board has no further information about the affair." I am not quite clear whether the dates are old or new style; but at any rate they are all dates before January 26, 1918.

M. Schvettau said that in the autumn of 1917 the Government of Odessa changed to a Government of Soviets, and that in the beginning of 1918 the Soviet Government was in actual control of Odessa, and that it appointed a Commissar to the University. All that this comes to is that there was a Soviet form of government at Odessa at that time.

M. Poushkine was not at Odessa. He said that in 1918 the position at Odessa was very peculiar and that the R.S.F.S.R. was very anxious to retain power over the Black Sea ports. His evidence does not help me on the point now under consideration. M. Krougliakoff was of opinion that from November, 1917, to March, 1918, the Soviets at Odessa exercised power, acknowledging the sovereign authority of the supreme Soviet power in Petrograd. But he gave no facts to support his view. His view was based on the assumption that the Petrograd Government succeeded to the sovereignty over all the territories which had been territories of Imperial Russia. There is nothing to justify this assumption. As a lawyer's view it is opposed to the lawyer's view of Dr. Idelson that the R.S.F.S.R. never was sovereign of any territory except Northern Russia.

In the course of the evidence there was put in a decree dated December 1, 1917, which is described as a "Decree of the Second All-Russian Congress of Soviets of Workers, Soldiers, and Peasants' Deputies respecting the establishment of the Council of People's Commissaries." This is one of the congresses of Soviets held in Petrograd. It is difficult to regard these congresses as having sovereign power. They are rather in the nature of meetings of delegates of party organizations. The congress is styled an All-Russian Congress of Soviets. But on December 1, 1917, for reasons which I have already stated, no Soviet organization had sovereignty in the territory of the Ukrainian Socialist Republic. If the Soviets in the Ukraine sent deputies to the congress of December 1, 1917, they were not there as members of a sovereign body. Similarly, if the Soviets in Odessa sent delegates to the congress, it does not follow that they attended as members of a sovereign body. The decree contemplates the convening of a Constituent Assembly. The evidence was that such an assembly was convened in Petrograd in January and came to no decision and was no more heard of. There is no evidence that the Soviets in Odessa sent delegates to this assembly. The decree says that the management of separate branches of State life is given to committees, and that the governing power belongs to the Collegium of Chairmen of these Committees, that is, the Council of People's Commissaries, subject to the All-Russian Congress of Councils of Workmen, Peasants, and Soldiers' Deputies and its Central Executive Committee. There is no evidence that the Soviets of Odessa ever sent a chairman of this committee to Petrograd as a member of this Collegium.

The decree of January 26, 1918, on which the defendants rely, is expressed to be a decree of the Council of People's Commissaries. It provides for the appointment of commissaries to take charge of the shipping companies' offices. There is no evidence that that was done by the Soviets at Odessa. Those Soviets had in fact begun to seize the ships on their own account long before the decree of January 26, 1918, and after the decree of January 26, 1918, they continued to do it in their own way, without regard to the decree of January 26, 1918, until in March, 1918, their activities were put an end to by the arrival of the Austrians.

I was also referred to a copy of a paper, "The Voice of Revolution," of March 9, 1918. Its office was in Odessa. M. Glouschenko said it was the official paper of the Soviets. It styles itself "Organ of the Executive Committee of Soviets of Workers', Soldiers', and Peasants' Deputies of the Rumanian Front and Region." It reports some decrees or orders made in Petrograd and speaks of the Russian Republic. This is a small bit of evidence to support the view that the Soviets of Odessa recognized the sovereignty of the persons in power at Petrograd. But it carries me a very little way.

Taking the evidence as a whole, and I think I have set out the whole of the evidence, I am quite unable to find that Odessa was at any time within the territory of the R.S.F.S.R. or of the revolutionary government of Northern Russia which afterwards took definite form as the R.S.F.S.R.

As to Mr. Dunlop's contention, the persons who seized the ships—whether the Sailors' Union or some association of Soviets in Odessa—either seized them as robbers or seized them as an independent sovereign and made them the property of that sovereign. But their sovereignty, if sovereignty it was, came to an end in March, 1918, and was never revived. And how can I regard the Ukrainian S.S.R. as their successors? There was a complete break. No doubt, if a Government originates in revolution and is then established as a Government, and is then recognized by this country, the recognition is retro-active and recognizes the acts of the Government from its beginning (see *Sagor's* case, [1921] 2 K.B., at pages 543 and 549). But that supposes a continuity in the governmental activities of the persons so recognized. What was the beginning of the governmental activities of the Ukrainian S.S.R.? Certainly there were none in Odessa until after the Jupiter had left Odessa. I can see less reason for saying that a seizure by the Soviets in Odessa resulted in the property in the ships being in the Ukrainian S.S.R. than for saying that the retaking of the ships by the persons who controlled them during the occupation of the Austrians and the French, and ultimately removed them to France, vested the property in those persons.

In my judgment the defendants have not shown that the property in the Jupiter ever was in the U.S.S.R. or any of the Republics forming the U.S.S.R. In my view, therefore, each of these contentions fails, and the defendants have not discharged the burden which rested upon them on this part of the case.

The result is that my judgment is that M. Bourgeois in March, 1924, was wrongfully deprived of his possession, and that no one has established any title superior to that of M. Bourgeois. In arriving at this conclusion, I have not considered it necessary to consider how far the Ukrainian S.S.R. adopted, or by what means the Ukrainian S.S.R. adopted, the legislation of the R.S.F.S.R. There may be some other matters that were discussed before me which I have not considered, but if I have not considered them it is because in my view the conclusions at which I have arrived make it unnecessary for me to consider them. I find that M. Bourgeois has made out a *prima facie* right and is entitled to judgment unless a superior

right is made out. No superior right has been made out, and therefore M. Bourgeois must have judgment for possession.

MR. JUSTICE HILL, on January 20, directed that the name of the Compagnie Russe de Navigation à Vapeur et de Commerce, as plaintiffs, should be struck out of the writ, and he formally pronounced against the claims of the plaintiffs Tcheloff and Margoline. He granted a declaration that the plaintiff Bourgeois was entitled to possession of the Jupiter at the date of the writ, and gave judgment for him against the defendants and their bail for £7,800, with costs. He refused the application of the plaintiff Bourgeois for interest, as damages, because he thought that it was a matter of mere speculation whether the plaintiff would have been in any better position if he had had possession of the ship in October, 1924, rather than of £7,800 now.

On the application of Mr. DUNLOP a stay of execution was granted, provided that notice of appeal was entered within four weeks.

[Solicitors—Messrs. William A. Crump and Son; Messrs. Wynne-Baxter and Keeble.]

Chan. Div. (Romer, J.) } 1927. Jan. 19.

PROFESSOR DR. G. JAEGER v. THE JAEGER COMPANY, LIMITED.*

Trade name—Passing off—Jaeger clothing—Change of meaning of word "Jaeger"—Confusion—Injunction.

A limited company was formed in England, over 40 years ago, for the sale of Jaeger sanitary clothing and bedding. At that time the word "Jaeger" as applied to such goods meant goods made in accordance with the principles enunciated by Professor Gustav Jaeger—*i.e.*, goods made of animal fibre. The company's business was carried on subject to agreements entered into between the company and Professor Jaeger and certain German companies. In 1925 the plaintiff company, which consisted of members of Professor Jaeger's family who had been introduced into the business formerly carried on by him, opened a retail shop in London, and in 1926 they commenced an action against the defendant company for a declaration that they were entitled to use the word "Jaeger" upon and in connexion with articles of clothing and analogous goods and to carry on business in the sale of such goods under the style of Prof. Dr. G. Jaeger, provided that they took reasonable precautions to distinguish their goods from those of the defendants. The defendants by their counterclaim sought an injunction to restrain the plaintiffs from passing off their business or goods as those of the defendants by the use of the name "Jaeger" or otherwise.

Held, that the meaning of the word "Jaeger," as applied to goods of this nature, had ceased in this country to be descriptive and had come to denote the goods of the defendants; that the plaintiffs were entitled to the declaration, qualified, however, by the insertion, after the word "Jaeger," of the words "as part of their business name"; and that the defendants were entitled to the injunction which they sought by the counterclaim.

This action was brought by the plaintiff company for a declaration that they were "entitled to use the word 'Jaeger' upon and in connexion with articles of clothing and analogous goods and to carry on business in the sale of such goods under the style of Prof. Dr. G. Jaeger provided that they take reasonable precautions clearly to distinguish such goods and business from the goods and business respectively of the defendants."

The defendants, by their counterclaim, sought an injunction to restrain the plaintiffs from passing off their business or goods as those of the defendants by the use of the name "Jaeger" or otherwise.

Sir Arthur Colefax, K.C., Mr. Moritz, K.C., and Mr. K. E. Shelley appeared for the plaintiffs; Sir Duncan Kerly, K.C., Mr. Farwell, K.C., and Mr. F. E. Bray for the defendants.

MR. JUSTICE ROMER, in delivering a considered judgment, said:—The history of this case begins some 50 years ago at the time when Professor Gustav Jaeger first disclosed to a somewhat sceptical world his theory and system of sanitary clothing. According to the professor perfect health could alone be obtained by avoiding the use in clothing and bedding of all material of vegetable fibre, and by the adoption of clothing and bedding made throughout of animal fibre, such as wool, hair, and feathers. The material used should for preference be undyed, but if dyed it was essential that the dye should be "fast." Nor did the professor confine his attention to the material of which clothing was to be made. He designed a number of garments himself, and the use of these garments, to which he gave the name of "Normal," if not essential, was at any rate expected of all true disciples. A glance at some of the catalogues containing illustrations of these garments provokes the reflection that adherence to the system must have required a considerable degree of moral courage, and this may explain the fact that up to the year 1883 it does not seem to have occurred to anyone in this country that the system had any commercal value. In the early part of that year, however, a Mr. Ihlee conceived the idea of forming a company over here for the purpose of exploiting the system. So far as I can see, Professor Jaeger could not have prevented anyone from making and selling in this country clothing or bedding made in strict accordance with the principles enunciated by him, and from announcing the fact that they had been so made. But Mr. Ihlee evidently considered, and I have no doubt considered rightly, that the exploitation of the system over here was not likely to be a commercial success unless he could enlist the professor's interest in the undertaking, and could make use of the professor's name in such a way as to indicate that the business was being carried on with his approval. Mr. Ihlee accordingly approached Professor Jaeger and obtained from him a letter dated June 8, 1883, authorizing Mr. Ihlee to form in England a limited company using the professor's name for the purpose of introducing his system in England and the Colonies on condition that Mr. Ihlee would use marks with the professor's name, and would utilize the same on the goods sold. The professor further stipulated that Mr. Ihlee would have made and would sell an English translation of an extract from one of the professor's published works, which he refers to as his

* Reported by J. L. DENISON, Esq., Barrister-at-Law.

Normal Clothing Book. All this was, however, expressed to be conditional upon Mr. Ihlee's obtaining the consent of, among other people, a German firm called Messrs. Benger. This condition was rendered necessary by the fact that the professor had entered into various agrements with German manufacturers, including Messrs. Benger, conferring upon them certain exclusive rights in connexion with his system. The earliest of these agreements was one bearing the date October 30, 1879, and made between the professor of the one part and Messrs. Benger of the other part. It purported to confer upon Messrs. Benger the exclusive right of manufacture and sale in Germany, and in other countries, of a shirt therein called a "Normal Shirt," made according to the professor's specifications. For every shirt sold the professor was to receive a royalty. Messrs. Benger, for their part, pledged themselves to manufacture the shirts of pure sheep's wool only, and of the shape designed by the professor. In return for this the professor pledged himself to facilitate the introduction of the Normal shirts by recommending them warmly, and to stimulate their propagation by means of public meetings and in the Press. These exclusive rights were subsequently extended so as to cover all underclothing made in accordance with the professor's system. It would seem, however, that Messrs. Benger had not, down to 1883, ever exploited the system in this country, although they had registered a trade mark here in respect of articles of clothing, such trade mark consisting in part of the words "Dr. Jaeger's Normal Wool System." Somewhat similar agreements were entered into by the professor with other German manufacturers in respect of other articles made according to his system, the right to manufacture socks, stockings, towels, petticoats and aprons, and certain other articles, for instance, being ultimately given to one Entress, and the right to manufacture blankets and certain cloth having been given to a firm of Greve and Uhl. It is not necessary to refer to the various agreements in detail. It is sufficient to say that Professor Jaeger conferred upon the manufacturers the right to use his name in connexion with the various articles made in accordance with his system on the terms of his receiving royalties, and that he protected himself as far as he could against the use of his name in connexion with articles that did not conform in all respects to the principles which he had advocated. In this state of affairs Mr. Ihlee entered into an agreement, dated September 19, 1883, with Messrs. Benger, Mr. Ihlee purporting to contract as representative of the defendant company, which was not yet in existence. Under this agreement the company were to have the exclusive right of selling in Great Britain, her Colonies and possessions, the woollen fabrics of Messrs. Benger described as being protected there through a registered trade mark, being the trade mark to which I have already referred. The company were to procure all normal woollen underwear or wool which was manufactured by Messrs. Benger exclusively from them, and were to combine the names of Benger and Jaeger in posters placed in show windows and shops. Messrs. Benger, for their part, pledged themselves to supply the company only with such Normal articles as should comply in every respect with the requirements of Professor Jaeger, and in order to prove its authenticity to have every article stamped as therein mentioned. It would appear that the defendant company thereafter entered into similar arrangements with others of the professor's concessionaires. On December 10, 1883, the defendant company was incorporated under the name of Dr. Jaeger's Sanitary Woollen System Company, Limited, which name it retained until the year 1920, when it became The Jaeger Company, Limited. The first object stated in its memorandum was "to introduce and make generally known Professor Dr. Gustav Jaeger's Sanitary Woollen System." One of the first acts of the company was to register a trade mark (hereinafter referred to as the diamond trade mark) consisting of part of a portrait of Professor Jaeger bearing his signature and containing after the name of the company the words "sole concessionaires." The company obtained the consent of the professor to this, and it further induced him to sign a statement dated December 11, 1885, which was in the following words:—"I have conceded to Dr. Jaeger's Sanitary Woollen System Company, Limited, 42, 43, Forestreet, London, E.C., the sole right in Great Britain and the British Possessions of the use of my name, publications respecting my system, patents, trade marks, &c., and the sole sale in Great Britain and the British Possessions of articles of clothing, bedding, &c., in connexion with my sanitary woollen system, and stamped with the trade marks. I guarantee that the materials of such articles, made by the authorized manufacturers, consist throughout of animal fibre (animal wool, hair, feathers), without any mixture of vegetable fibre; also that articles described to be of the natural colour are free from dye, and that dyed articles are only treated with genuine and harmless dyes. For articles on which the trade marks in question do not appear I am, of course, not responsible." So anxious was the company in those days to associate the professor and his name with the operations they were about to undertake. The defendants also found it desirable to obtain the consent of Messrs. Benger and other concessionaires of the professor to the registration of the diamond trade mark, and they induced such concessionaires, including Messrs. Benger and Entress, to sign a document recording such consent and undertaking to stamp all articles destined for the defendants with the trade mark. In the year 1885, indeed, the defendants agreed that in the event of their business being given up in London, or generally in England, the trade mark should be placed at the absolute disposal of Messrs. Benger for their manufactured articles, and that in the like event the words "Dr. Jaeger's Sanitary Woollen," which by that time had also been registered by the defendants as a trade mark, should also be placed at Messrs. Benger's sole disposal. By an agreement dated May 27, 1886, the relations between the defendant company and the professor were more precisely defined than they had been before that date. By that agreement the professor granted to the defendant company the sole right in Great Britain and her Colonies and possessions to make use of his name, the publications concerning his system, the diamond trade mark, and the sole right of sale of Normal articles manufactured according to his system and marked with the trade mark. As regards such articles the company obtained the professor's guarantee, the company undertaking to obtain Normal articles from the concessioned firms in the legitimate qualities, form, and pattern authorized by the professor, and undertaking to see that all Normal articles marked with the trade mark and not procured from the original concessioned firms should correspond exactly to the requirements of Dr. Jaeger's system, and should, as regards their component parts, be upon his request submitted to him for examination. The company further undertook to pay a royalty to the professor upon all articles of Normal clothing used in their business and marked with the trade mark, so far as the articles were not made by the original concessionaire firms.

With the advantages so secured to them by these

agreements with Professor Jaeger and his concessionaires, and by somewhat similar agreements that were from time to time substituted for them, the defendant company carried on business in this country in the sale of articles made under the professor's system. All goods sold by them were at first obtained solely from the concessioned firms in Germany. But at the date of the outbreak of the Great War rather less than one-quarter of the goods were being obtained from this source, the remainder being manufactured in this country.

His Lordship described the relations between the companies down to 1914 and stated that members of the professor's family were introduced into his business. His Lordship then continued: Upon the outbreak of war, however, all further commercial intercourse came to an end, and the various agreements with the defendant company were thereby determined. The effect of this was that the defendant company continued to carry on its business, using for that purpose the name of Dr. Jaeger and the diamond trade mark but without paying him or the plaintiff firm any royalties in respect of their so doing. They ceased, of course, to get any goods from Germany, confining themselves exclusively to the sale of goods that were British made. Upon the conclusion of peace, and perhaps not unnaturally, this state of affairs appeared to the plaintiffs and to some of the concessioned firms to be grossly unfair. Messrs. Benger and Messrs. Greve and Uhl accordingly in the month of June, 1920, made a demand upon the defendants that unless they were prepared to enter into fresh arrangements with those two firms they should cease using the word "Jaeger" as part of their name or upon their goods. A similar demand was put forward on behalf of the plaintiff firm. It should be stated that the professor himself had died in the year 1917.

His Lordship referred to disputes which then arose between the two companies, and continued:—The plaintiffs in November, 1925, opened a retail shop in New Bond-street. In the meantime the defendant company had applied for registration in class 38 of the word "Jaeger," the application being advertised on October 7, 1925. Notice of opposition was given on November 21, 1925, by the plaintiffs, who stated as their grounds of opposition that the word "Jaeger" was not and could not be distinctive of the products of the defendants and was calculated to deceive, adding that they would rely upon the fact that the word "Jaeger" formed part of their own business name and was being so used by them in connexion with all goods included in the class. In their counter-statement the defendants alleged that the use by the plaintiffs of the word "Jaeger" in connexion with their goods was recent and calculated to deceive. The defendants, however, still refrained from taking legal proceedings to restrain the plaintiffs from trading in their own name, and accordingly on January 9, 1926, the plaintiffs issued their writ in this action.

His Lordship read the pleadings, and continued:—At the Bar, however, Sir Arthur Colefax merely asked for a declaration in the terms above set forth qualified by the insertion after the word "Jaeger" of the words "as part of their business name."

His Lordship then dealt with allegations of fraud against the plaintiff company and said: It is sufficient for the moment to say that in my judgment the charge is wholly unfounded. The plaintiff firm has been in existence for nearly forty years, and during that time or the greater part of that time has been engaged in business in Germany. There was no ground whatever for saying that the firm was originally established for the purpose of committing a fraud in this country, or that for that purpose the name of a derelict firm was resuscitated. If any such charge could be made out the Court would not, of course, give the plaintiffs any relief whatsoever. As it is, it seems to me that it is only right to make the amended declaration asked for, in order, if for no other reason, to show that the plaintiffs are innocent of the serious charge brought against them.

The plaintiffs, however, only succeed in this action in part, and I propose to make no order as to the costs of it. I must now deal with the counterclaim. In addition to the serious charge of fraud to which I have just referred, the defendants allege that the word "Jaeger," in connexion with the business of woollen goods, hosiery and garments, for many years past has come to mean and does mean to the trade and public only the goods and business of the defendants, and is distinctive of such goods and business. They then allege that on many occasions customers desiring to deal with the defendants have entered or made purchases at the New Bond-street shop of the plaintiffs under the belief that it was a branch of the defendants, and claim an injunction to restrain the plaintiffs from passing off their business and goods as or for those of the defendants by the use of the name "Jaeger" or otherwise.

His Lordship said that there could be, in his opinion, no doubt upon the evidence before him that the word "Jaeger" had, by the year 1924, ceased in this country to be descriptive and had come to indicate the goods of the defendants. He also found that there was evidence of confusion, but said that he could not, however, adopt the view put forward by the defendants that, in setting up business in this country, the plaintiffs intended that such confusion should arise. After stating the nature of the precautions taken by the plaintiffs to prevent confusion, he said that to a person ignorant of the meaning of the word "Jaeger" at the present day all this would appear quite sufficient for the purpose of distinguishing the plaintiffs' goods from those of the defendants, and, as he had already said, he believed that the plaintiffs themselves were so ignorant. He then continued:—In the circumstances, it seems to me that I ought to grant the injunction sought by the defendants in their counterclaim. The defendants, however, have, in my judgment, entirely failed to substantiate the very serious charge of fraud that they chose to make against the plaintiffs, the successors and representatives of Professor Jaeger, to whom they owe so much. I shall make no order as to the costs of the counterclaim.

[Solicitors—Messrs. Rehder and Higgs; Messrs. Hutchison and Cuff.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.) 1927. Jan. 20.

OLDHAM v. SHEFFIELD CORPORATION.*

Negligence — Highway—*Cul-de-sac*—Extension—Contractor's road—Unlighted fence across it—Appearance of continuous road—Invitation to use—Accident to invitee.

The defendants, a local authority, who were carrying out road improvements, employed contractors to pull down a wall at the end of a *cul-de-sac* and to make a new road joining the

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

old *cul-de-sac* to an existing highway. The contractors pulled down the wall and made up a section of the new road as a contractor's road and then closed further progress by erecting a wooden fence, but there was no night watchman or lamp to give warning of the obstruction. Between the fence and the existing highway with which the *cul-de-sac* was to be connected there was a dangerous ravine, but the lights on each side of that highway were clearly visible to anyone entering the *cul-de-sac* and might induce a stranger to suppose that there was a continuous road. The plaintiff, who was driving a motor-car at night, proceeded along the *cul-de-sac* and the contractor's road, and, not seeing the fence, crashed through it into the ravine and was seriously injured. In an action for negligence,

Held, that although the place of the accident was not a highway but a private site, yet, as there was an invitation to go upon it, the defendants were liable for the consequences of putting an unexpected obstruction in the path of the invitee, and the plaintiff was entitled to recover.

This was an appeal by the defendants, the Corporation of Sheffield, from a decision of Mr. Justice Salter given on further consideration in London of an action for damages for negligence tried by him at Leeds Assizes. He decided in favour of the plaintiff, and awarded £1,500 damages, plus £208 15s. special damage.

The plaintiff in the action, Mr. John Walter Oldham, licensee of the Birley Hotel, Sheffield, claimed damages for the negligence and misfeasance of the defendants and their servants in carrying out certain road improvements in Sheffield whereby a motor-car which he was driving fell with him over the edge of a deep ravine into the river Sheaf.

The defendants denied negligence and pleaded contributory negligence. They also alleged that the defendant was drunk while driving the motor-car.

On July 31, 1924, about 10.15 p.m., the plaintiff was driving a motor-car along a road known as Charlotte-road, Sheffield. That road ran downhill, and met another road, Edmund-road, almost at right angles. It crossed Edmund-road, but ended in a *cul-de-sac* with houses on each side. There had originally been a wall cutting off the end of the road at that point, but some time before the accident happened the corporation had entered into a contract to extend the road across land belonging to the Duchess of Norfolk so as to join another road, also called Charlotte-road, on the other side of the valley in which the river Sheaf ran, and in a continuous line with the first Charlotte-road.

The contractors had been engaged for some time in constructing a bridge across the river Sheaf. They had pulled down the wall at the end of the existing Charlotte-road and had made up a section of the new road as a kerbed contractor's road for a distance of 80ft. beyond the site of the old wall, which itself was only 23 yards beyond the cross-roads, and had then closed further progress by erecting a wooden fence 7ft. in height.

The plaintiff, having driven his car down Charlotte-road and reached Edmund-road, proceeded straight along the old *cul-de-sac* into the new partly constructed road, and, not seeing the fence, crashed through it. Immediately beyond was a steep declivity ending in the river Sheaf, into which the car fell. The plaintiff was seriously injured. He sustained a fractured skull, both knees were bruised and cut, and he suffered a severe shock to his nervous system causing loss of memory. The repairs to his motor-car cost over £100.

There was evidence at the trial that there was nothing to prevent a person not well acquainted with the locality from proceeding across Edmund-road into the old termination of Charlotte-road, there being no night watchman or warning red lamp to indicate that there was an obstruction. It was also proved, and the Judge found, that the lights on each side of the road beyond the ravine would be clearly visible, after the wall had been pulled down, to anyone driving at night down Charlotte-road, and might induce any stranger to suppose that there was a continuous road before him, instead of a dangerous ravine protected by an unlighted fence.

By agreement, the jury was discharged and the case was left to the Judge to decide. The action as originally brought alleged dedication of a road left in a dangerous condition, but the Judge found that there was no evidence of any dedication of the unfinished road to the public, and that it was very difficult to presume dedication from user of a *cul-de-sac.* He found that the plaintiff was misled by the defendants' neglect of duty in not preventing anyone from driving down the partly finished contractor's road. It was, in his opinion, as plain an instance as one could well find of what was called a trap. If the plaintiff was a trespasser, he was a most unwilling trespasser. The plaintiff had been out for a drive of about 22 miles, and was going a long way round to get home. He had had drinks at two or three places, but there was no evidence that he had consumed sufficient drink to incapacitate himself in any way. The Judge awarded damages as stated.

The defendants appealed.

Mr. Waugh, K.C., and Mr. Paley Scott appeared for the appellants; Mr. Mortimer, K.C., Mr. W. P. Donald, and Mr. G. W. Wrangham for the respondent.

The Court did not call upon counsel for the respondent.

The Master of the Rolls, in giving judgment, said that he would have been quite content to express his concurrence with the judgment of Mr. Justice Salter, but in deference to the argument which had been addressed to the Court he would supplement it with a few observations. It was unnecessary to restate all the facts of the case. The place where the accident happened was in the occupation of the corporation, who were engaged in executing certain works to join up the two portions of Charlotte-road across the ravine through which the river Sheaf ran. He agreed, however, with Mr. Justice Salter that there was no dedication to the public of any of the land so occupied. There was evidence that there was a view straight across the ravine to a considerable rise beyond up to the point where the further portion of Charlotte-road crossed the Midland Railway. The road apparently led straight ahead and a lamp seemed to show that the road continued. From the photographs put in evidence it appeared that any person looking down Charlotte-road from behind Edmund-road might think that he had a continuous stretch of roadway before him. An attempt was made by the defendants to prove that the plaintiff had taken too much drink to drive a motor-car, but the Judge, who saw the witnesses, held that that plea failed, and the Court would not interfere with his decision.

He (the Master of the Rolls) thought that the case had been rightly decided. The accident did not happen on a highway, but that did not dispose of the case if it were found that there was an invitation to go on a private site. The photographs showed clearly that, where the newly constructed section of road continuing Charlotte-road began, part of the kerb had been laid, and a roadway, though not a good one, had been made. If there was an invitation, then the case seemed to fall within the law as stated by Mr. Justice Willes in *Corby v. Hill* (4 C.B.N.S., 556, at p. 567).

When once the invitee had received and accepted the invitation, he went along the roadway in the confidence that it was safe to pass along it. That made the defendants liable for putting an unexpected obstruction in the path of the invitee. The corporation, when once they had pulled down the old wall at the end of the then existing road, were bound to put up some sort of protection to prevent people going that way from falling into the ravine. They put up a wooden fence which, on a dark night, might easily be mistaken for the roadway, but they placed no light upon it. The question was whether the corporation had taken proper steps to warn the public against the danger of falling into the trap. The answer was that the fence ought to have been lighted with a red lamp.

On the basis of the reasoning in *Corby v. Hill* (*supra*), when there was an invitation to the public, there was a duty to light an obstruction after dark. The corporation could not be said to be the agents of the Duchess of Norfolk, as owner of the land, in what they were doing; they were occupying the property in order to do work for their own purposes. There was, in his Lordship's judgment, a duty upon the corporation to fence off the ravine properly, and to light the fence during darkness. The appeal failed and would be dismissed, with costs.

Lord Justice Sargant and Lord Justice Lawrence concurred.

[Solicitors—Messrs. Rollit, Sons, and Haydon, for Sir W. E. Hart, Town Clerk, Sheffield; Messrs. Chambers and Sons, Sheffield.]

K.B. Div. (Salter and Talbot, JJ.) 1927. Jan. 21.

EX PARTE BREWSTER.*

Local Government—Poor law guardian—Alleged disqualification—Patient in hospital maintained out of rates—Payment for cost of treatment—Local Government Act, 1894 (56 and 57 Vict. c. 73), s. 46 (1) (*b*), (7).

This was an application by Mr. Harry George Brewster, of 187, The Broadway, Bexley Heath, a local government elector in the Bexley Urban District and the Dartford Union, for an order directing the Dartford Guardians to show cause why a writ of *mandamus* should not issue commanding them to declare vacant under section 46, subsection 1 (*b*) and subsection 7, of the Local Government Act, 1894, the office of guardian held by Mrs. Ellen Moira Pyne, of Erith, on the ground that, since her election as guardian, she had received "union or parochial relief."

Mr. R. C. Maxwell, for the applicant, said that the ground of the application was that while Mrs. Pyne was a guardian she was a private patient in the King Edward Avenue Hospital, Dartford, which was maintained by the guardians out of the rates. Although she paid the whole cost of her maintenance and treatment, she was technically in the position of a pauper—a view which was accepted by most boards of guardians. An operation was performed on her by her own doctor, who afterwards attended her in the hospital, the anæsthetic being administered by the medical superintendent of the hospital, who was not a whole-time officer, but was paid a separate fee by the guardians for such services. Private patients were not admitted to the hospital if their admission interfered with the treatment of pauper patients.

Mr. Justice Salter, in giving judgment, said that, as the guardians had been paid in full for every privilege and advantage received by Mrs. Pyne at the hospital, there was no evidence on which it could be said that she had received "union or parochial relief" within the meaning of the Act of 1894.

Mr. Justice Talbot agreed.

[Solicitors—Messrs. May, Sykes, and Co.]

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

Judicial Committee of the Privy Council. (Lord Phillimore, Lord Carson, Lord Darling, Sir Lancelot Sanderson, and Mr. Amir Ali.) 1927. Jan. 21.

SONATON PAL v. GALDSTOUN.*

Practice Note.

In dealing with this appeal from Bengal to the Judicial Committee of the Privy Council, Lord Phillimore, on behalf of that tribunal, made some serious observations in regard to the manner in which the records of the suit and the appeal had been prepared and to the unnecessary inclusion of superfluous documents. His Lordship said:—A very large and cumbrous record has been produced and put before their Lordships, containing, amongst other things, a mass of accounts which were obviously immaterial after the High Court had said that the parties had agreed the accounts between them and had agreed what was due to the plaintiff as a creditor.

The solicitor acting here for the Indian appellant had notice in a letter sent to him by the Registrar of November 3 that "attention would be drawn to the record in this case which contains a large quantity of matter which should not be included and which, as at present advised, should the appellant succeed, I shall not be prepared to allow on taxation."

Their Lordships asked Mr. Narasimham, one of the counsel for the appellants, what he could say about this subject. He pointed out that in Calcutta it was very difficult, if one party contended that the documents should be printed and made part of the record in the case, for the other party to resist it. With that their Lordships are not in agreement. They have the advantage of the assistance of Sir Lancelot Sanderson, who has just returned from India, and they understand that the practice, at any rate in Bengal, and this case comes from Bengal, is well settled. If one party thinks that a document should be printed and the other party thinks it unnecessary, a reference is made to the Registrar of the High Court, who determines, at any rate in the first instance, what should be done. Their Lordships have no reason to suppose that the respondent did desire

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

that these accounts should be made part of the record, but, if he did, the appellant should not have rested content, but should have gone to the Registrar and got a decision as to the usefulness of this mass of accounts.

That is so far as the solicitors in India are concerned. In their Lordships' opinion, if the appellant had succeeded, all those costs would have been disallowed for the reasons given.

But there is another matter on which their Lordships have called for the attendance of the solicitor for the appellants here. It does not follow that, because unnecessary documents have been printed in India, they should be included in the books bound up for their Lordships. It is the duty of the solicitor in this country to make a selection of the necessary documents. The other papers should be ready at hand in case they should be required. In cases of doubt the solicitor should take the advice of counsel on this point, and for this purpose, on application being made, a fee will be allowed.

Their Lordships have intimated the same opinion on other occasions. They have thought it necessary to require the attendance of the solicitor in order to make it quite clear that drastic action will be taken if more care is not used in this matter.

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. Jan. 28.

GRAYSON v. GRAYSON.*

Divorce—Wife's prayer for dissolution—Wife guilty of adultery—Discretion of Court—Grant of decree.

In this suit Mr. Denys Henry Harrington Grayson, a shipbuilder, of Beauchamp-place, South Kensington, had petitioned for the dissolution of his marriage with Elsie May Grayson *née* Jones, of Sloane-street, on the ground of her adultery with a named co-respondent.

By her answer the respondent denied the charges, and by way of counter-charge alleged that the petitioner had committed adultery with Sylvia Ironside, and prayed for the dissolution of her marriage.

The husband's petition had been dismissed and the charges therein struck out.

Mr. Bayford, K.C., and the Hon. Victor Russell appeared for the respondent, who admitted the truth of the charge of adultery contained in her husband's petition and asked the Court to exercise its discretion in her favour.

MR. JUSTICE HILL, in giving judgment, said that this was one of those cases which it would have been impossible to maintain 20 years ago, but the views of the Court as to the circumstances in which its discretion could be exercised had altered enormously in the last few years.

It used to be thought, and he was not sure that there was not a good deal to be said for it, that an injured spouse, who chose to substitute for the legal remedy the remedy of going away with someone else, could not also have the legal remedy.

That view had been modified. One important element now considered was the future of the people, and whether they were likely to marry again or not. The husband was living with a woman, and counsel had said that those two were anxious to marry, and that the husband would never return to his wife, who would not take him back. If he refused a decree the result would be that the wife would remain tied to her husband, an unsatisfactory condition of affairs, and the husband would go on living with the woman with whom he was now, a still more unsatisfactory state of affairs.

He would exercise his discretion, but in so doing he was going as far as he thought he could go. Mrs. Grayson had been seriously wronged by her husband, but she was not compelled to go away with another man. That was her own choice.

His LORDSHIP granted a decree *nisi*, with costs and the custody of the one child of the marriage.

[Solicitors—Messrs. Churchill, Clapham, and Co.]

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

Court of Appeal. (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.) } 1927. Jan. 21.

IN RE BOWER WILLIAMS.*

Bankruptcy—Settlement—Property accruing to settlor — Wife's intestacy — Administration granted to husband—Property accruing to husband in right of wife—Settlement by husband upon child of marriage—Bankruptcy of settlor within two years—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 42.

By s. 42 of the Bankruptcy Act, 1914, voluntary settlements made within two years of the bankruptcy of the settlor are void as against the trustee in bankruptcy, with certain exceptions, one being "a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife." A wife who was possessed of certain shares died intestate. Her husband took out administration, settled the shares upon trusts for the daughter of the marriage, and became bankrupt within two years.

Held, that notwithstanding the operation of the Married Women's Property Act, 1882, and the independence which it gave to a wife in the holding of her property, the husband had taken the shares *jure mariti,* or "in right of his wife," and the settlement upon the daughter was not void.

The facts in this appeal from a decision of Mr. Justice Astbury are taken from the judgment of Lord Hanworth, M.R.:—"The husband married his wife on May 20, 1913. On March 30, 1925, she died intestate. On May 9, 1925, the husband took out letters of administration to her estate. On June 4, 1925, the husband made a voluntary settlement, the nature of which was this: there was a daughter of the marriage, and part of the property of the wife consisted of a certain number of shares in a private company, the articles of which contained a clause restricting the transfer of shares except to those who were members of the wife's family, these shares having come to the wife from her father, and, owing to this difficulty of transfer, the husband, having become possessed of the shares, covenanted with the trustees of the settlement to hold them upon trust to pay to the trustees out of the income for the benefit of the daughter

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

during her life the yearly sum of £200 ; as to the balance of the income and the corpus, they were to be for his own benefit. Notice of this settlement was given to the company in July, 1925. Unfortunately the husband got into difficulties, and on April 15, 1926, a receiving order was made against him, and on April 26 he was adjudicated bankrupt.

"Section 42 of the Bankruptcy Act, 1914, which is in *pari materia* and almost identical in terms with section 91 of the Act of 1869, provides by subsection (1) that 'Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall if the settlor becomes bankrupt within two years after the date of the settlement be void against the trustee in the bankruptcy . . . " subject to certain provisions which I need not recount. Now the trustee in bankruptcy says that the bankrupt has made a settlement, and that he became bankrupt within two years from its date, and hence that it is void as against him. No question arises as to the interest taken by the bankrupt under the settlement, but what is said is that the settlement, so far as the daughter is concerned, is equally void under the section. The answer of the trustees of the settlement is that the operation of the section is excluded in the case of the daughter, because the section excepts settlements made 'on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife,' and they say that this property came to the bankrupt only in right of his wife, and that it is a settlement for the child of this marriage. To that the trustee in bankruptcy replies that since the Married Women's Property Act, 1882, although the husband on the wife's intestacy becomes administrator of the wife's estate, yet so far as he takes anything he does not take it in right of his wife, and that under that Act of 1882 the property of a married woman is held completely free from the husband in respect of all rights which formerly accrued to him *jure mariti*."

Mr. Justice Astbury held that the shares were taken in right of the wife, and dismissed a motion by the trustee in bankruptcy to set aside the settlement. The trustee appealed.

Mr. TINDALE DAVIS, for the appellant, referred to *Smart v. Tranter* (43 Ch.D., 587) ; *Surman v. Wharton* (7 *The Times* L.R., 196 ; [1891] 1 Q.B., 491) ; *Cooper v. Macdonald* (7 Ch.D., 288) ; and *In re Lambert's Estate—Stanton v. Lambert* (39 Ch.D., 626).

Mr. F. WHINNEY, for the trustees of the settlement, was not called upon.

The MASTER OF THE ROLLS, after stating the facts, as set out above :—The question, therefore, is whether the property settled is property which accrued to the husband in right of his wife. There is no question as to its being for a child, or its accruing after marriage, so in effect we have only to construe the meaning of those five words "in right of his wife." Counsel, in the course of an interesting argument, said that those words were only retained in the Act to meet the case where there had been a marriage before the Married Women's Property Act, 1882, and that in all cases where the Married Women's Property Act, 1882, operates there is no scope for the words of the section. It becomes, therefore, necessary to see what was and is the position of a husband. It appears to me that the point raised has been decided by a case which is binding on this Court, but in deference to the argument which has been addressed to the Court I will call attention to the position of the matter historically. It appears that originally an administrator took beneficially such residue as fell into his hands. The Statute of Distributions altered the law as to administrators generally, and removed that loose privilege, and a doubt arose whether the husband's rights in respect of the wife's property were cut away if he acted as administrator of his wife's estate. Consequently by the Statute of Frauds, section 24, it was provided that neither the Statute of Distributions "nor anything therein contained shall be construed to extend to the estates of *feme-coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates and recover and enjoy the same as they might have done before the making of the said Act." That means that the husband, as administrator of his wife, took all the property that he was entitled to take *jure mariti*, and he got the legal title by the grant of administration. But what was the relation of the husband to the wife's property which lay outside the hands of the wife when she died ? I am reading from Lush on Husband and Wife, 3rd edition, page 66, where he says : "Marriage was only a qualified gift to the husband of the wife's choses in action. It depended upon himself whether he made them his absolute property or not. If he brought the outstanding fund under his own exclusive control and dominion, by obtaining payment or otherwise—if, as it was said, he 'reduced it into possession'—during the coverture, the wife's right was gone. But if he did not, her choses in action remained her property, and upon the husband's death in her lifetime she was entitled to them as against his legal personal representative."

Now here we have got shares which are choses in action, and the husband would have to take out administration to bring them into his hands. We have been referred to two cases in which the property was not reduced into possession during marriage, and in which the wife held it after the Married Women's Property Act, 1882. Mr. Justice Stirling, in *In re Lambert's Estate—Stanton v. Lambert* (39 Ch.D., 626), after dealing with the two Acts to which I have referred, said this (at p. 630) : "Accordingly the husband, when living, was absolutely entitled to be the administrator of his wife. After his death, however, there were cases in which the Ecclesiastical Court considered itself bound to grant administration to the next of kin of the wife. Nevertheless, in equity, the title of the husband prevailed, and the administrator of the wife was held to be a trustee for the legal personal representative of the husband." (Then he cites cases and continues): "The equitable interest of the husband vested on the death of the wife, and passed not merely to his legal personal representatives but to his assignees in bankruptcy." Now what is the effect of that ? It is said that though by the Statute of Frauds he is entitled to be administrator, yet what he takes he takes as administrator, that he does not take anything which reaches him *jure mariti*, as husband. It is said that that is how the situation has been completely altered since 1882, that the right of the husband now is no more than the statutory right to be administrator, and that that does not fulfil the words of section 42 : "in right of his wife."

In *Smart v. Tranter* (43 Ch. D., 587) Lord Lindley, in a judgment which is binding upon us, said (at p. 596): "It is clear that since the Statute of Frauds if the husband takes out administration he can get the

reversionary choses in action of the wife ; but if he does not, the Statute of Frauds does not in terms apply. That doubt was raised and solved very early in the case of *Cart v. Rees*, which is stated in the following terms by the Lord Chancellor Cowper when giving judgment in *Squib v. Wyn* (1 P. Wms., 378, at p. 381) : 'A wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which the next of kin of the wife administered to her, and Lord Parker held that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's choses in action being, by the Statute of Distributions, vested in the husband as next of kin to the wife ; and whereas there is a proviso in 29 Charles II. saying that the Statute of Distributions shall not extend to the estates of *feme coverts* that die intestate, but that their husbands may have administration of their personal estate as before the making the Act, his Lordship said this clause was made in favour of the husband and not to his prejudice ; so that it was intended by the Parliament that the husband should be within the Statute of Distributions, so as to take the wife's choses in action as to his benefit, but should not be within the same as to his prejudice ; and that this was not a new point, but had been settled, and upon very good reason; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute.'" That shows very clearly that the relation of husband and wife secures that administration shall be granted to the husband, and, if it be granted to a person other than the husband, that person would hold for the husband ; because the beneficial interest in the wife's property vested in him on her death, though certain steps had to be gone through, because he was entitled to be treated as being in a higher position than next of kin for the reason that he was the husband. So I think that here the husband takes because he is the husband, not because he is the administrator. I think the judgments of Lord Justice Cotton and Lord Lindley both make that clear. A little further on Lord Lindley says (39 Ch.D., at p. 596) : "There is now no doubt as regards the choses in action of the wife not reduced into possession during the coverture that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity, but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in Peere Williams."

For these reasons, and because that case is binding on this Court, it appears to me that we must hold that the beneficial interest in these shares accrued to the bankrupt in right of his wife, and therefore the settlement on the daughter remains good. The appeal therefore fails and must be dismissed.

Lord Justice Sargant stated the facts, and continued : The sole question is whether the property was property which had accrued to the bankrupt "in right of his wife," and it is conceded that all the words of the exception are satisfied except those words. The Judge below has decided that the property accrued in right of the wife, and in my opinion he was right in so holding. It was argued against this that the bankrupt did not take the property in right of his wife by virtue of his title as her husband, but because he had constituted himself administrator of his wife's estate. I think that this is not so. I think that that is shown by *Smart v. Tranter* (43 Ch.D., 587) and *In re Lambert's Estate* (39 Ch.D., 626), where it is recognized that on the death of the wife intestate the husband at once became entitled to the full beneficial interest in the choses of the wife, and the process of taking out administration was only a process of bringing into possession. It was only a method of completing his legal title, and had no bearing on any beneficial interest in the property. The beneficial title is the main thing that we have to consider, but, even if we have to regard the taking out of administration as an essential step, those two cases show that the right which the husband got to take out administration was because he was the husband of his deceased wife, and so that does not prevent the husband from being entitled to the property in right of his wife. Counsel sought to limit the *jus mariti* to a right which the husband exercises during coverture, but, in my view, the term "*jus mariti*" also includes the rights which a husband may have on her decease, including the right to take out letters of administration in order to get possession of her property. If, as I think, the husband, as husband, has a right to get the property of his wife, it is impossible to say that he does not get it in right of his wife. The appeal must be dismissed.

Lord Justice Lawrence.—It is not disputed that the beneficial interest in the shares vested in the bankrupt, but it was strenuously contended that because since 1882 the husband took no interest in the property during the wife's lifetime he was only entitled to the beneficial interest which he took by being executor. It is said that those words in section 42 do not apply to property so acquired by a husband. I think there is no authority which binds the Court to confine the language of section 42 in that way. I think the property accrued to the settlor solely by virtue of his position as husband surviving his wife, and therefore was property which accrued to him "in right of his wife" within the ordinary meaning of the words. I think the appeal should be dismissed.

[Solicitors—Messrs. Osborn and Osborn ; Messrs. Teff and Teff.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Jan. 14.

REX v. KENT JUSTICES—EX PARTE TRIPLOW.*

Justices — Landlord and tenant—Application under Small Tenements Recovery Act, 1838—Concurrent jurisdiction in County Court—Practice of justices not to hear such applications—General rule—*Mandamus*.

An order in the nature of a *mandamus* to justices to hear and determine an application under the Small Tenements Recovery Act, 1838, was made absolute when it appeared that the justices had made a general rule not to hear such applications on the ground that the County Court was a more suitable forum for cases which not infrequently raise difficult questions of law.

This was a rule *nisi* for an order in the nature of a *mandamus* to justices of the Sittingbourne Petty

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Sessional Division of Kent to hear and determine the matter of an application by Frank Triplow under the Small Tenements Recovery Act, 1838, for possession of a cottage in the occupation of one Wheatley.

All the material circumstances leading up to the refusal of the justices are set out in the judgment of the Lord Chief Justice.

Mr. A. L. B. Thesiger showed cause; Mr. Elliot Gorst supported the rule.

The Lord Chief Justice.—This is a rule *nisi* for an order in the nature of a *mandamus* to certain justices of the county of Kent to hear and determine pursuant to the statutes in that behalf the matter of an application under section 1 of the Small Tenements Recovery Act, 1838, for possession of a small tenement known as No. 3, Duvards-place, Borden, in the said county, upon the grounds that the tenement was within the jurisdiction of the said justices, and that the justices were wrong in law in refusing to hear the said application. In my opinion the case is perfectly clear. It is common ground that the tenement was within the jurisdiction of the justices; the question is whether they refused to hear the case. Two classes of material are put forward to show that they refused—first, a report in the first person from the *East Kent Gazette,* from which it appears that as counsel was opening the applicant's case the Chairman interrupted and asked if there had been any application to the County Court. Counsel said that there had been an application, but under a different Act, and this was a different set of facts and a speedier method of justice. The Chairman then said: "This Court, as a rule, does not deal with these things. They should go to the County Court. This case has been examined by the County Court Judge?" Mr. Gorst replied: "Yes. It was before him on a certificate from the County Agricultural Committee." The magistrates' clerk interposed: "And it was adjourned for the plaintiff to get it?" Mr. Gorst: "And he got it. The facts were entirely different from what will come before you." The Chairman: "The attitude of this Court is that these cases should go to the County Court, and, in my opinion, it is better that they should. The County Court Judge knows better than we do. If he has turned it down I don't think this Court ought to deal with it." Mr. Gorst: "Does the Bench not wish to hear this case?" The Chairman: "That is our attitude. We do not care on what grounds it was turned down by the County Court Judge." Mr. Gorst: "Very well, I can't press it."

That is to say, that because two years before upon some facts there had been an unsuccessful application to the County Court, this application was not to be heard. That extract makes it clear that the refusal to hear was not based upon special facts relating to the individual case, but on a general rule adopted by the justices with reference to a class of cases. If there were any doubt it would be made clear from the letter of the Clerk to the Justices, which was the second matter put forward in support of this rule. Writing to the applicant's solicitor in reply to an inquiry as to a convenient date for the hearing of the application, the clerk says: "My justices have for many years decided not to entertain applications in ejectment, holding the view that as the County Court has concurrent jurisdiction disputes affecting the law of landlord and tenant can be better dealt with in that Court, which is presided over by a Judge trained in law." It is not necessary to enlarge upon the matter; it seems as clear as can be that the justices declined to hear this application in pursuance of a general rule, which they are not entitled to do. The rule must accordingly be made absolute.

Mr. Justice Avory.—I agree that the conduct of the justices in this case, however excellent and well-intentioned their motives, amounted to a declining of jurisdiction. There may be good reasons why a landlord should seek his remedy under this statute rather than in the County Court—*e.g.,* that justices sit more frequently than the County Court. In some cases it may be absolutely necessary to seek the speediest remedy; if, for instance, the tenant is guilty of wilful waste. Upon proof of the necessary facts it becomes the duty of the justices to issue their warrant.

Mr. Justice Salter.—I agree. We have nothing to do with the merits. The justices must hear this application and enforce the legal rights of the parties, whatever they may turn out to be.

[Solicitors—Messrs. Hedley Norris and Co., for Messrs. Harris and Harris, Sittingbourne; Messrs. Mowll and Mowll, for Mr. J. M. A. Poncia, Ashford, Kent.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927.
Jan. 12.

REX v. POSTMASTER-GENERAL—EX PARTE CARMICHAEL.*

Master and Servant—Compensation for injury by accident—Industrial disease—Substitution of departmental surgeon for certifying surgeon—Workman on capitation list of local medical officer—Certificate by chief medical officer—"Medical officer under whose charge the workman is placed"—*Certiorari*—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 43 (1) (*f*), 44 (3).

By s. 44 (3) of the Workmen's Compensation Act, 1925, "In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under the foregoing provisions of this part of this Act. . . ." Under the power now contained in this subsection the Secretary of State made regulations of which the material one was: "In the application of the provisions of the said section to telegraphist's cramp, so far as regards a workman employed by the Postmaster-General, the Post Office medical officer under whose charge the workman is placed shall, if authorized to act for the purposes of the said section by the Postmaster-General, be substituted for the certifying surgeon."

C., a telegraphist employed by the Postmaster-General, was on the capitation list of the local Post Office medical officer at Grimsby. She complained that she had telegraphist's cramp; in accordance with the regulations of the department, the case was referred to the chief medical officer, who had special knowledge of telegraphist's cramp. The chief medical officer certified that C. was not suffering from tele-

* Reported by J. W. Hall, Esq., Barrister-at-Law.

graphist's cramp. C. obtained a rule *nisi* for a *certiorari* to quash the certificate.

Held, (1) that the chief medical officer was not the medical officer "under whose charge C. was placed," and that he was not entitled to give a certificate; (2) that the granting of a certificate was in the nature of a judicial act in respect of which *certiorari* would lie; (3) that an appeal to a medical referee under s. 43 of the Act was not equally beneficial, since the referee's concurrence with the chief medical officer's certificate would be conclusive, whereas the certificate was a nullity; (4) (*per* Avory, J.), that whether an appeal was equally beneficial or not, C. being a party aggrieved, *certiorari* would go *ex debito justitiæ* at her instance.

This was a rule *nisi* for a *certiorari* to bring up and quash a certificate of Colonel H. V. Prynne, chief medical officer of the Post Office, purporting to be given under section 44 of the Workmen's Compensation Act, 1925, whereby he certified that Mrs. Carmichael, the applicant, was not suffering from telegraphist's cramp.

The facts, the grounds of the rule, and the relevant sections of statutes and orders are fully set out in the judgment.

Mr. W. Shakespeare showed cause; Mr. Horton-Smith supported the rule.

The Lord Chief Justice.—This is an order *nisi* for a writ of *certiorari* directed to the Postmaster-General to remove into this Court a certificate purporting to be made and issued by one Colonel H. V. Prynne and dated September 25, 1926, whereby it was certified that one Ethel Carmichael was not suffering from the disease known as telegraphist's cramp.

The grounds upon which the rule was granted were as follow:—"That the said Colonel H. V. Prynne was not the Post Office medical officer under whose charge the workman was or ever had been placed, and therefore could not be authorized by the Postmaster-General to act for the purposes of sections 43-44 of the Workmen's Compensation Act, 1925, and could not be substituted for the certifying surgeon, and therefore had no jurisdiction to act for the purposes of the said sections, and accordingly had no jurisdiction to issue the said or any certificate thereunder."

The matter has taken a considerable time in argument, but the point of it can, I think, be quite shortly stated. Under the provisions of the Workmen's Compensation Act, 1925, it is provided as follows by section 44, subsection (3): "In such cases"—that is, cases referred to in the two previous subsections under "Industrial Diseases"—"and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under the foregoing provisions of this Part of this Act and those provisions shall be construed accordingly." In pursuance of this power, which was originally contained in s. 8 (5) of the Workmen's Compensation Act, 1906, the Secretary of State in February, 1918, made an order which, so far as is relevant to the present matter, contained this paragraph, numbered 5:—"In the application of the provisions of the said section to telegraphist's cramp, so far as regards a workman employed by the Postmaster-General, the Post Office medical officer under whose charge the workman is placed shall, if authorized to act for the purposes of the said section by the Postmaster-General, be substituted for the certifying surgeon." The topic dealt with in that paragraph of that order is obviously a topic of the greatest possible importance to the workman concerned. In the ordinary case under the Workmen's Compensation Acts, the workman, by evidence, proves the happening of an accident arising out of and in the course of his employment, and proves injury; but in this particular matter of industrial diseases the first step, and it is a condition precedent to any right to recover compensation, is the certificate of a duly certifying surgeon. The statute, notwithstanding these orders, contemplates, and quite naturally contemplates, that the certifying surgeon shall be a totally independent person. The taxpayer's money which is to be paid in compensation is to be controlled in this respect, not by a departmental official, but by a perfectly independent certifying surgeon, unless the steps are taken which this paragraph under this order indicates. What are those steps? The Post Office medical officer may be substituted for the certifying surgeon if, and only if, two conditions are fulfilled: (1) If he is the medical officer under whose charge the workman is placed, and (2) if he is authorized to act for the purposes of this Part of the Act by the Postmaster-General.

In the present case, Mrs. Carmichael had been for a long time employed as a telegraphist. She had been employed at most of the material time at Grimsby and for part of the time in Hull, and although under the system adopted by the Post Office every Post Office worker, apparently, is on the capitation list of some medical adviser or other, whose services may be obtained by the Post Office worker without the payment of fees, Mrs. Carmichael for some reason did not consult the medical officer upon whose capitation list she was; she preferred for some reason the services of her own private medical practitioner. But she was, as the documents show, upon a capitation list, and there was a person who, wherever she was, whether at Grimsby or elsewhere, stood to her in the relation of the local medical officer to a Post Office servant. A time came when she complained that she was suffering from telegraphist's cramp, and thereupon, in the circumstances set out in Colonel Prynne's affidavit, he made an examination: he came to the conclusion that she was not suffering from telegraphist's cramp, and in the certificate which is here complained of he stated that opinion.

The first question is: Was Colonel Prynne the Post Office medical officer under whose charge Mrs. Carmichael had been placed. Colonel Prynne has sworn a long affidavit in which he sets out with the greatest clearness the steps which he took in the matter. It is quite clear that when a certain stage was reached he did play the part of a consultant, but I am not in the smallest degree satisfied that he was at any time the Post Office medical officer under whose charge Mrs. Carmichael was placed. Nor am I in the smallest degree satisfied that he was authorized to act for the purpose of the section by the Postmaster-General. When the question arose the solicitor to Mrs. Carmichael very pointedly, and in repeated letters, inquired as to Colonel Prynne's authority, and at length, on October 7, 1926, the solicitor to the Post Office wrote saying this: "Colonel Prynne's authority to act in this case rests on his position as Chief Medical Officer, as explained in my letter of September 25, and the fact that the case was referred to him. There is no specific document of which I could send you a copy."

In other words, Colonel Prynne was the chief medical officer, he had some special knowledge of telegraphist's cramp, and the case was referred to him. But that is a totally different thing from authorizing him to act for the purposes of this section. In my opinion, on the true construction of this part of this order the medical officer referred to is the ordinary local medical officer under whose charge the workman is placed. It does not follow that the medical officer must be the person to give the certificate. Ordinarily the person who gives the certificate will still be the certifying surgeon ; but if the Postmaster-General desired somebody within the area of the Post Office service to be substituted for the certifying surgeon, that person must be, I think, the medical officer under whose charge the workman is placed, not *ad hoc*, but the medical officer under whose charge in the ordinary sense the workman is placed. That view of the matter is, I think, greatly fortified when one looks at the manual for the use of Post Office medical officers. Here it is provided, I observe, in rule 6, at pages 2 and 3 : " The duties of a Post Office medical officer are briefly as follows." There are 10 of them. No. 9 is, " To act as certifying surgeon under section 8 of the Workmen's Compensation Act, 1906, so far as regards Post Office servants who are suffering from telegraphist's cramp." Although rule 57, which relates to the whole subject of telegraphist's cramp, has been amended by successive additions, including the rather interesting addition that in cases of doubt the chief medical officer should be consulted and the case should not be referred to a specialist or consultant not connected with the Post Office, the rule nevertheless retains its original provision that when all the various steps have been taken the medical officer will then be asked to give a certificate of disablement in the form prescribed by the Act, the form being supplied by the secretary as required, with any necessary instructions.

In those circumstances I am satisfied, first, that Colonel Prynne was not the Post Office medical officer under whose charge Mrs. Carmichael was placed, and, secondly, that he was not authorized to act for the purposes of this part of the statute by the Postmaster-General. He therefore could not be substituted for the certifying surgeon. It follows that the certificate to which he has put his name is so much waste paper.

There was a moment in this case when it was argued that the document was of such a kind as not to be proper for the writ of *certiorari*. But I am satisfied, when I look at the part which a certificate of this nature must play in the making of any claim for compensation by a Post Office worker suffering from telegraphist's cramp, that the certificate of the certifying surgeon is of the nature of a judicial act, and is a fit subject for *certiorari*. I think, therefore, that the position of Mrs. Carmichael is that she has never received or been given the opportunity of receiving a certificate from the only surgeon who could lawfully give a certificate. But it is said that she is not in the least damaged by that fact, if a fact it be, for the reason that the statute provides for an appeal, and it is quite true when one looks at section 43 of the Workmen's Compensation Act, 1925, subsection (1) (*f*), that in the cases with which that section is dealing the machinery of appeal is provided. The words are : " If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final, and the medical referee, when deciding the matter, shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive."

The argument which has been urged against this rule on this point is that even though it be assumed that Colonel Prynne's so-called certificate is a mere nothing, nevertheless Mrs. Carmichael is not damnified, because she can appeal to the medical referee as if there had been a refusal to give a certificate. I do not think that is the true view. This section, in my opinion, assumes that one of two things has happened : either that there has been a refusal to give a certificate, in which case the medical referee starts with a clean sheet, or that if there has been a certificate granted it has been granted by someone who was authorized to grant it. I do not think that it was contemplated at all that the judgment of the medical referee should in the smallest degree be fettered or influenced by a certificate given by a wholly unauthorized person, and I do not think that Mrs. Carmichael would be in the same position before the medical referee as that in which she would have been if there had been a refusal on the part of the proper officer to give her any certificate at all. This certificate, made as it is, if it is not correct, may very well have a misleading effect. I do not think, therefore, that the argument that the beneficial remedy of appeal is open is at all fatal to the applicant for this rule.

Some further points were taken, but I do not think it is necessary to take up time by referring to them. Certainly I shall not express any opinion upon the powers which this Act confers or the particular mode in which they are conferred. Those are topics not for this Court but for other persons. But wide as these powers are, autocratic as the exercise of them may be, I do not think that they open the door to the particular piece of autocracy with which we are in this case concerned. I think, therefore, that this rule ought to be made absolute, and that this pretended certificate ought to be quashed.

Mr. Justice Avory.—I do not differ from the view that this certificate, being a condition precedent to the right of the workman to claim compensation, may be a proper subject for a writ of *certiorari*, but I have entertained considerable doubt in this case whether the applicant here was not a person under the charge of the chief medical officer of the Post Office within the meaning of the regulation No. 5 which has been quoted. In view of the letter of October 7, 1926, which refers back to the letter of September 25, 1926, I am not prepared to differ from the view which my Lord has expressed that there is not here sufficient to show that she ever was under the charge of the chief medical officer within the meaning of that regulation. The letter of September 25, 1926, states that the chief medical officer is authorized to act for the purpose of the said section by the Postmaster-General. I am inclined to think that that is established, that he was authorized to act for the purpose by the Postmaster-General. But it goes on : " He is specially charged with all cases of alleged telegraphist's cramp, and he is therefore normally the proper person to fulfil the functions of certifying surgeons." I think there is a fallacy there in saying that because he is charged with all cases of alleged telegraphist's cramp he is therefore the proper person to fulfil the functions of certifying surgeons. On the whole, as I say, I do not differ from the view that she was not in the circumstances under the charge of the chief medical officer, and consequently that he

had no authority to give this certificate which he did give in this particular case.

I have also entertained considerable doubt whether any practical advantage is to be gained by the applicant in this case if this rule is made absolute, in view of the provisions of section 43, subsection (1) (*f*), of the Workmen's Compensation Act, 1925. I have, throughout the argument, certainly entertained the view that the section gives the applicant all the relief which she can require, and that she might under that section have the matter determined by the medical referee, whose decision would be final as to whether she is in fact suffering from this disease or complaint. But, even if that remedy is open to her, it is undoubtedly good law that, if the application for a *certiorari* is made by a party aggrieved, then it ought to be granted *ex debito justitiæ*, and the Court has not a general discretion which it would have when the application is made by one of the public who is not personally concerned. That was decided long ago in the case of *Rex v. Surrey Justices* (L.R., 5 Q.B., 466), and on that principle, even although she has the remedy by appeal in this case, I am prepared to agree that the *certiorari* should go, seeing that the application is being made by the applicant as the party aggrieved.

Mr. Justice Salter.—I agree that this rule should be made absolute. Where a workman has contracted a scheduled disease and is thereby disabled, and the disease is due to the employment, he is entitled to compensation as though he had met with an accident arising out of and in the course of his employment; but only if he can obtain from the proper medical officer a certificate of two matters: that he has contracted the disease, and that he is thereby disabled. That is the first essential step to obtaining compensation, and, if he can obtain that certificate, then *prima facie*, and subject to appeal, he is entitled to compensation. I agree with the other members of the Court that Colonel Prynne was not the Post Office medical officer under whose charge the workman was placed.

I do not think that I can derive very much assistance by a study of the manual. It shows how the Post Office authorities read these words. So far as it goes, it appears to support the view that this Court is taking. The normal certifying officer is the certifying surgeon under the Factory Acts. In the case of telegraphist's cramp, when contracted by postal servants, there is a right to substitute a Post Office medical officer for the certifying surgeon. For that right there are two conditions: the person appointed must be the Post Office medical officer under whose charge the workman is placed, and he must be authorized to act under the statute by the Postmaster-General. The mere fact that he is the medical officer under whose charge the workman is placed does not entitle him to certify, nor can the Postmaster-General appoint in lieu of the certifying surgeon any Post Office medical officer except the medical officer under whose charge the workman is placed.

Having regard to a letter of October 7, 1926, I share my Lord's doubts as to whether Colonel Prynne ever was in fact authorized to act, but, whether he was or not, I am quite clear that he never was the medical officer under whose charge Mrs. Carmichael was placed. The certificate, therefore, in my view, is invalid, and I agree with my Lord and Mr. Justice Avory that it is a judicial decision, to which a proceeding by way of *certiorari* would apply. *Prima facie*, therefore, it ought to be set aside.

The point about which I have entertained doubt is the remaining one, namely, the question of appeal. The Act provides by s. 43 (1) (*f*) that if an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, there shall be an appeal to the medical referee, whose decision shall be final. I think the words "or other surgeon" refer to a surgeon who may be substituted under section 44, subsection (3), of the Workmen's Compensation Act, 1925. But I take it that the paragraph to which I have referred, section 43, subsection (1) (*f*), of the Act of 1925, assumes that there has been a grant or a refusal of a certificate by an officer authorized by law to grant or to refuse.

On appeal to the medical referee the medical correctness of the grant or refusal can be challenged, but its validity cannot be. The medical referee could not entertain the question whether the officer who purported to certify or refuse to certify was qualified by law to do so. If Mrs. Carmichael were to succeed in the appeal, and the medical referee were to differ from the diagnosis of Colonel Prynne, I have very little doubt that the Postmaster-General would pay, although I have a good deal of doubt whether he would be legally bound to pay. But, if the medical referee should agree with Colonel Prynne, then the applicant's claim would be finally defeated; and, in my opinion, that would not be a satisfactory result, because, in my view, she never has become a certified claimant and never has taken the first step necessary to entitle her to compensation. If she were now to go to the proper medical officer and ask for a certificate, I think her position might be gravely compromised, and his position rendered difficult by the existence of this embarrassing certificate.

I agree, for the reasons given, that the certificate should be quashed.

[Solicitors—The Solicitor to the Post Office; Messrs. Simpson, Palmer, and Winder.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Jan. 14.

CRACK v. HOLT.*

Hackney Carriages—Licence—Plying for hire—Omnibus—Taking up in private yard—Town Police Clauses Act, 1847 (10 and 11 Vict., c. 89), s. 45—Town Police Clauses Act, 1889 (52 and 53 Vict., c. 14), ss. 3, 4 (1).

Section 45 of the Town Police Clauses Act, 1847, makes it an offence for the proprietor of any carriage to permit it to be used as a hackney carriage plying for hire within the prescribed distance without a licence. By s. 4 (1) of the Town Police Clauses Act, 1889, "The several terms 'hackney carriages,' 'hackney coach,' 'carriages,' and 'carriage,' whenever used in sections thirty-seven, forty to fifty-two (both inclusive), fifty-four, fifty-eight, and sixty to sixty-seven (both inclusive) of the principal Act [the Act of 1847] shall, notwithstanding anything contained in section thirty-eight of that Act, be deemed to include every omnibus." By s. 3 of the Act of 1889, "The term 'omnibus,' where used in this Act, shall include every omnibus, charabanc, wagonette, brake, stage-

* Reported by J. W. Hall, Esq., Barrister-at-Law.

coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance ; but shall not include . . . any omnibus starting from outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance."

Held, that under the above enactments an omnibus is required to have a licence when plying for hire anywhere within the prescribed distance, even in a private yard.

These were two cases stated by the Hull stipendiary magistrate.

The appellant, Frederic Edward Crack, a police inspector, preferred an information under section 45 of the Town Police Clauses Act, 1847, and section 3 of the Town Police Clauses Act, 1889, against John Charles Holt, of Newport, Gilberdyke, for that he, on July 16, 1926, then being the proprietor of a certain omnibus, unlawfully did permit such omnibus to be used as an omnibus plying for hire within the prescribed distance of the city and county of Kingston-upon-Hull without having obtained a licence to ply for hire. The information was heard and dismissed on September 29, 1926.

A similar information on the same facts was preferred against Reginald Sportan Holt, the son of John Charles Holt, for driving the omnibus, and that information was also dismissed. The cases stated were, *mutatis mutandis,* identical and were taken together.

The Town Police Clauses Act, 1847, section 45, provides:—

"If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence . . . or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such licence as aforesaid has not been previously obtained . . . every such person so offending shall for every such offence be liable to a penalty not exceeding 40s."

The Town Police Clauses Act, 1889, brings omnibuses within the rules relating to hackney carriages, and, by section 3, provides:—

"The term 'omnibus' where used in this Act shall include—every omnibus, charabanc, wagonette, brake, stagecoach, and other carriage, plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance ; but shall not include . . . any carriage starting from and previously hired for the particular passengers thereby carried at any livery stable yard (within the prescribed distance) whereat horses are stabled and carriages let for hire, the said carriage starting from the said stable yard and being *bona fide* the property of the occupier thereof, and not standing or plying for hire within the prescribed distance . . . any omnibus starting from outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance."

The following facts were proved or admitted:—

The respondent, J. C. Holt, was the owner of a motor-omnibus, driven by his son, R. S. Holt, on the instructions of his father, for which no licence to ply for hire had been granted by the Corporation of Hull, the licensing authority, for the prescribed distance, which was the area of the city and county of Kingston-upon-Hull.

On July 16, 1926, at about 10.30 a.m., the omnibus was, on the instructions of the respondent, J. C. Holt, standing in a yard in Carr-lane, Hull, which was the private property of a Mr. Lockey, who had for about 12 months permitted the respondent to use his yard in this way on payment of 7s. 6d. a week. Mr. Lockey was a jobmaster, and had stabling for horses and vehicles in the yard. The omnibus had the word "Newport" lettered on the front window. Six passengers mounted the omnibus, which had a seating capacity of 14, one handing to R. S. Holt money for a fare. R. S. Holt then drove the omnibus into the streets of Hull, the respondent, J. C. Holt, who was sitting by him, alighting within the city boundary after the vehicle had travelled some short distance.

No passengers alighted, and no further passengers mounted the omnibus until it had passed outside the boundary of the city of Hull. Outside the city passengers alighted at various points and others got on board. As the passengers got off they paid their fares, save the one who had already paid on the omnibus in Mr. Lockey's yard.

A passenger who travelled from the yard to Newport (outside the city) was told by R. S. Holt on alighting that the fare was 1s. 6d. single or 3s. return. He then paid 3s. for the return fare, no ticket being given him. About 1 p.m. the last-mentioned passenger mounted the omnibus for the return journey. There were five other passengers then on board, one of whom alighted outside the city boundary and paid his fare. Six other passengers got on to the omnibus before the city boundary was reached. After passing within the city boundary one of the passengers alighted, and a person got on who was not invited by R. S. Holt to do so, nor was he observed by R. S. Holt to have done so.

On arriving at Mr. Lockey's yard all the passengers alighted, and also the person last mentioned, R. S. Holt receiving payment from the former, but refusing to take a fare from the latter, whom he did not recognize as having any right to be a passenger.

The omnibus usually did three journeys of a similar character each day and four on Saturdays. R. S. Holt, by his father's instructions, did not invite or seek for passengers while the omnibus was passing along the streets within the prescribed distance.

The appellant contended that J. C. Holt, in permitting his son to convey passengers for reward from Mr. Lockey's yard to places outside Hull and from places outside Hull into Hull, was permitting the omnibus to be used as an omnibus plying for hire within the prescribed distance without a licence.

The respondent, J. C. Holt, contended that in view of the fact that his instructions to his son, R. S. Holt, were that he was not to invite or take up passengers in the streets of Hull, but only in Mr. Lockey's private yard, he could not be held to have been permitting his omnibus to ply for hire within the prescribed distance.

The magistrate's attention was directed to the following cases (among others) :—*Birmingham and Midland Motor Omnibus Company v. Thompson* ([1918] 2 K.B., 105) ; *Clarke v. Stanford* (L.R., 6 Q.B., 357).

Inasmuch as there had been no previous hiring of the omnibus for any particular passengers, and further as the omnibus was not the property of the occupier of the livery stable yard (Mr. Lockey), the magistrate was of opinion that the respondent was not entitled to the benefit of the exception created

by section 3 of the Town Police Clauses Act, 1889. But being of opinion that, R. S. Holt having carried out the respondent's instructions only to take up passengers in a private yard and not to invite or seek for passengers in the streets within the prescribed distance, the respondent J. C. Holt had not permitted the omnibus to be used as an omnibus plying for hire within the prescribed distance, the magistrate dismissed the information, with £3 13s. costs.

Mr. G. R. Mitchison appeared for the appellant; Mr. C. Paley Scott for the respondent in each case.

The Lord Chief Justice.—The question upon which the opinion of the Court is desired is whether, upon the statement of facts set out in the case, the magistrate came to a correct determination in point of law—in other words, whether it was open to him on those facts to come to any conclusion except that an offence had been committed.

It is tolerably clear that the case in the Court below turned upon the fact that the omnibus started from a private yard and did not seek or accept passengers in the streets of Hull. It appears to me that the case is clearly covered by authority. It was held in *Birmingham and Midland Motor Omnibus Company v. Thompson* ([1918] 2 K.B., 105) that an omnibus was required to have a licence when plying for hire anywhere within the prescribed distance, whether in a public street or not.

In that case Mr. Justice Avory said: "It is to be observed that by section 3 of the Act of 1889 the term 'omnibus' is to include, among other things, a 'stagecoach and other carriage plying or standing for hire by or used to carry passengers at separate fares.' Such a stagecoach was expressly excluded from the operation of the Act of 1847, and I think it is matter of common knowledge that at that date stagecoaches more often than not started from and took in their passengers in the private yard of an inn; from which it is plain that the Legislature thought that but for such express exclusion a stagecoach would have come within the operation of the Act notwithstanding that it did not ply for hire in a street. In the later Act the Legislature when expressly including a stagecoach must equally be taken to have done so in view of the fact that stagecoaches usually started on their journey, as I have said, from the yard of some inn as distinguished from a street. . . . I should like to add that if it were necessary to discuss the question whether these omnibuses were under the circumstances plying for hire in a street I should have liked further time to consider it. I am not satisfied that it has been decided in any previous case that under such circumstances as those of the present—namely, the gate of the yard being open, placards and notices directing the public to the yard and the omnibuses being visible from the street—these omnibuses might not properly be said to be plying for hire in a street; but it is not necessary to decide that, and I postpone the expression of any opinion upon it." And in the case of *Clarke v. Stanford* (L.R., 6 Q.B., 357), which was a case dealing with a carriage whilst on the premises of a railway company, under a contract with them to await the arrival of their trains, for the conveyance of any passenger by railway who chose to hire it, it was held that the carriage was plying for hire, and must be licensed. In that case Chief Justice Cockburn said: "I think this case is clearly within the statute. The owner and driver of this carriage were rightly convicted, as the carriage was plying for hire. In *Case v. Storey* (L.R., 4 Ex., 319) the question turned upon a different statute, and the decision was that under that statute there must be a plying for hire in a public place; this case is, therefore, not governed by that decision. The words of the present statute 'plying for hire' are satisfied by the facts which exist in the present case. . . . I assume that the use of the carriage is confined to the purposes of the passengers coming by railway; still, that is a plying for hire."

That case dealt with a vehicle on the premises of a railway company. Those cases make it quite clear that what was done in the present case was a plying for hire in the prescribed area. It is, indeed, an *a fortiori* case; for in *Clarke v. Stanford* (*supra*) the vehicle was available only for persons arriving as passengers by a particular train; here it was waiting for anyone who might choose to come to the yard. The stipendiary magistrate has misdirected himself, and the case must be remitted to him with a direction to convict. His attention has been too exclusively directed to the fact that the yard was a private one. There is nothing to distinguish the son's case in principle, and the same order will be made in that case.

Mr. Justice Avory.—I agree that the magistrate came to an erroneous conclusion. The question which he had to determine was whether this omnibus was plying for hire within the prescribed distance without a licence, and the only ground on which he came to the conclusion he did was that as the proprietor had given instructions only to take up passengers in a private yard and not to invite nor seek for passengers within the prescribed distance, he had not permitted the omnibus to be used as an omnibus plying for hire within the prescribed distance. The case of *Birmingham and Midland Motor Omnibus Company v. Thompson* ([1918] 2 K.B., 105) is an express decision that it is not necessary in order to bring the case within the statute that there should be a plying for hire in a public street. It was found in that case that there was not a standing or plying for hire, and Mr. Justice Atkin, as he then was, said: "All we have to consider is whether this was an omnibus plying for hire within the prescribed distance; and if it was, then, whether or not the proprietors were using it as an omnibus so plying for hire within that distance. I think the case clearly falls within the statute, and that the conviction was right."

Mr. Justice Salter.—I am of the same opinion.

[Solicitors—Messrs. Smith and Hudson, for Messrs. Laverack, Wray and Iveson, Hull; Mr. Basil K. Barton, Hull.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Viscount Finlay, Lord Wrenbury, Lord Darling, and Sir John Wallis.)

1927. Jan. 27.

CROWN MILLING COMPANY, LIMITED, AND OTHERS v. THE KING.*

New Zealand—Monopolies—Offence—Restriction of dealing—Consideration given to another person—Whether including party's own agent—"Contrary to the public interest"—Question of fact—Commercial Trusts Act, 1910 (New Zealand statute) (1 Geo. V., No. 32), ss. 3, 5.

By s. 3 of the Commercial Trusts Act, 1910,

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

"Every person commits an offence who, either as principal or agent, in respect of dealings in any goods, gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person" (*a*) Shall deal exclusively with any person or class of persons; (*b*) Shall not deal with any person or class of persons; (*c*) Shall restrict dealings with any such person or class; (*d*) Shall be, or become, a member of a commercial trust; or (*e*) Shall act under the direction of any commercial trust with regard to the sale, purchase or supply of goods.

By s. 5, "Any person who conspires with any other person to monopolize wholly or partially the demand or supply in New Zealand or any part thereof of any goods, or to control wholly or partially the demand or supply or price in New Zealand or any part thereof of any goods, is guilty of an offence if such monopoly or control is of such a nature as to be contrary to the public interest."

Held, that s. 3 applies only to cases where the consideration is given or the promise is made to another party to the dealing and has no application to the case of an advantage given or promised by one of the parties to the dealing to his own agent.

Held, further, that in the absence of a statutory definition of the classes of monopoly or control that are to be deemed contrary to the public interest the question whether a particular monopoly or control was contrary to the public interest was in the circumstances a question of fact.

This was an appeal from a judgment of the Court of Appeal for New Zealand in a suit regarding the legality of a combination of flour millers in New Zealand for the operation of a scheme for the monopoly and control of flour and the by-products of wheat milling.

Mr. M. Myers, K.C. (of the New Zealand Bar), Mr. J. H. Stamp, and Mr. W. D. Campbell (of the New Zealand Bar) appeared for the appellants; Sir John Simon, K.C., Mr. F. O. Langley, and Miss Joan Clarkson for the respondent.

Viscount Finlay.—This case raises questions of great importance with regard to the construction and effect of the New Zealand Act, 1910, No. 32, which came into operation on January 1, 1911. It is entitled "An Act for the Repression of Monopolies in Trade or Commerce," and is cited as the Commercial Trusts Act, 1910.

This Act is directed against what are known as commercial trusts. In section 2 "commercial trust" is defined as meaning any association or combination of persons having as an object:—

"Controlling, determining, or influencing the supply or demand or price of any goods in New Zealand . . . or elsewhere"; or

"Creating or maintaining in New Zealand . . . or elsewhere a monopoly, whether complete or partial, in the supply or demand of any goods," or "acting in New Zealand or elsewhere with any such object."

The Act applies only to goods mentioned in the schedule, which has been amended by subsequent Acts, and includes in its enumeration many of the principal necessaries of life.

The most important of the enacting clauses are section 3 and section 5.

Section 3 makes it an offence to give or offer in respect of any dealings in goods any valuable consideration:—

"(*a*) For dealing exclusively with any person or class of persons;

"(*b*) For not dealing with any person or class of persons;

"(*c*) For restricting dealings with any such person or class;

"(*d*) For being, or becoming, a member of a commercial trust; or

"(*e*) For acting under the direction of any commercial trust with regard to the sale, purchase or supply of goods."

Section 5 makes criminal any conspiracy to monopolize or control the demand or supply in New Zealand of any goods, if such monopoly or control is of such a nature as to be contrary to the public interest.

There are other sections of a subsidiary nature to which reference has been made, particularly sections 4, 6, 7, and 8. Provision is also made for the infliction of a penalty for offences against the Act, and for the granting of injunctions (sections 10 and 13).

The present proceedings were instituted against the Crown Milling Company, Limited, of Dunedin, and three other companies carrying on business in New Zealand as flour millers. A company entitled Distributors, Limited, of Christchurch, flour millers' agents, were also joined as defendants.

The statement of claim charged against the defendants conspiracy in breach of section 5 of the Commercial Trusts Act, 1910, and set out the agreement entered into in furtherance of the conspiracy alleged. The defendants denied that there had been any infraction of the Act, and alleged that, so far from prejudicing the trade, what had been done by the defendants had been beneficial in its operation.

The case came on for hearing before Mr. Justice Sim in the Supreme Court of New Zealand, and after a trial which lasted for ten days Mr. Justice Sim gave judgment in favour of the defendants. An appeal was brought against this decision to the Court of Appeal in New Zealand, and after a hearing before five Judges, being the first and second divisions of the Court of Appeal sitting together, the Court, by a majority, set aside the decision of the Supreme Court, and entered judgment for the Crown. The Court consisted of five members—Chief Justice Stout, Mr. Justice Herdman, Mr. Justice Reed, Mr. Justice MacGregor, and Mr. Justice Alpers, the majority consisting of three Judges. The defendants by this appeal to his Majesty in Council ask that the judgment of Mr. Justice Sim should be restored.

The object of these proceedings was to put an end to a combination of flour millers in New Zealand, the nature and objects of which are stated in the form of agreement scheduled to the statement of claim.

The company known as Distributors, Limited, was incorporated for the purpose of acting as agents for the millers in the campaign which it was proposed to initiate against the evils from which the trade in flour, &c., was alleged to suffer. They cannot be better stated than in the language of the preamble to the agreement, adhesion to which it was the office of Distributors, Limited, to promote. The parties to

this agreement were, on the one hand, the mill owners who signed it, and, on the other, Distributors, Limited. The preamble is as follows :—

" Whereas the company is incorporated with powers to buy, sell, deal in, and act as agent for the sale of wheat, flour, and other products of milling and cereals : And whereas by the unnecessary multiplicity of marketing and distribution processes the cost of producing, marketing, and distributing flour by flour millers individually is unnecessarily expensive, and results in the net price obtainable by flour millers being unremunerative : And whereas, with a view to minimizing necessary and eliminating unnecessary expenses to individual flour millers the company is prepared to use its organization for the purpose of canvassing for orders, issuing invoices to purchasers, and marketing and distributing flour sold, and otherwise acting as agent in respect of the sale of flour and such other products as aforesaid : And whereas, by reason of difficulties in finance arising from delays and failures in payment by purchasers of flour from flour millers, it is advisable that adequate protection should as far as practicable be obtained against sales to purchasers who are insolvent or unable to pay for flour purchased within a reasonable time : And whereas the company is in a position to dispose of flour to better commercial advantage than can be obtained by individual flour millers, having regard to the difficulties aforesaid : And whereas the said mill owners are the owners of a certain flour mill situated at ....., and hereinafter called 'the said mill' : And whereas the said mill owners have agreed that the company shall act as their sole agent for the sale of flour and its by-products, upon the terms and subject to the provisions hereinafter contained : And whereas the company in consideration thereof has agreed to extend to the said mill owners the advantages it possesses in the marketing and distribution of such flour : Now, this agreement witnesseth that the parties hereto do hereby, in consideration of their mutual covenants and agreements hereinafter contained and implied, mutually covenant and agree in manner following, that is to say :— "

Then follow the details of the agreement. Distributors, Limited, were to sell on behalf of the mill owners (clause 3 (*a*)) ; the agency was to be exclusive (clause 4), and was to be in the nature of a *del credere* agency at 5 per cent. commission, subject to modification (clause 7). The price was to be fixed by the directors of the company (clause 11) and arrangements were to be made for the equitable distribution of the trade (clauses 12 and 13). There were a number of other provisions which it is not necessary to state in detail, and provision was made for the final settlement of any dispute which might arise in carrying them out by reference to arbitration (clause 31).

There has been a singular difference of judicial opinion in this case. Of the six Judges who took part in it, one who formed the Court of first instance and five in the Court of Appeal, three were in favour of the Crown and three in favour of the defendants. The defendants thus succeeded in the Court of first instance, where Mr. Justice Sim, sitting alone, was in their favour, but the Crown succeeded in the Court of Appeal, where three were in favour of the Crown and two in favour of the defendants.

It will be convenient in the first instance to state shortly the conclusions at which their Lordships sitting on this Board have arrived, and the principles on which it appears to them that the decision must depend, and then to proceed to an examination of the conflicting views expressed in the judgments in the Courts below.

In order that the Crown may succeed in this case, it is necessary to show that there had been an offence either under section 3 or under section 5 of the Commercial Trusts Act, 1910, there being no other sections in the Act which for the purposes of the present case would constitute an offence.

Section 3 of the Act runs as follows :—

" 3. Every person commits an offence who, either as principal or agent, in respect of dealings in any goods, gives, offers, or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person—

" (*a*) Deals or has dealt or will deal, or intends or undertakes or has undertaken or will undertake to deal, exclusively or principally, or to such an extent as amounts to exclusive or principal dealing, with any person or class of persons, either in relation to any particular goods or generally ; or

" (*b*) Does not deal or has not dealt or will not deal, or intends or undertakes or has undertaken or will undertake not to deal, with any person or class of persons, either in relation to any particular goods or generally ; or

" (*c*) Restricts or has restricted or will restrict, or intends or undertakes or has undertaken or will undertake to restrict, his dealing with any person or class of persons, either in relation to any particular goods or generally ; or

" (*d*) Is or becomes or has been, or has undertaken or will undertake to become, a member of a commercial trust ; or

" (*e*) Acts or has acted or will act, or intends or undertakes or has undertaken or will undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods."

In the opinion of their Lordships the facts of this case do not disclose any infraction of section 3. That section provides that an offence is committed by any person who, either as principal or agent, in respect of dealing in any goods, gives, offers, or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward or other valuable consideration for the reason, or on the express or implied condition that the latter person does or does not do any of the things specified under heads (*a*), (*b*), (*c*), (*d*) and (*e*) in that clause.

The agreement of the flour millers with Distributors, Limited, is said to show an offence under this section. If Distributors, Limited, fell within the description of " other person " mentioned in the first sentence of section 3 as the person to whom the consideration is given or promised, there would be abundant evidence of such an infraction. But the position of Distributors, Limited, was that of mere agents for the millers, who were parties to the dealing in goods in respect of which the provisions of section 3 come into play. In the opinion of their Lordships that section applies only to cases in which the consideration was given or the promise made to another party to the " dealing." Section 3 has no application to the case of an advantage given or promised by or on behalf of one of the parties to the dealing to his own agent. The essence of the offence in section 3 is that the advantage must have been given or promised to a party to the dealing. It follows that the prosecution cannot rely upon section 3.

Section 5 remains for consideration. It runs as follows :—

" Any person who conspires with any other person to monopolize wholly or partially the demand or

supply in New Zealand or any part thereof of any goods, or to control wholly or partially the demand or supply or price in New Zealand or any part thereof of any goods, is guilty of an offence if such monopoly or control is of such a nature as to be contrary to the public interest."

This clause deals with conspiracy to monopolize in New Zealand the demand or supply of any goods or to control the demand, supply or price, *if such monopoly or control is of such a nature as to be contrary to the public interest.* It is upon these last words that there has been in the Courts below so great a difference of opinion. The question is whether the monopoly or control which it was the object of the defendants to establish was of such a nature as to be contrary to the public interest. The Legislature has not attempted to define the class or classes of monopoly or control which are to be deemed contrary to the public interest within the meaning of this clause. The Courts have to decide this question for themselves.

It is apparent that the effect of the Act is not to treat every monopoly or control as necessarily contrary to the public interest. No offence is committed against the enactment unless the maintenance or control is of such a nature as to be contrary to the public interest. The most obvious form of prejudice to the public interest would be if the effect of the monopoly were to cause an unreasonable rise of price in articles which are necessaries of life. There are in the Act sections dealing with the exaction of unreasonable prices fixed under the influence of any "Commercial Trust," *e.g.,* section 6 and section 7, but it is not charged against the defendants in the present case that the prices have been raised to an unreasonable point within the meaning of any such provision.

Of course, if the Legislature of New Zealand or of any part of his Majesty's Dominions had enacted that any particular acts or omissions should stamp any monopoly or control as contrary to the public interest, every Court would be bound to give effect to such a law. But with regard to the transactions with which their Lordships are now concerned, the Legislature has not taken this course ; it is left to the Courts to ascertain in each case whether the nature of the monopoly or control is contrary to the public interest as a matter of fact, or as a matter of law under some provision of the law, whether common law or statute.

It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy. Strong views may be entertained on the one side or on the other, but the one material question here is whether the monopoly or control is of such a nature as to be contrary to the public interest. The burden of establishing this is, of course, upon the party who asserts that the monopoly or control is of such a nature.

It is clear that the Legislature had in view that there might be cases of monopoly or control which would not be contrary to the public interest, and that it is so contrary must be established in each particular case of prosecution in which it is sought to prove an offence under the Act. The burden of proof is, of course, upon the person who asserts any proposition, and this applies with special force when, as here, the commission of crime is in question. Their Lordships do not think that this proposition has been established in the present case, and for this reason, in their opinion, one essential element in the case for a successful prosecution is wanting. The point is one upon which opinions may differ, as a reference to the judgments of the Courts below in the present case will abundantly show.

It is now necessary to consider the course which the case has taken and the grounds on which the various Judges arrived at their conclusions.

In the Court of first instance Mr. Justice Sim dealt first with section 3 of the Commercial Trusts Act, 1910. He pointed out that the agreement here is for the appointment of an agent for the sale of goods, not an agreement for the sale of goods as in the *Coal Vend* case, *Adelaide Steamship Company v. The King* (15 Commonwealth L.R., 65), and *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Company* (29 *The Times* L.R., 743 ; [1913] A.C., 781), which had been relied on for the Crown. Mr. Justice Sim goes on to consider whether the monopoly and control in the present case are of such a nature as to be contrary to the public interest under section 5. He gives the history of the agreement between the millers which formed the subject of the prosecution, and on his consideration of the evidence he held that the Crown had failed to establish its case. He therefore gave judgment for the defendants.

The case was taken on appeal to the Court of Appeal in New Zealand. The judgments revealed great diversity of view, not only as to the answer to be given, but also as to the point of view from which the question should be considered.

Chief Justice Stout says, record, page 176 :—

"It cannot therefore, in my opinion, be said that this contract was not of" "[such] a nature as to be contrary to the public interest. First, the Distributors Company had the power of fixing the price ; second, it had the power of fixing the amount of production, and where the production was to take place at different parts of the Dominion, and it had the power of declaring that flour produced in New Zealand must be exported (see paragraph 5). It was therefore a contract of such a nature as to be contrary to the public interest."

And, further, on page 177 at line 10 he said :—

"It is surely not necessary to show that the monopoly and control of food and its price are contrary to the public interest."

He therefore held that the offence had been committed under section 5 of the Act.

Mr. Justice Herdman, on the other hand, held that no offence under section 5 had been proved, and pointed out that because there is some restraint of trade it does not necessarily follow that a contract is detrimental to the public interest. In his opinion, no offence against the Act had been committed, as it was not shown that what had been done was prejudicial to the public.

Mr. Justice Reed arrived at the same conclusion as the Chief Justice, though not quite for the same reasons. He said :—

"It is urged that this is necessary to the life of the flour-milling trade, that unrestricted competition in the past resulted in fluctuating prices of flour and, in some cases, in sales below a remunerative price.

"No doubt the law will uphold, in exceptional cases, an anti-competitive contract if it is clearly shown that unrestricted competition will result in ruin to private interests, and an ill-regulated supply, for such cannot be of advantage to the public. In *North Western Salt Company v. Electrolytic Alkali Company* (30 *The Times* L.R., 313 ; [1914] A.C., 461) Viscount Haldane, L.C., said as follows, at p. 469 :—

"'An ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour

disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view.' "

In the result, Mr. Justice Reed gave judgment for allowing the appeal. After adverting shortly to the evidence as to the history of flour milling in New Zealand, he went on to say (page 195, line 29) :—

" As, for eighty years, with open and unrestricted competition, flour millers were able to carry on without the suggested dire results following, it would require the most cogent evidence that circumstances had so changed that at the present day it would be ruinous to private parties engaged in the industry if a return to such unrestricted competition were made, before the Court should assist in imposing upon the public such an extremely detrimental monopoly. The evidence called entirely failed in that respect.

" For these reasons I think the appeal should be allowed."

Mr. Justice MacGregor was of opinion that the judgment of Mr. Justice Sim should be reversed. He said, with reference to Government control of flour supplies, that it was originally a war measure adopted in 1917, when shipping was almost unprocurable. This control had been continued year after year until apparently it had become intolerable, and, after a reference to the evidence, went on (page 202, line 36) :—

" Is it not abundantly plain from all this that the aim and object of the flour millers was, when the Government monopoly ceased, to fasten on the public of New Zealand in their own interest a similar measure of monopoly, not public, but private, not conceived from any motive of public policy, but wholly self-serving and contrary to the public interest ? In other words, they deliberately conspired together to perpetuate under their own control the State monopoly which the Government itself was about to abandon as undesirable in the public interest."

And on the next page, 203, line 27, he goes on to say :—

" A mass of evidence was produced in support of and against these grave allegations. I need not refer to that evidence in detail. In the result, I am of opinion that the main charges made by the Crown have been established as against the respondents. In most cases, indeed, the facts were indisputable."

Mr. Justice Alpers, at the commencement of his judgment (record, page 206), says :—

" Three questions fall to be discussed on this appeal . . . in my opinion, each of these questions should be answered in the negative."

He also expressed his agreement with the judgment of Mr. Justice Herdman, which already has been adverted to in this opinion. On the third question he expresses his agreement with the view of Mr. Justice Sim, the trial Judge.

In the result this case, which has occupied so much time in its progress through all the Courts, resolves itself into one question—namely, Has the prosecution established that on the facts of this particular case the monopoly or control was of a nature contrary to the public interest ? The question is, of course, such as to lend itself to prolonged discussion, and it has been fully and ably argued on both sides. In their Lordships' opinion, the question in the circumstances of the present case is really one of fact and cannot be decided merely as a matter of law. Their Lordships, after reviewing and weighing the evidence, have come to the conclusion that the prosecution has not discharged the burden of proof which lies upon it, and that the judgment of Mr. Justice Sim should be restored.

The respondent should pay the costs of the appeal.

Their Lordships will humbly advise his Majesty accordingly.

[Solicitors.—Messrs. Pontifex, Pitt, and Co. ; Messrs. Mackrell, Matron, Godlee, and Quincey.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1927. Jan. 19.

KREDITBANK CASSEL v. SCHENKERS, LIMITED, AND OTHERS.*

Company—Bills of exchange—Bills wrongfully drawn by branch manager on behalf of company—Ostensible authority to bind company—Forgery—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 24—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), s. 77.

The defendants, a limited company, by their memorandum had power to sign, make, draw, accept and indorse bills of exchange. By article 18 of the articles of association the directors were empowered " to determine who shall be entitled to sign and make, draw, accept and indorse on the company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts and documents." The defendants carried on business in London as general carriers and forwarding agents, and they had a branch office at Manchester, of which one Sydney Clarke was manager. Clarke was also concerned in the formation of a company known as Clarke and Walker, Limited. Having bought goods on behalf of the last-named company, Clarke, without any authority to do so from the defendants, drew seven bills on behalf of the defendants signed " S. Clarke, Manchester Manager." The bills were made out to the order of the drawers, accepted by Clarke and Walker, Limited, and indorsed on behalf of the defendants " S. Clarke, Manchester Manager."

The bills were discounted by the plaintiff bank, and when they were dishonoured by the acceptors the plaintiff bank as holders in due course sued the defendants as drawers, but the latter repudiated the whole transaction, and stated that Clarke had acted without authority.

Held, (1) that in the absence of evidence that the branch manager had ostensible authority to draw bills on behalf of the company, the plaintiffs were not entitled to assume that he had such authority (*Houghton and Co. v. Nothard, Lowe and Wills,* [1927] 1 K.B., 246, followed), and (2) that the bills were forgeries and therefore null and void and the defendants were not precluded from setting up the forgery or the want of authority of the manager.

Ruben and Ladenburg v. Great Fingall Con-

* Reported by E. J. M. Chaplin and T. W. Morgan, Esqrs., Barristers-at-Law.

solidated (22 *The Times* L.R., 712 ; [1906] A.C., 439) followed.

Judgment of Wright, J. ([1926] 2 K.B., 450), reversed.

This was an appeal from the judgment of Mr. Justice Wright ([1926] 2 K.B., 450).

The following statement of the facts is taken from the judgment of Mr. Justice Wright :—The plaintiffs, a German bank, claim as holders of seven bills of exchange, of which the defendants were drawers and indorsers, and which the acceptors have dishonoured. The present trial concerns the defendants, the drawers and indorsers, only ; they obtained leave to defend under Order XIV.

The defendants are a limited company incorporated on February 16, 1921, having a registered office at 15, Eldon-street, in the city of London ; their business is that of general carriers, forwarding and shipping agents and warehousemen. They have a branch office at Manchester, of which one Sydney Clarke was branch manager.

The defendant company, by its memorandum, had power to sign, make, draw, accept, and indorse bills of exchange. By article 18 of the articles of association it was provided as follows : "The directors shall have power to determine who shall be entitled to sign and make, draw, accept and indorse on the company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts and documents."

Two resolutions of the directors were passed on May 14, 1923. By one resolution the defendant company's bank was empowered to honour cheques, bills of exchange and promissory notes drawn, signed, accepted or made on behalf of the company by Mr. J. de Vorsen (manager) and Mr. W. Jager (assistant manager), or by any one director. A later resolution passed on January 2, 1924, was to a similar effect. By the other resolution, the bank was empowered to honour on behalf of the company the signature of Mr. S. Clarke on all cheques payable only to his Majesty's Customs. Such cheques were in fact in payment of reparation duties. S. Clarke was described as assistant manager, but in fact he had, with the directors' assent, used a rubber stamp with which he could sign on behalf of the defendant company as Manchester manager.

In general, all finance was controlled by the London office, and though Clarke indorsed cheques and paid them into the defendant company's bank he was required to send cheques drawn by the defendant company, other than those dealt with in the resolution, to the London office for signature. The defendant company was closely connected with a large and important transport company called Schenker and Co., Berlin, whose head office was in Berlin, and which had various branches in Germany, including one at Sonneberg.

In August, 1924, Sydney Clarke became concerned in the formation of a company called Clarke and Walker, Limited, and in September of that year went to Sonneberg, and on that company's behalf made a large purchase of toys from a merchant called Teichmann, of Sonneberg. He arranged that payment should be made to Teichmann by bills drawn in the name of the defendant company, payable to their order and drawn upon Clarke and Walker, Limited. The defendant company had no knowledge of this, and gave Clarke no authority ; his action was a fraud on the defendant company. He was, however, supported in these proceedings by the manager at Sonneberg of Schenker and Co., Berlin, a man called Bauer.

Under this arrangement seven bills were drawn, each for £200 and each dated Manchester, September 23, 1924, on behalf of Schenkers, Limited, S. Clarke, Manchester manager, to drawer's order, accepted by Clarke and Walker, Limited, and indorsed on behalf of Schenkers, Limited, "S. Clarke, Manchester Manager." Teichmann took them to the plaintiff bank, who, having obtained unsatisfactory reports as to Clarke and Walker, Limited, refused at first to discount more than three bills—£600 in all—without further security. It was then arranged between the plaintiff bank and Teichmann that they would discount the remaining four bills if they had the further security of the indorsement of Schenker and Co., Sonneberg, which was done, Bauer signing in their name. The plaintiff bank thereupon discounted the bills, and in turn had them discounted with the Dresdner Bank at Frankfort. It was admitted that the plaintiff bank acted in good faith and without any actual or constructive notice of any irregularity on the part of Clarke, or any actual suspicion or ground of suspicion that his conduct was unauthorized. The defendant company, however, when the bills were presented and dishonoured by the acceptors and notice was given them, repudiated the whole transaction and stated that Clarke had acted without their authority, so that they were in no way liable for the bills. The plaintiff bank sue as holders in due course, having repaid the Dresdner Bank and obtained the bills.

It was not contended that S. Clarke had actual authority to pledge the defendant company's credit by drawing or indorsing the bills, but the plaintiffs contended that he had implied or apparent authority, which the defendant company denied.

By section 77 of the Companies (Consolidation) Act, 1908, it is provided as follows : "A bill of exchange . . . shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

Mr. Justice Wright held that the defendant company was liable, as the branch manager, Sydney Clarke, might have been authorized by the constitution of the defendant company to draw the bills ; that Sydney Clarke, in drawing the bills on behalf of the defendant company, was a person acting under its authority within the meaning of section 77 of the Companies (Consolidation) Act, 1908, and that a holder in due course was entitled to assume that Sydney Clarke had the authority of the company in fact. He accordingly gave judgment for the plaintiffs.

The defendant company appealed.

Mr. D. N. Pritt appeared for the appellants ; Mr. A. T. Miller, K.C., and Mr. D. B. Somervell for the respondents.

Lord Justice Bankes.—This case undoubtedly raises an important point, and in this Court a point has been raised which was not raised before the learned Judge. The main facts are really not in dispute, and they are these. The plaintiffs bring their action against the defendant company alleging that the defendant company were the drawers and indorsers of a number of bills of exchange which were dishonoured by the acceptors on presentation. They commenced their action and took proceedings under Order XIV. In answer to their claim, the defendant company set out the facts shortly and their contention was that these bills had been drawn and

indorsed by a man who was a manager merely of a branch of their business in Manchester, and that he had done what he did without any authority whatever, and, although they did not say so, in substance it must be assumed from their affidavit that their case was that he had done it in fraud of the company. Upon that affidavit being filed, an order was made in chambers that the case should be tried as a short cause, and it was so tried before Mr. Justice Wright. There the plaintiffs' case was that, the defendants being a company and having among their articles of association an article which authorized the delegation of authority to do such an act as drawing or indorsing a bill of exchange, the rule of law laid down in the House of Lords in *Mahony v. East Holyford Mining Company* (L.R., 7 H.L., 869) applied because they had discounted these bills *bona fide* and without notice of any irregularity whatever. It was upon that state of facts and on that contention that the learned Judge dealt with the matter. At the time when the learned Judge gave judgment the case of *Houghton and Co. v. Nothard, Lowe and Wills*, now reported ([1927] 1 K.B., 246), had not been before this Court. Mr. Pritt, for the appellants, relies on that case as being an authority that on the particular facts of this case and the particular form of the article relied upon, the plaintiffs fail in substantiating their cause of action.

But during the argument another point was taken, which was that this act of the branch manager was a forgery, and that, there being no ground on which the company could be said to be estopped from setting up the forgery, the rule in *Mahony's* case (*supra*) did not apply. I think that is fairly stating the argument on the one side and on the other.

Now it is clear, I think, and well established, first of all, that in the case of a company incorporated under the Companies (Consolidation) Act, 1908, which has an article empowering the directors to delegate their authority, anybody dealing with the company without notice of what has actually happened is entitled to say that that article is of itself notice and that anybody dealing with the company must be presumed to have notice of the existence of the article. I think it is also quite clearly established that a stranger dealing with a company has a right to assume as against the company that all matters of internal management have been duly complied with. There are many cases in the books in which, there being an article authorizing the delegation of authority, a company has been held liable although the person who has purported to act upon the delegation of authority had in fact no authority, because, whether he had or had not, the authority is a matter of internal management with which the stranger had no concern.

Article 18, which is the article in question, is in this form : "The directors shall have power to determine who shall be entitled to sign and make, draw, accept, and indorse on the company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts, and documents." That article is in a somewhat peculiar form. It is not in the form in which it is found in many of the decided cases, in which the article itself indicates the person by name or by description to whom the power may be delegated. But this is an article authorizing the directors to determine who shall be entitled to sign, and, of course, if they are entitled to say who shall be entitled to sign, they can, if they like, give authority to a most irresponsible person. In *Houghton and Co. v. Nothard, Lowe and Wills* (*supra*) the article was in very much the same terms. The directors were empowered to "delegate to any managing director, local board, head manager, manager, attorney or agent any of the powers . . . for the time being vested in the directors." The authority in that case was more circumscribed, if I may use that expression, because it did indicate by description the persons to whom the authority might be delegated. In that case there were certain facts upon which all the members of the Court came to the conclusion that the plaintiffs in that case were not in a position to rely upon the rule in *Mahony's* case (*supra*), because upon the facts the true inference was that they did not rely upon the authority or any suggested delegated authority, but that they distrusted the position and authority of the person who was negotiating, and they required express confirmation, and unfortunately for them the express confirmation was not a confirmation at all. But Lord Justice Sargant in his judgment (and Lord Justice Atkin concurred) did go further, and I think did lay down in terms which cover this case a proposition of law that under the circumstances of that case, which I cannot distinguish from the circumstances of this case, the rule in *Mahony's* case (*supra*) does not apply. If I am correct in that view, that is sufficient to dispose of this appeal.

But during the argument a further point was raised which seems to me to be quite fatal to the plaintiffs' case, and that is that the act of this branch manager was a forgery, and that under those circumstances the documents were merely waste paper, and the plaintiffs could make no claim against the defendants except upon one of two grounds : either that the defendants were estopped from setting up the forgery or that, apart altogether from the rule in *Mahony's* case (*supra*) or article 18, the branch manager had such ostensible authority as rendered the defendants as his employers liable for the acts of drawing and indorsing these bills.

It was contended on behalf of the appellants that what is said to be a dictum of Lord Loreburn in *Ruben and Ladenburg v. Great Fingall Consolidated* (22 *The Times* L.R., 712 ; [1906] A.C., 439) has no application to the facts of this case. But, as Lord Justice Atkin has pointed out, it is very material to see what Lord Justice Stirling said in the Court of Appeal in that case. Lord Justice Stirling deals with the point in terms as to whether or not the fact that the document is a forgery is of any importance when you are seeking to apply the rule of law in *Mahony's* case (*supra*), and this is what he says (20 *The Times* L.R., at p. 724 ; [1904] 2 K.B., at p. 729). He first of all refers to the articles of association, and then he says : "The document on which the plaintiffs rely is written on the company's paper, and has the seal of the company affixed, and is countersigned by the secretary ; it also purports to bear the signatures of two directors, but these are mere forgeries by the secretary. In the circumstances the certificate (as was indeed admitted by the plaintiffs at the trial) is not a valid or genuine document, and does not in my opinion bind the defendants. It was suggested that, inasmuch as the document appeared on the face of it to satisfy the requirements of the articles of association, the plaintiffs, acting as they did in good faith, were not affected by irregularities in the proceedings of the secretary : *Mahony v. East Holyford Mining Company* (*supra*). To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void." The distinction was drawn by Lord

Hatherley in advising the House of Lords in the case itself, and then the judgment goes on to refer to what Lord Hatherley had said. That being the decision appealed from, what Lord Loreburn said (22 *The Times* L.R., 712 ; [1906] A.C., at p. 443) was this : "I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." It is quite true, as Mr. Miller has contended, that that case has reference to a certificate and not to a bill of exchange, and he relied upon section 24 of the Bills of Exchange Act, 1882, which he said distinguished the case and protected his client. But in my opinion, short of an estoppel, that section does not assist the case which he sets up. Although that is the rule in reference to forgery, it is quite clear that the person setting up the forgery may be estopped from setting it up. Lord Macnaghten deals with that, and in *Ruben's* case (22 *The Times* L.R., at p. 713 ; [1906] A.C., at p. 444) he says, having regard to the fact that the document was a forgery, "Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel." In my opinion there was no evidence here upon which an estoppel could be founded. I will deal in a moment with the letter which accompanied these bills of exchange. Under those circumstances it seems to me that it has been proved that the bills are forgeries, and there being no evidence of estoppel it does not lie in the plaintiffs' mouth to rely upon the rule in *Mahony's* case (*supra*). Then they are driven to rely, if they can, upon the ordinary rule applicable to the case of principal and agent, and if they could show, or if they had brought evidence to show, that the drawing and indorsing of bills of exchange were within the ostensible authority of a person occupying the position of this branch manager, it might be that they would have been in a position to establish a claim founded upon that ground. But no such evidence was attempted, and I certainly am not prepared to accept the proposition that it was within the ostensible authority of this branch manager, having regard to his position, to accept bills of exchange to this amount and in this form.

In my opinion, therefore, the appeal succeeds upon both grounds. Mr. Miller relied upon the letter that was sent by this Manchester branch manager accompanying the bills, but so far from assisting Mr. Miller's case it seems to me to be against it. It certainly does not amount to an estoppel that he was allowed to use letter paper headed "Schenkers, Ltd., International Forwarding, Shipping and Insurance Agents. Head Office, 15, Eldon St., London" ; and it certainly is not estoppel, it seems to me, that he was allowed to use a stamp for signing documents : "For and on behalf of Schenkers, Ltd. Branch Manchester Manager." It does not seem to me to amount to an estoppel, and short of an estoppel I cannot see that the document has any greater force or effect than the bills themselves.

Under all these circumstances I think the appeal succeeds and that the judgment for the plaintiffs should be set aside and entered for the defendants with costs here and below.

Lord Justice Scrutton.—In my view this is not an easy case, and but for two authorities on two points to which the Court has been referred I should desire to go much more carefully into the various lines of authorities than has been done ; but in my view this Court is bound, and I am bound, by authority on two points to decide that this appeal should be allowed.

The facts are rather curious. A German gentleman named Teichmann was a seller of goods, and he sold a considerable quantity of goods, over £1,000 worth, to a firm of Clarke and Walker, Ltd., 17, Blackfriars-street, Manchester. As is quite usual in commercial transactions, while the buyer desired credit and was only prepared to pay by giving a bill, the seller desired to get the money as soon as possible and desired to discount the bill, and the ordinary course of business would be, of course, that the seller would draw on the buyer and get the bill discounted either before or after acceptance. Now that was not the course that was pursued in this case. The gentleman representing the supposed buyers, Messrs. Clarke and Walker, Limited, a Mr. Clarke, came to the seller with a bill drawn by a firm of Schenkers, Limited, signed on their behalf by himself, described as Manchester manager, and already accepted by Clarke and Walker, Limited ; so that the position was that Clarke and Walker, Limited, the buyers, being primarily liable, for some reason Schenkers, Limited, had by drawing become liable on the bills and guaranteed the payment by the buyers, Clarke and Walker, and the person who signed the document which would make Schenkers, Limited, guarantors was a gentleman of the name of Clarke, the same as the Clarke of Clarke and Walker, Limited, and he described himself not as a director or managing director or anything of that sort, but Manchester manager. The document was accompanied by a letter from Manchester addressed to the seller : "We beg to enclose you herewith bills of exchange for £1,400 drawn by Messrs. Clarke and Walker and countersigned by your good selves," and that document itself was again signed "Schenkers, Limited. Clarke, Manchester Manager." It seems to me to add nothing to the signature that already appeared on the bill of exchange, "Schenkers, Ltd. Clarke, Manchester Manager." Now, as a matter of fact, Clarke had no authority to bind Schenkers, Limited. There was an article in the articles of association of Schenkers, Limited, which empowered the directors to delegate to anybody the power of signing bills of exchange, but they had not, as a matter of fact, given any delegation to Clarke, and he had no authority to bind them by bills of exchange, and he knew it ; and in binding them he was defrauding them. The seller, Mr. Teichmann, took the documents to a German bank, who discounted them, and then, when they were dishonoured, or rather when Schenkers, Limited, said they would have nothing to do with them, sued Schenkers, Limited, the drawers, the acceptors not being worth anything.

The case came before Mr. Justice Wright, as did a similar case, namely, *Houghton's* case (reported [1927] 1 K.B., 246 in the Court of Appeal), and Mr. Justice Wright applied the doctrine of *Royal British Bank v. Turquand* (6 E. and B., 327), which, as I understand roughly, is this, that any person is deemed to have notice of the articles of association of any company whose articles of association are registered. I think some of the cases go further, and say that he is not only deemed to have notice but he is to be deemed to understand what they really mean, which is sometimes a rather extensive presumption. But

if the thing that happened is a thing that might have been done if certain internal arrangements in the company had been made, then the person knowing of the articles is not bound to inquire whether the internal arrangements of the company have been carried out, and may assume that the thing is regular because there was an article which justified the proceedings if the company within its own ambit, within its own domestic management, took certain steps. Acting on that position, Mr. Justice Wright said that in this case there was an article under which power could have been delegated to Clarke, the Manchester manager, and the bank was not bound to inquire whether in fact authority had been delegated because it could have been delegated, and consequently on the line of *Royal British Bank v. Turquand* (*supra*), and within the cases about presumption and notice of the contents of articles, Mr. Justice Wright held that the bank was excused from inquiring whether the domestic arrangements necessary to delegate to Clarke power to accept bills of exchange had been made, there being powers in the articles to make such delegation.

There are two matters which I think bind me to say that the decision was wrong ; first of all I think it has been established by the House of Lords that the doctrine that you are deemed to have notice of articles and need not inquire as to whether the domestic arrangements necessary to carry them out had been made does not apply where the document to which that principle is sought to be applied is a forgery. I think, having considered the matter, that the decision in *Ruben and Ladenburg v. Great Fingall Consolidated, Limited* (22 *The Times* L.R., 712 ; [1906] A.C., 439) binds me to come to that conclusion. Anyone who remembers the time when that case was decided knows that it excited tremendous discussion both in legal and commercial circles. A secretary of a company had issued a document, purporting to be regularly signed by directors and with the seal of the company on it, to people who advanced money on the strength of it, and the secretary of the company was a person who had authority to issue certificates ; he was the person to whom you would go to get a certificate ; but the company were allowed to say to the person who had advanced money on the faith of the certificate issued by its secretary : "This is not a document that binds the company at all," and that, as my Lord has pointed out, began with the passage in the judgment of Lord Justice Stirling, where, citing the case of *Mahony v. East Holyford Mining Co.* (L.R. 7 H.L., 869), the case in the House of Lords which perhaps states most clearly the doctrine that everybody is presumed to know the contents of registered articles of association, he said : "To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void." Then he quotes the passage that my Lord has read from Lord Hatherley in *Mahony's* case (*supra*), pointing out that to forgery the doctrine which he was laying down in *Mahony's* case (*supra*) did not apply. When it came to the House of Lords, Lord Loreburn said in almost the same language as Lord Justice Stirling : "It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." Lord Loreburn, without referring definitely to the doctrine, puts the ground on which the company are not liable as being that the document is a forgery, is not the company's deed, and there is nothing to prevent the company from saying so. Now, of course, there is this difficulty about *Ruben and Ladenburg v. Great Fingall Consolidated* (*supra*), that certainly Lord Davey—and I am not certain that another noble Lord did not say so—said that they were not liable because the act was done for the benefit of a servant and not for the benefit of the company, following a statement in those terms by Mr. Justice Willes in *Barwick v. English Joint Stock Bank* (L.R. 2 Ex., 259, at p. 265) and the House of Lords subsequently in a considered judgment in *Lloyd v. Grace, Smith and Co.* (28 *The Times* L.R., 547 ; [1912] A.C., 716), to which Lord Macnaghten was a party, has said that that limitation was erroneous, and that although the act is done for the benefit of an employee alone, not for the benefit of the company, yet the company may be liable. There is a little difficulty in reconciling the two cases on the head of forgery. I have always felt that difficulty, more especially as I was the Judge who originally decided *Lloyd v. Grace, Smith and Co.* (*supra*), and, having been reversed by the Court of Appeal, was affirmed by the House of Lords. But the House of Lords, having *Ruben and Ladenburg v. Great Fingall Consolidated* (*supra*) cited to them, have not in any way repudiated the doctrine of *Mahony's* case (*supra*), the doctrine of presumption of knowledge of the contents of the articles of association, and the doctrine of *Royal British Bank v. Turquand* (*supra*), that you need not inquire into the details of internal management, and, though dissenting from parts of the judgment, said nothing to interfere with the rest of the judgment so far as it is based on forgery.

Now it seems to me clear that this document is a forgery within the language of the Forgery Acts. It contains a false statement, namely, that the manager is acting for the company, and it purports to bind the company. That statement is in fraud of the company, and those two elements appear to make the document a forgery within the Forgery Acts. That being so, I feel bound by the decision of the House of Lords to hold that in this case it is not open to the plaintiffs to say "The question whether authority has or has not been delegated to Clarke, the Manchester manager, is a matter of internal management about which I need not inquire under the rule in *Royal British Bank v. Turquand*" (*supra*).

The second matter that I think binds me is this. In *Houghton's* case (*supra*), which in many details is very similar to this, when it came before the Court of Appeal, two judgments in effect were given. The judgment of my Lord dealt with the matter on the particular facts, and he declined to express any further opinion. But the judgment of Lord Justice Sargant, in the reasons with which my brother Atkin concurred, took a further point. He said that, though there is a power of delegation, though you are deemed to know it, you cannot say "I am deemed to know of that and I did act upon it," unless it is proved that you did in fact know of it. Now I hope it is not disrespectful to say that I wish that Lord Justice Sargant, who is thoroughly conversant with that branch of the law, had explained to people who are not so thoroughly conversant with that branch of the law exactly how that fitted in with the doctrine that you are deemed to know and to understand the true meaning of the articles of association. As is very usual when people who are speaking know all about a matter, they forget that other people do not know so much about it. The Lord Justice has not explained exactly how his decision fits in with the line of cases

of which *Mahony's* case (*supra*) is an instance. But whether he has explained his reasons or not, there is no doubt about what he said, and there is no doubt that my brother Atkin has concurred in the reasons. In those circumstances I think I am bound by the decision given by a majority of the Court, which prevents the plaintiffs from putting forward a position like this: "We are deemed to know there was a power of delegation, and we are excused in those circumstances from inquiring into the internal management, because the judgment has said that you need not unless you in fact knew of the power of delegation and relied on that power." As I understand, the case being tried as a short cause and only on defences specified in an affidavit, Mr. Pritt did not go into questions of notice, and I think the learned Judge rather indicated that he could not, otherwise I should have thought that this transaction was so unusual as a commercial transaction that it put the seller and the bank on inquiry as to how it came about that this odd guarantee was given in fact by a gentleman named Clarke who appeared to be the same person as was guaranteed. But that point was not taken, and I do not rest my judgment here on that point, though I think there would have been a good deal to be said for it if it had been taken, and though it rather relieves my feeling, apart from the law, that upon the merits there is a good deal to be said for it.

Lord Justice Atkin.—I agree. The transaction itself which my Lord has just referred to was certainly a transaction which one would not suppose was within the ordinary course of business in this country. The firm of Schenkers, Limited, are a very large firm of forwarding agents. They do not deal in goods except so far as they make some advances on them. They have a branch, among other places, in Manchester, of which one Clarke was at the material times a manager. But Clarke also formed a company of Clarke and Walker for the purpose of dealing, among other things, in toys. He had recently formed this company, and there was apparently a very small capital subscribed. He went over to Germany in his capacity as interested in the firm of Clarke and Walker for the purpose of buying toys in the toy market in Germany, and he bought or agreed to buy a large quantity of toys from a man named Teichmann. Teichmann wanted to be sure about payment, and he consulted a gentleman named Bauer, who was interested in the German firm of Schenkers, and who also carried on a similar business as a limited company. Mr. Bauer, who apparently was very anxious to help the firm of Clarke and Walker, said "You had better get your Clarke and Walker bills endorsed by our firm of Schenkers, in England, who are perfectly sound." Apparently that was done, and Mr. Teichmann was satisfied with that. So Mr. Clarke went back to England and then drew seven bills of £200 each, all dated the same day and all made payable three months after date. He drew these bills on Clarke and Walker payable to his order or their order, and he drew the bills in the name of Schenkers, Limited, "S. Clarke, Manchester Manager"; and he sent those bills to Teichmann, saying "This is £1,400 of bills," and Teichmann took the bills to the bank, and they discounted them. I quite agree that we are not concerned here with the question of notice; we must assume that the bank had no notice that there was anything wrong with the bills. But they thought it necessary to make some inquiries, and the man of whom they thought it necessary to make inquiries as to whether these bills drawn in the name of Schenkers were in good order was the man who in fact signed the bills. They wrote to Clarke, who had given the bills in the name of Schenkers, Limited, and asked whether when he did give a bill in the name of Schenkers, Limited, it was in order, and they got an answer that it was—as might be expected—and so they were satisfied with that, and they discounted the bills.

Now the bills themselves, it is quite plain to my mind, were forgeries; they were false documents and they were fraudulent documents; they were concocted by Clarke for the purpose of defrauding Schenkers, Limited. I have no question about that. The firm of Schenkers, Limited, had nothing to do with these bills or the consideration for them, and it is an obvious fraud upon them; and it would appear, therefore, that there was no reason why they should pay for the forgery or pay Mr. Teichmann. But it is said that they are liable, and one reason why it is said that they are liable is this. It is said: "You are a limited company, and as a limited company you are in a very much more awkward position than if you were a firm, because you have got a provision in your articles that the directors may determine who may sign bills of exchange, and inasmuch as the directors may determine who may sign bills of exchange with the authority of the company, therefore anybody who purports to sign a bill of exchange in the name of the company is deemed to have authority to sign the bill of exchange." If that doctrine were really carried to its logical conclusion it would be a very alarming thing for companies, for anybody who has the pen of a ready writer need only sit down and write a bill of exchange in the name of any company who had that article, and that company would be presumably bound when the bill got into the hands of a holder for value without notice, even though the thing was an absolute forgery. That, I think, is untrue, and the article cannot have that extended bearing. I think there is a limitation accepted by the learned Judge, as was pointed out before, and pointed out in one of the cases—that that would mean that not merely the office boy but anybody might purport to sign on behalf of the company. That cannot be true, and to my mind quite plainly it is not true. The learned Judge himself limited the doctrine in his judgment to such a person as falls within the category of persons who under the articles might properly be empowered if the appropriate authority had been given. That seems to me to bring you to an entirely different class of case. I agree that that probably is right, but who is the person who might properly be entitled? You are then thrown back on the persons who ordinarily, apart from the articles, from their position in the company or elsewhere would be acting within the scope of their apparent authority in signing a bill. That is a question which has to be determined, to my mind, quite apart from the actual terms of the article, which merely empowers the directors to pick out a person who can have authority to sign a bill. Now if you deal with that proposition and come to consider whether the manager of a branch business is a person who has ostensible authority to sign bills on behalf of the company, in my view, in the absence of evidence to the contrary, the learned Judge was wrong in assuming that there was any such ostensible authority. It depends, of course, upon the evidence as to the nature of the business and as to the actual position occupied by the gentleman. But in the absence of evidence I am not prepared to hold that the manager of a provincial branch, even if he is in such an important position as manager of the Manchester branch of a forwarding agency, has authority to draw bills to

bind his company. The actual evidence given, I think, was that the company never signed bills at all, and in the absence of evidence that the branch manager had ostensible authority to draw bills, I should have thought quite plainly that he had not. Therefore this is the ordinary case of a person having exercised or purported to exercise an authority to bind the company in fraud of the company, outside the scope of his ordinary ostensible authority. If that is the case, then under section 24 of the Bills of Exchange Act, 1882, the holder is not entitled to enforce payment of these forged bills unless the principal is precluded from setting up the forgery or the want of authority. To my mind, inasmuch as the act was not done within the ostensible authority of the agent, the principal is not precluded from setting up the want of authority. That seems to me to determine this case.

I think the true limits of the doctrine as to the effect of an article which empowers the company or the directors of it to nominate a person to have authority to do a particular act on behalf of the company are made quite plain in the judgments of my Lord and Lord Justice Sargant in the case of *Houghton and Co. v. Nothard, Lowe and Wills* ([1927] 1 K.B., 246). It seems to me, therefore, to be unnecessary to consider the further doctrine as to knowledge of the articles of the company, except that one might say this, that the doctrine is as to knowledge of the article, that is to say, you are to be in the same position as though you had read the articles, and, if you had read the articles, all you would see would be that the directors had power to nominate the person who was to sign bills of exchange, and it appears to me that you would not be in a very much better position if you knew that unless you went on further and inquired whether or not the directors had in fact nominated a particular person to sign the bills. There are certain cases where you need not make that inquiry, and when you find the power and know that the act can be done by the company in a board meeting, and there purports to be a resolution, you are not obliged to inquire whether or not the forms of the company required by the articles as to the constitution of the board and the quorum and so on have been actually carried out. If you are dealing with a director in a matter in which a director normally would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles before he exercises that power have in fact been complied with. Those are matters of internal management—which an outsider is not obliged to investigate. But we have the authority of the Court of Appeal in *Houghton's* case (*supra*) and of the House of Lords in *Ruben's* case (22 *The Times* L.R., 712; [1906] A.C., 439) for saying that the doctrine that you need not investigate whether or not the internal management of the company has been strictly carried out in accordance with the articles has no application to cases where you have an obvious forgery. As regards that, it appears to me that the cases which have been referred to have no operation. In this case there is the right of this company to say: "These are not our bills, and we are not precluded from denying the authority of the person who purported to sign the bills on our behalf."

For these reasons I think the appeal should be allowed and judgment entered for the defendants with costs.

[Solicitors—Messrs. Wm. A Crump and Son; Messrs. Durrant Cooper and Hambling.]

Judicial Committee of the Privy Council. (Viscount Finlay, Viscount Dunedin, Lord Parmoor, Lord Darling, and Lord Warrington of Clyffe.) 1927. Feb. 7.

ROBINS v. NATIONAL TRUST COMPANY, LIMITED, AND OTHERS.*

Privy Council Appeals—Concurrent findings of fact — General rule against interference — Exceptions.

The general rule, that on an appeal to the Judicial Committee of the Privy Council the Board will not examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact, is not confined to Indian appeals but will be applied to all the judicatures from which an appeal lies to the Judicial Committee. Although an exception may be made to the rule in the case of a miscarriage of justice, yet the words "miscarriage of justice" in this exception mean only such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense judicial procedure at all.

The application of the rule may, however, be prevented by showing that the finding of one of the Courts was so based on an erroneous proposition of law that, if that proposition be corrected, the finding disappears.

This was an appeal from a judgment of the Supreme Court of Ontario (Appellate Division), in a suit in which the appellant sought to set aside the will of Mr. E. C. Walker, a distiller at Walkerville, Ontario.

Mr. Stuart Bevan, K.C., Mr. O. E. Fleming, K.C. (of the Canadian Bar), and Sir Robert Aske appeared for the appellant; Mr. Glyn Osler, K.C., Mr. J. H. Rodd, K.C., and Mr. J. F. Hellmuth, K.C. (all of the Canadian Bar), for the respondents.

Lord Dunedin, in delivering their Lordships' judgment, said: The late Edward Chandler Walker was at first senior partner of the firm of Walker and Sons, and thereafter when that firm was changed into a limited company was president of Walker and Sons, Limited, whiskey distillers, in Walkerville, Ontario. He was a very wealthy man, married, but with no children, and he died on March 11, 1915, leaving a widow. He left a will dated February 27, 1914, and the respondents are the trustees and the principal beneficiaries under the said will. The said will revoked all prior wills. The testator had made a prior will on December 21, 1901, under which the appellant is a beneficiary. The present action is at the instance of the appellant to set aside the will of 1914 and restore the will of 1901. The grounds on which he seeks to set aside the will of 1914 are: 1. Want of testamentary capacity in the testator on the date of the execution of the said will; 2. Fraud or undue influence by which the testator's brothers obtained the execution of the said will.

The appellant was manager of the company, both as a firm and afterwards as a limited company, for a long period, and was on terms of great intimacy with the testator. The appellant left Walkerville in 1914, and went to England. He alleges that he only came to know of the will of 1901 under which he was a beneficiary, and of the state of affairs as at the date

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

of the will of 1914, in April, 1922. On June 23, 1923, he raised the present action against the executors, and the beneficiaries were afterwards added as defendants.

The action was tried before Mr. Justice Mowat without a jury. Evidence was led on both sides. The evidence was voluminous and contradictory, and the trial lasted six or seven days. The learned Judge found that no testamentary incapacity of the testator had been made out, and that it had not been shown that the execution of the will was induced by fraud or undue influence, and he dismissed the action. Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously affirmed the judgment of the Trial Judge. Appeal has now been taken to the King in Council, and the appellant has sought to induce their Lordships who sit on this Board to examine and revise the evidence and to come to the conclusion that the result arrived at by the Trial Judge and the Court of Appeal was wrong. This raises in a quite distinct way the question whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact. Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The Judicature which has given greatest occasion for its development has undoubtedly been the Judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed it is obvious that, if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various Judicatures whose final tribunal is this Board.

Being as has been said a rule of conduct, and not a statutory provision, the rule is not cast iron, but it would avail little to try to give a definition, which should be at once exhaustive and accurate, of the exceptions which may arise. It will be sufficient to quote what has been said on this subject in the past :—

In *Moung Tha Hnyeen v. Moung Pan Nyo* (L.R., 27 Ind. Ap., 166) Lord Hobhouse, delivering the judgment of a Board which included Lord Macnaghten and Lord Lindley, said :—

"There has been nothing to show that there has been a miscarriage of justice or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognized here, and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Court below on matters of fact ; unless very definite and explicit grounds for that interference are assigned."

And in *Rani Srimati v. Khajendra Narayan Singh* (L.R., 31 Ind. Ap., 127) Lord Lindley repeated the view :—

"The appellants have failed to show any miscarriage of justice or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all-important would amount to a miscarriage of justice. The expression means no such thing. It means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the words judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if the proposition be corrected the finding disappears, then in that case it is no finding at all. Such an attempt was made with great skill and pertinacity by Mr. Bevan for the appellant in the present case. He laid stress on the law as it had been authoritatively settled in England, and in Ontario in such matters the law of England rules. Now the English Courts have gone what some might think pretty far on the question, what duty lies on those who propound a will. Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but as soon as the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by the following cases : *Barry v. Butlin* (2 Moo. P.C., 480) ; *Cross v. Cross* (3 Sw. and Tr., 292) ; *Tyrrell v. Painton* ([1894] P., 151).

Now their Lordships will assume that these cases are right. The reason for this form of expression is that the appellant represented that the Appellate Division of the Supreme Court of Ontario in the case of *Larocque v. Landry* (52 O.L.R., 479) had taken another view, in that it held that when once probate was granted though only in common form, the onus was on him who sought to set it aside, and the Court in this case held itself bound by that case. It is questionable whether that is the result of the decision. But assuming that it is, when an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and, that being settled, the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board. But in the present case their Lordships do not consider it necessary to settle which of the two possible views as to onus is right ; they will assume for the purposes of this discussion that the English rule is right. But given the law the appellant in their Lordships' opinion fails in its application to the facts. Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a

man who is alive was born requires no proof. The onus is not on the person making the assertion because it is self-evident that he had been born. But to assert that he was born on a certain date if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. That seems to their Lordships the case here. After reviewing the evidence as to capacity the learned Trial Judge says :—

"The result of this evidence pieced together, dovetailed together, combined and considered as a whole does not make me think that there was anything which would affect the mind or which would show the incapacity of the late E. C. Walker to make his will when he did."

The Court of Appeal first stated the grounds put forward by the appellant for the reversal of the judgment of the Trial Judge, thus :—

"That the evidence established that the testator was not mentally capable of making a will at the time when the alleged will was executed";

and after examining the evidence it concludes thus :

"The plaintiff clearly fails upon the first of his grounds for the reversal of the judgment."

There is a passage at the beginning of the Trial Judge's judgment which shows that on the question of onus he agreed with what had been laid down by the Court of Ontario, and the appellant argued that the learned Judges of the Court of Appeal must be presumed to have had the same views, and that, consequently, the whole judgment was vitiated by this wrong view as to onus. But, as has been already explained, there was no question of onus in the determination as it came to be made. It was a considered result of the evidence, and onus as a determining factor never arose, for the learned Judges could, and did, come to a positive conclusion on the evidence led. Learned counsel laid stress on the fact that the Trial Judge expressed the result of his view in a negative fashion :—

"The evidence does not make me think that there was anything which would show the incapacity of the testator."

He argued that that was no positive finding of capacity as the authorities require. The learned Judge was not dealing with onus. He was stating a result in ordinary English, and to say that the above sentence was not a positive finding of capacity seems to their Lordships as out of the question as to say that if one said of a man that he was not dead on a certain date there was no finding that he was alive.

Their Lordships therefore think that the attempt to avoid the effect of the concurrent finding rule fails. Much was sought to be made of the unfair way in which, the appellant argued, the Trial Judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms that he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai* (L.R., 30 Ind. Ap., 41) the judgment of their Board states :—

"The rule (as to concurrent findings) is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence."

No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will. See *Craig v. Lamoureux* (36 *The Times* L.R., 26; [1920] A.C., 349).

In their Lordships' opinion the rule as to concurrent findings clearly applies in this case, and the appeal falls to be dismissed. A petition was lodged for the admission of new evidence. This application had been made to the Court of Appeal and refused. Their Lordships will be slow indeed to interfere with the decision of the local Court on what is really a question of discretion and procedure. This petition therefore falls to be dismissed, with costs.

Their Lordships will humbly advise his Majesty in accordance with the above opinion. The appellant will pay the costs of the appeal.

[Solicitors—Messrs. Collyer-Bristow and Co.; Messrs. Blake and Redden; Messrs. Freshfields, Leese, and Munns.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Feb. 7.

MITCHELL v. B. W. NOBLE, LIMITED.*

Revenue — Income-tax — Profits — Deductions —Business expense—Payment to retiring director—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Cases I. and II., rule 3 (*a*).

The Court held that a payment by a company to a director in order to induce him to retire, in circumstances in which the other directors had come to the conclusion that it was essential in the interests of the company that he should retire, was a business expense deductible from the company's profits for purposes of income-tax.

Decision of Rowlatt, J. (43 *The Times* L.R., 100), affirmed.

This was an appeal from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 100). The short point was whether a payment to a retiring director, made because it was believed to be advantageous to the respondent company to get rid of him, was a business expense which could be deducted from profits in ascertaining the amount due for income-tax.

The company's directors were entitled to hold office for life, subject to their holding certain shares and subject to dismissal for misconduct. In the event of a director being so dismissed the remaining directors were empowered to require him to sell to them his shares in the company at par.

It was also provided that if any director should, *inter alia*, neglect his duties or be guilty of such misconduct towards the company or otherwise as would in the absence of any agreement to the contrary entitle a company summarily to dismiss him

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

from his employment, the company should have power to dismiss him forthwith, paying to him such a proportion of his salary only as should then be due.

In 1920 the company, by altering its articles, issued 2,000 participating notes, and allotted them to the directors. The notes were to confer certain rights in profits. It was provided that no persons other than a director, officer, servant, or employee of the company should be entitled to hold or acquire participating notes. It was also provided that when a noteholder ceased to be a director, officer, servant, or employee of the company he should forthwith surrender his notes to the company to be cancelled.

During 1920 and 1921 considerable friction of a personal nature arose between one director of the company and his co-directors, and there was evidence before the Special Commissioners of conduct on the part of that director improper in a director of the company. The other directors desired to get rid of him and considered it necessary for the sake of the good name of the company to do so. It was admitted that the company might possibly have been justified by law in exercising its power of dismissal, in which case the dismissed director would have been entitled to no compensation. But the other directors were anxious that the matter should not become public, and they entered into negotiations with the director concerned for his retirement. He at first demanded £50,000, but a compromise was eventually arrived at, and on December 30, 1921, an agreement was entered into between the company, the remaining directors, and the retiring director, whereby the retiring director agreed (1) to retire from the company ; (2) to transfer his shares, which at that time were 300 £1 shares, at their face value of £1 per share to the remaining directors ; and (3) to surrender his participating notes. The company agreed to pay him £19,200 and the directors to pay him £300, making together the sum of £19,500. He agreed to accept that sum in full and complete satisfaction of all claims which he had or might have against the company or the directors. (The £300 paid by the directors was expressed to be the consideration for his shares.)

The sum of £19,500 was payable in five annual instalments. The first instalment (which was duly paid) amounted to £5,500 and consisted of (*a*) the £300 payable by the directors for the retiring director's shares and (*b*) £5,200 being part of the £19,200 payable by the company.

It was contended on behalf of the company that the sum of £19,200 was money wholly and exclusively laid out for the purposes of the business ; and that the instalments were admissible deductions from profits as and when they fell due.

It was contended on behalf of the Crown, *inter alia* :—

(1) That, in essence, the £19,200 was domestic expenditure incurred for the purpose of buying out a director and shareholder for purely personal reasons and was not expenditure incurred for the purpose of earning profits of the company.

(2) That neither the £19,200, nor the instalment of £5,200, nor any other instalment thereof was money wholly and exclusively laid out or expended for the purposes of the company's business, nor admissible as a deduction in computing the profits of the company for assessment to income-tax.

The Special Commissioners held that the instalment of £5,200 paid to the retiring director should be allowed as a business expense, and they reduced the assessment.

Mr. Justice Rowlatt upheld the Special Commissioners.

The Crown now appealed.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown and cited, *inter alia, British Insulated and Helsby Cables, Limited v. Atherton* (42 *The Times* L.R., 187 ; [1926] A.C., 205) ; *Ounsworth v. Vickers, Limited* (31 *The Times* L.R., 530 ; [1915] 3 K.B., 267).

Mr. Konstam, K.C., Mr. Le Quesne, K.C., and Mr. Merlin for the respondents were not called upon.

The Master of the Rolls, in giving judgment, said that it was clear that the company was one which, with a very small capital, could earn very large profits mainly by the personal skill and industry and reputation of the directors. It was therefore natural that they should agree to terms with this director who had resigned, so as to avoid any scandal. Good credit was essential to the carrying on of the business, and the Court must not overlook the finding of the Special Commissioners that a bargain had been concluded in the interests of the company. The directors had had to face a difficult and delicate problem ; they had to get rid of this director without public scandal, and so they had agreed to give him a large sum which was to be paid by instalments.

It was said that that was not a payment "wholly and exclusively" for the purposes of the business within the meaning of Rule 3 (*a*) of Cases I. and II. of Schedule D of the Income Tax Act, 1918, although the Special Commissioners had found that it was a "business expense." In his (the Master of the Rolls's) view, the Court should interpret that phrase as applying to an expense incurred for and on behalf of carrying on the business of the company, and it seemed that the Special Commissioners meant to find that as a "business expense" it was incurred "wholly and exclusively" for the business.

That was the finding of fact, but it could, of course, be said that it was not open to them to find that in law. Upon that question, however, he agreed with what was said by Lord Cave in *British Insulated and Helsby Cables v. Atherton* (42 *The Times* L.R., 187 ; [1926] A.C., at p. 212), that :—

"A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

That, and other authorities which had been cited, showed that, when there was this finding of fact that the directors were minded to save the company from scandal and that they were satisfied that they must get rid of this director and pay this sum as a means of doing so, then it was impossible to say that it could not be regarded as a sum which could be deducted as an expense of the business. In *Strong and Co., of Romsey, Limited v. Woodfield* (22 *The Times* L.R., 754 ; [1906] A.C., at p. 452) Lord Loreburn said :—

"I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself."

And Lord Davey said in the same case, at p. 453 :—

"These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade."

In the present case the directors had had to face a situation of delicacy and gravity ; they were justified in the course which they took, and from that

point of view the payment was a proper business deduction.

Then it was said for the Crown that, even if that were so, it was a capital expenditure, although spread over certain years; and that it was an ascertained sum, and not one of a recurring nature. Mr. Justice Rowlatt, on the other hand, held that it was a simple business payment. Several cases bearing upon this point had been discussed in *British Insulated and Helsby Cables v. Atherton* (*supra*). In *Smith v. Incorporated Council of Law Reporting* (30 *The Times* L.R., 588; [1914] 3 K.B., 674) a gratuity of £1,500 was paid to a law reporter upon retirement. *Hancock v. General Reversionary and Investment Company, Limited* (35 *The Times* L.R., 11; [1919] 1 K.B., 25) was a case where money was expended to purchase an annuity for the benefit of a retiring actuary.

It was not easy to get much help from particular cases on their own particular facts, but it seemed to him that the present case approximated more closely to these last two cases, where the deduction was allowed as current expenditure, than to the *British Insulated and Helsby Cables* case (*supra*) and other cases where the sum expended was held to be capital.

The payment in the present case was made in the course of business. It was not made to secure an actual asset to the company so as effectively to increase the company's capital. It was made to enable the directors to carry on as they had done in the past, unfettered by the presence of a colleague who might have a bad effect upon their credit. The payment was a business expense and deductible for income-tax purposes. The appeal would be dismissed.

Lord Justice Sargant, after stating the facts, said that with regard to the question whether the disbursement was wholly and exclusively for the purposes of the business he could see nothing to show or even suggest that it was not so. A good deal of stress had been laid upon the fact that the continuing directors could buy out the shares of the retiring director at par, but they could have done that in the same way if he had been dismissed. In a company of this private and confidential nature it was absolutely necessary that, if one director left, his shares should be taken by the others. Again, the mere fact that a very large dividend could have been earned was not conclusive, because these dividends would have come from the whole company and been incidental to the profits of the whole company, and therefore, as a secondary result, a payment made to ensure the prosperity of the whole company was not tarnished, so to speak, by the fact that it went to the benefit of the directors, who were in fact the company.

Then it was said that this must be a payment of capital. With regard to that he (Lord Justice Sargant) agreed with the view of Mr. Justice Rowlatt that compensation paid to ensure the dismissal of a servant was a payment usually attributable to revenue, and to the year in which it was made. It did not seem on the face of it to be a capital expenditure, and it was a payment of a sort which might be liable to recur, though it might be hoped that it would not. Moreover, to him (the Lord Justice) it seemed impossible to say to what capital account such a payment could be placed. It did not seem to be such a payment as could be taken to be withdrawn from the company's capital of only £1,000. It was undoubtedly paid out of profits, and essentially different from the payments made in cases which had been referred to which were payments for the permanent benefit of the company and for the permanent increase of its capital. The appeal must therefore be dismissed.

Lord Justice Lawrence said that he agreed with the other members of the Court that this was a payment wholly and exclusively for the business, and that its sole object was to enable the company to carry on its activities. As to whether it was an expenditure of capital or of revenue, he confessed that he had some doubts, which were not wholly resolved, whether the payment was not made, as said by Lord Cave in *British Insulated and Helsby Cables v. Atherton* (42 *The Times* L.R., 187; [1926] A.C., 205), to secure an advantage for the enduring benefit of a trade. However, the other members of the Court had decided that the payment was not of capital, and his (Lord Justice Lawrence's) doubts in the matter were not strong enough to make him wish that a reply should be asked for from the respondents.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Ashley, Tee, and Sons.]

K.B. Div. (McCardie, J.) 1927. Jan. 28.

MARTIN v. BENSON.*

Practice—Costs—Defamation—Contemptuous damages—Plaintiff's costs—Court's discretion—Principle on which rule is to be applied—Meaning of "good cause" for costs not following event—Action oppressive or one that should not have been brought—Relevant matters before issue of writ may be considered—Order LXV., rule 1.

This action, tried with a special jury, was brought by Lionel Walker Birch Martin, of Kensington, late managing director of Bamford and Martin, Limited, motor engineers, of Kensington, who alleged that the defendant, the Hon. John Roby Benson, a director of the above company, on three occasions uttered words to three different persons imputing dishonesty on the plaintiff's part. In substance the defences were two: (1) Non-publication; (2) justification. There was no plea of privilege. The words complained of contained a number of serious allegations against the plaintiff, and their meaning the defendant did not seek to dispute. The particulars of justification were expressed in the clearest and most unambiguous terms. They charged the plaintiff (*inter alia*) with three felonies of larceny, with criminal conspiracies, and with several acts of dishonesty.

The trial of the action lasted for many days. Much of the evidence was of an intricate character. At the conclusion of the summing-up his Lordship left a series of questions to the jury which covered the various points raised by the defence and particulars of justification. The jury found that the defendant had in fact published the words complained of, and they found also as to each separate matter of justification that the plea of justification had not been proved by the defendant. Upon each of the seven separate heads dealt with by them the jury awarded the plaintiff damages to the extent of ¼d. only. The damages were, therefore, 1¾d. in all.

* Reported by G. G. Beagley, Esq., Barrister-at-Law.

After the jury had given their verdict the defendant's counsel asked that the plaintiff be deprived of costs. On the application of the plaintiff's counsel, there was on a later date an examination of legal decisions upon the question of costs, and judgment was reserved.

Mr. Norman Birkett, K.C., and Mr. J. W. Morris were for the plaintiff; Sir Leslie Scott, K.C., and Mr. Hugh Beazley for the defendant.

His Lordship, in giving judgment, said:—The plaintiff's counsel pointed out to the jury in the plainest words the gravity of the accusations made against his client, and he asked for damages which would fully vindicate the plaintiff's character and conduct. The defendant's counsel stated in express language that he, too, recognized the serious character of the allegations made, and as to the criminal offences charged he said that he regarded himself as occupying the position of a prosecuting counsel with respect to the burden of proof. The jury were fully alive to the considerations involved. As a result of the trial they awarded to the plaintiff the sum of 1¾d. damages only. The amount given was as contemptuous as it could be.

The question for decision is whether I should make an order depriving the plaintiff of costs. The jurisdiction of the Court in such a matter rests to-day on Order LXV., Rule 1, which provides (in substance) that where an action is tried with a jury the costs shall follow the event unless the Court, for good cause, shall otherwise order. The words "good cause" have been discussed in many cases, and it is not easy to elicit a clear meaning from so broad a phrase. The Court has a discretion, but it is a discretion which must, of course, be exercised judicially. The notes in the practice books upon Order LXV., Rule 1, are replete with decisions upon the point. Before the Supreme Court of Judicature Act, 1873, in actions of libel and slander, damages under 40s. did not carry costs. See *per* Lord Justice Bowen in *Moore v. Gill* (4 *The Times* L.R., 738). Hence the problem did not then arise which to-day calls from time to time for judicial consideration when trivial damages are given in claims for defamation. Order LXV., Rule 1, it is to be noted, applies to all actions tried with a jury. It contains no special provision with respect to actions of libel and slander. It is obvious, however, that each type of action may have its particular aspects and call for distinctive consideration. With respect to every class of jury action, however, it seems to be clear that the Judge is to decide the question of costs independently of any view expressed by the jury. In the case now before me the jury expressed in clear and emphatic manner their own view that each party should pay his own costs. But, as Mr. Justice Hawkins pointed out in *Roberts v. Jones* (7 *The Times* L.R., 517; [1891] 2 Q.B., 194, at p. 198), "The Judge is under no obligation to give effect to any special reasons or views the jury may have entertained or expressed in giving their verdict, such, for instance, as a hope or recommendation that it may or may not carry costs, unless such views accord with his own." See too the even clearer words of Lord Justice James in *Harnett v. Vise* (5 Ex.D., 307, at p. 311), and *per* the Court of Appeal in *Wootton v. Sievier* (30 *The Times* L.R., 165). It is plain that the Judge must exercise his discretion as to costs, not only unfettered by, but wholly independently of, any view expressed by the jury on that particular matter.

Now what is "good cause" in such a case as the present? In *Forster v. Farquhar* (9 *The Times* L.R., 338; [1893] 1 Q.B., 564, at p. 567) (which was not a case of defamation), Lord Justice Bowen, in giving the judgment of the Court, said: "No nearer and no closer definition can be given that there will be good cause whenever it is fair and just as between the parties that it should be so." But the question still remains as to when it is fair and just to make a special order depriving the plaintiff of costs upon a trial by jury. The constantly cited decision of *Jones v. Curling* (13 Q.B.D., 262), which again was not a case of defamation, but of ejectment, indicated in substance that upon the question of good cause within Order LXV., Rule 1, "the facts must show the existence of something, having regard either to the conduct of the parties or to the facts of the case, which makes it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation." (See, for example, *per* Lord Esher, Master of the Rolls, at page 268.) Taking then the broad statements of Lord Justice Bowen and Lord Esher, Master of the Rolls, in the cases which I have cited, the question here is as to the manner in which they should be applied to actions for defamation. Upon this point *Harnett v. Vise* (*supra*) is important. It was an action for libel. The plaintiff had secured a verdict for £10 damages, but had been deprived of costs by Baron Huddleston under a rule of Court substantially similar to Order LXV., Rule 1. The matter went to the Court of Appeal. They affirmed the decision of the Judge (which had been approved by a Divisional Court) and they laid down a useful principle. That principle was stated by Lord Justice James (page 311) as follows: "It is the duty of the Judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of." The Court, therefore, is not confined in any way to that which has occurred since the writ. It may look at all the relevant matters which took place before the writ. In this connexion it is worth while to mention the wide area of considerations which is open to a jury with respect to the assessment of damages. See *Praed v. Graham* (24 Q.B.D., 53). The jury, as Lord Esher there pointed out, may consider the plaintiff's conduct before action, after action, and in Court during the trial. As Lord Justice James indicated in *Harnett v. Vise* (*supra*, at p. 312), when dealing with the question of costs there may be a great deal in the conduct of a plaintiff which shows that he himself has brought about the defamation complained of. This point, I think, is important. A like view of the principle was expressed by Lord Justice A. L. Smith in *Bostock v. Ramsey Urban District Council* (16 *The Times* L.R., 520; [1900] 2 Q.B., 616, at p. 622)—a case of malicious prosecution—where the successful defendants were deprived of costs. I may mention, too, the words of Lord Justice Atkin in *Ritter v. Godfrey* (36 *The Times* L.R., 144; [1920] 2 K.B., 47, at p. 61), where he expressed the view that there would be grounds for dealing with a successful plaintiff's costs when his conduct had induced the defendant reasonably to believe that he had a good defence. The principle seems clear: the difficulty lies in the application. It is in the light of the decisions cited, and particularly of *Harnett v. Vise* (*supra*), that other rulings on the question of costs in actions for defamation should be considered. It must, I take it, be now deemed clear law that a plaintiff is not to be deprived of costs merely because a jury has given nominal damages. See *O'Connor v. Star Newspaper, Limited* (9 *The Times* L.R., 233), where, however, Lord Justice A. L. Smith pointed out that the smallness of the damages

was an important element to be considered if there were other circumstances which could be taken into account. In that case the plaintiff, who recovered one shilling damages, was in fact deprived of costs.

It may not, of course, be right to deprive a plaintiff of costs where nominal damages only have been given upon the request of the plaintiff's counsel and where good ground exists for thinking that the assessment of a trivial sum by the jury was referable to that request. But if no particular circumstance such as that which I have just suggested by way of example exists, and a jury award contemptuous damages, what ought a Judge to do in the exercise of his discretion ? There are several decisions and dicta which help to a conclusion. In *Moore v. Gill* (*supra,* at p. 739) Lord Justice Bowen said : " It seemed to him that in this case a farthing damages meant that the action ought not to have been brought, and that it was *prima facie* 'good cause' for depriving the plaintiff of costs." In *Wood v. Cox* (5 *The Times* L.R., 272, at p. 274), where the plaintiff obtained one farthing damages only, Lord Justice Bowen said : " The jury, by giving such damages, said in effect that the plaintiff did not deserve to get more than a farthing, though the libel was a serious one." In the course of the argument he had said (page 273) : " In law a plaintiff brings an action not to clear his character but to recover damages. If the jury only give him a farthing, might it not be said that he ought not to have brought the action ? " Lord Justice Fry said : " Where the smallness of the damages indicated the view of the jury that the action ought not to have been brought, in his opinion 'good cause' to deprive the plaintiff of costs existed." In *O'Connor v. Star Newspaper, Limited* (*supra*), Lord Justice Bowen said : " The smallness of the damages was not conclusive upon that point. Speaking for himself he was inclined to think that when a farthing was given as damages in an action of libel or slander, that threw the onus of proof upon the plaintiff to show a reason for bringing the action ; it *prima facie* showed a reason for thinking that the plaintiff ought to be deprived of costs." The views expressed by Lord Justice Bowen seem to me to indicate the sound rule to be applied by the Court in the absence of any special facts which may explain the award of contemptuous damages. It must be remembered that an action for defamation is one in which the considerations of character, conduct, and reputation are peculiarly relevant, and that they are to be viewed in relation to the circumstances of publication and the general facts of the case. Here I may mention that the publications complained of in the present case were made to personal friends of the plaintiff under the circumstances shown in the evidence.

It is not possible satisfactorily to enumerate the special circumstances which may lead the Court to refuse a defendant's application to deprive a plaintiff of costs where trivial damages for defamation have been given by a jury. I see that in *Macalister v. Steedman* (27 *The Times* L.R., 217) Mr. Justice Bucknill refused to deprive a plaintiff of his costs, though the jury had found one farthing damages only. He apparently based his decision to a large extent on the fact that the jury found that the defendant had acted with express malice. This, I think, may be a matter of distinct relevance. There was no suggestion in the case now before me that the defendant had acted maliciously. I see, too, that in special circumstances Baron Huddleston, in *Myers v. Financial News* (5 *The Times* L.R., 42), not only deprived the plaintiff, who had been awarded a farthing damages by the jury in an action of libel, of his costs, but also directed him to pay the costs of the defendants. Many decisions on the point, I may mention, are collected and discussed in Mr. Gatley's excellent treatise on the Law of Libel and Slander. It is desirable that I should refer to three of them. The first is *Williams v. Ward* (55 L.J., Q.B., 566), in the Court of Appeal, which indicated one aspect of the matter which may arise in defamation actions. There the defendant had published a serious libel of (as Lord Esher said) " a multifarious kind." It made many charges against the plaintiff. The Court said that the jury must have thought that all the substantial allegations were proved, and that the charges made by the defendant were true except in some small and insignificant particulars. The Court therefore took the view that the action was oppressive, and thus that good cause existed within Order LXV., Rule 1. The verdict in that case was apparently a general one, whereas in the case before me the jury gave a number of findings and not a general verdict. But if, as in the case before me, the jury gives a repeated award of contemptuous damages, even though some of the slanders were of the most serious nature, I confess that I can see no distinction in principle beween *Williams v. Ward* (*supra*) and the present action. The next decision that I cite is *Nicolas v. Atkinson* (25 *The Times* L.R., 568), where Mr. Justice Phillimore said that his recollection was that in the more recent cases no costs had been given where damages were only a farthing. My own recollection agrees with that of the learned Judge, who is now Lord Phillimore. The final decision that I cite is a case which throws, I feel, much light on the matter, and which falls into line not only with *Williams v. Ward* (*supra*) but with the earlier cases which establish the principle on which Order LXV., Rule 1, is to be applied, not only generally, but particularly with respect to actions of defamation. I refer to *Red Man's Syndicate, Limited v. Associated Newspapers, Limited* (26 *The Times* L.R., 394). In that action of libel the jury found one farthing damages only. Mr. Justice Phillimore pointed out that where a farthing damages was given in a personal action for defamation it generally meant that a wrong had been suffered, but that owing to the nearness of the statements to the truth the wrong was so slight that a farthing covered the damage, or that the plaintiff's general character was so bad that it had not suffered further substantial damage by the libel or slander. In either case he thought that a defendant should not be called upon to pay the plaintiff's costs, and he therefore made an order under Order LXV., Rule 1, depriving the plaintiff of them. The underlying principle of this seems to be that in such cases the action should be regarded as oppressive, and as one that should not have been brought, and that therefore " good cause " exists.

Recognizing as I do that each case must depend on its own particular facts, I am satisfied in the present action that I ought to make an order depriving the plaintiff of costs. I have no doubt that the verdict of the jury meant, either that the statements made were so nearly true that ignominious damages would suffice, or that the plaintiff's character was so bad that contemptuous damages should be given. This, I think, is the basic explanation of the assessment by the jury, after the fullest deliberation, of one farthing damages only upon each head of claim, including the charges of felony. Nor do I doubt that the jury took the view that in any event the conduct of the plaintiff had been open to the gravest suspicion, that it called for severe condemnation, and that the plaintiff had brought the defamation upon himself. In my opinion the jury were amply warranted, upon the circumstances revealed at the

trial, in assessing the damages at the smallest sum that could be given.

I make an order depriving the plaintiff of costs.

[Solicitors—Messrs. Peter Thomas and Clark; Messrs. Shield and Mackarness.]

Court of Criminal Appeal.
(Lord Hewart, C.J., Avory and Talbot, JJ.)
1927. Jan. 31.

REX v. HUGHES.*

Criminal Law—Procedure—Indictment—False pretences — Amendment — Introduction of allegation as to representation of existing fact —Indictments Act, 1915 (5 and 6 Geo. V., c. 90), s. 5 (1).

A count for obtaining goods by false pretences, consisting in a promise to do something in the future, cannot be amended under s. 5 (1) of the Indictments Act, 1915, so as to introduce for the first time the fundamental ingredient of the representation of an alleged existing fact.

This was an appeal by Robert Hughes, the first Lord Mayor of Cardiff, who had been convicted at Swansea Assizes of obtaining money by false pretences and of larceny, and had been sentenced to three years' penal servitude.

Mr. T. W. Langman appeared for the appellant; Lord Halsbury, K.C., and Mr. Ivor Brace for the Crown.

Mr. LANGMAN said that the indictment on which Hughes was charged consisted of 18 counts charging him with obtaining money by false pretences, and with stealing it by a trick. Hughes had taken a great part in public life, and had been the first Lord Mayor of Cardiff. He had been a traveller for a large firm of whisky distillers, and also for certain large breweries, and had acquired an unrivalled knowledge of the licensed trade and the value of licensed property. The allegations against him were that in 1924, while in financial difficulties, he advertised for managers for certain licensed houses, and obtained from the persons who answered those advertisements certain sums as deposits by falsely pretending that he was in a position to appoint them as managers of licensed houses.

The indictment, as filed, alleged that Hughes had said that he "would" appoint the donors of the money to managerships. It was amended at the close of the case for the prosecution to an allegation that he had represented that he was in a position to make the appointments. That was done to make the indictment accord with evidence which had been elicited by questions put by the Judge. Section 5 (1) of the Indictments Act, 1915, gave the Court power to amend a defective indictment. This indictment, however, was not defective, but bad, and the amendment to it was not an amendment of a mere defect of form, but went to the very substance of the matter.

LORD HALSBURY said that the amendment could properly be made after the Grand Jury had found a true bill. No injustice had resulted from what had occurred, since the case had been dealt with entirely on the footing that the false pretence was that Hughes was, at the material moment, in a position to give to the applicants the jobs which he had promised them. If, moreover, the amendment had been refused he (counsel) would have gone on with the larceny charges and invited the Judge to direct the jury that they could find Hughes guilty of false pretences on the evidence given in support of those charges: see section 44 (3) of the Larceny Act, 1916. As the applicants had no intention of parting with the permanent possession of their money, there was evidence on which the jury could convict Hughes of larceny by a trick.

The LORD CHIEF JUSTICE, in giving the judgment of the Court, said that the false pretences and the larceny counts in the indictment were alternative. The jury had, however, convicted Hughes on all the counts. That, of course, was absurd.

The indictment was, with great carelessness, copied and passed, and in every one of the counts relating to false pretences the pretence was stated to be "by falsely pretending that he, the said Robert Hughes, would appoint the said So-and-So as manager . . ." In other words, the false pretences thus alleged were entirely consistent with mere futurity. At the trial a great part of the evidence was consistent with the view that what Hughes had said to the witnesses was of the nature of a promise to be fulfilled in the future.

At the end of the case for the prosecution, the Judge at the trial thought it right to amend the counts charging false pretences so as to read, "by falsely pretending that he, the said Robert Hughes, was in a position to appoint . . ." Hughes complained that he was prejudiced by that amendment's being made and that it could not be made "without injustice" to him within section 5 (1) of the Indictments Act, 1915.

In the opinion of the Court that sub-section dealt with defective indictments. Its object was to enable the Court, that justice might be done, to remedy a defect in an indictment. That was a wholly different matter from revising and altering the substance of the charge. As the indictment in the present case was copied and passed it alleged false pretences which were none at all. The evidence was largely consistent with such representations having been made, and it would be a bad precedent in such circumstances to permit the re-writing of the alleged false pretences at the conclusion of the case for the prosecution so as to introduce into the indictment for the first time the fundamental ingredient of the representation of an alleged existing fact. That was not correcting a defect in the indictment; it was altering its substance in circumstances in which Hughes was prejudiced by the alteration. His conviction on the counts charging false pretences must be quashed.

There was no evidence on which Hughes could be convicted on the counts charging larceny by a trick. The applicants for managerships intended to part with their money, relying no doubt on hopes which were disappointed. It was true that section 44 (3) of the Larceny Act, 1916, in a proper case and after a proper direction, empowered a jury to convict of false pretences on an indictment charging larceny, but that was entirely different from finding a verdict of false pretences on an indictment charging false pretences, which indictment, up to the last moment, was in substance wrong.

On the moral merits of the case it might be that little could be said for Hughes, but, not without reluctance, the Court had come to the conclusion that the appeal succeeded.

There being another indictment on the file against Hughes, he was released on his own recognizances to appear at Cardiff Assizes on February 10.

[Solicitors—Mr. B. W. P. Morgan, Cardiff; the Director of Public Prosecutions.]

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

Court of Appeal.
(Lord Hewart, C.J., Bankes and Scrutton, L.JJ.)
1927. Feb. 1.

PATHÉ OF FRANCE, LIMITED v. HARRIS
SAME v. MANSBRIDGE.*

Revenue — Customs — Cinematograph films—Emulsionized celluloid sheets in rolls—Width of 3ft. 9in.—Whether dutiable—Films 9½ millimetres wide—Imposition of duty on films "of standard width of 1⅜ inches"—Customs Consolidation Act, 1876 (39 and 40 Vict., c. 36), s. 17—Finance Act, 1925 (15 and 16 Geo. V., c. 36), s. 3 (1).

The effect of s. 17 of the Customs Consolidation Act, 1876, is that duty is payable under s. 3 (1) of the Finance Act, 1925, on films of the width of 9½ millimetres for use in a toy cinematograph.

But emulsionized celluloid sheets in the form of rolls 3ft. 9in. wide, although when cut and otherwise treated they could be used in a cinematograph, are not necessarily "cinematograph films" within s. 3 (1) of the Finance Act, 1925, and therefore on importation may not be chargeable with Customs duty under that enactment.

Judgment of Talbot, J. (42 *The Times* L.R., 760), reversed on the first point and affirmed on the second.

These were two appeals by the defendants from the judgment of Mr. Justice Talbot (42 *The Times* L.R., 760).

The actions were brought by the plaintiffs, Pathé of France, Limited, against collectors of H.M. Customs and Excise, asking for a declaration that no duty was payable by them on films 9½mm. wide for use with baby ciné apparatus imported by them from France, and for the return of £519 duty which had been paid. They also asked for a declaration that emulsionized celluloid sheet imported from France was not dutiable, and for the return of £6 2s. 10d.

Mr. Justice Talbot gave judgment in favour of the plaintiffs in both cases.

The defendants appealed.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. Bowstead appeared for the appellants; Sir Duncan Kerly, K.C., and Mr. J. G. Joseph for the respondents.

The Lord Chief Justice said: These two appeals have, as a matter of convenience, been heard together, but they do not raise precisely the same questions. Each of them is an appeal from the judgment of Mr. Justice Talbot, and in each proceeding it was claimed that a certain duty had been wrongly charged by collectors of Customs, in the one case upon films for use in a miniature cinematograph, known in the trade as a baby cinema apparatus, and in the other case upon a sheet of celluloid over 40 yards long and some 3ft. 9in. wide coated upon a substratum with emulsion. The plaintiffs are dealers in films for use in cinematograph exhibitions and also in other photographic appliances and accessories.

The question for our decision turns on the construction and application of a certain part of section 3 of the Finance Act, 1925, which, in its turn, repeated, with very slight modifications, the provisions of section 12 of the Finance (No. 2) Act, 1915. The Act of 1925 provided by section 3, subsection (1), that after a certain day certain Customs duties should be charged on articles imported into Great Britain or Northern Ireland. There is set out in the subsection a table or schedule which begins with motor-cars and their accessories and component parts, goes on to musical instruments and similar instruments and their accessories and component parts, then to clocks, watches and their accessories and component parts, and then finally comes to cinematograph films. The provision with regard to cinematograph films is as follows:—

"Cinematograph films imported for the purpose of the exhibition of pictures or other optical effects by means of a cinematograph or other similar apparatus;

"Blank film, on which no picture has been impressed, known as raw film or stock;

"Positives, that is, films containing a picture for exhibition, whether developed or not;

"Negatives, that is, films containing a photograph, whether developed or not, from which positives can be printed."

Those are the cinematograph films which are to be the subject of the new Customs duty. Then there follows what may be described as a money column, headed "Per linear foot of the standard width of 1⅜ inches," and calculated in that way, the duty, in the first case, on the blank films is to be ½d., on the positives 1d., and on the negatives 5d. Those are the films which are to be the subject of the duty, and those are the duties which, in the respective cases, are to be paid.

I deal first with the judgment of the learned Judge so far as it related to what has been described as the sheet of celluloid. That is really the judgment in the second case. In that case, apart from subsidiary questions, the main contest was whether it was true to describe this material, some 3ft. 9in. wide, as a cinematograph film within the meaning of this subsection. Nobody suggested that it was a cinematograph film suitable for exhibition in the condition in which it was, or suitable in the condition in which it was for being converted immediately into a positive or a negative film. What was said was that when it had undergone certain processes, which proved on analysis to be at least three, namely, slitting, perforation and trimming, it was material capable of being converted into cinematograph films, and that, as it stood, it was accurately to be described, not, indeed, as a cinematograph film, but as "cinematograph film," a generic description.

The question turned on evidence, and the learned Judge, who had the great advantage of hearing and seeing the witnesses themselves, arrived, after hearing the evidence, at a conclusion which he has expressed in no ambiguous terms. "I am satisfied," he says, "that no one in the trade, or out of it, would call such a sheet a cinematograph film. It might perhaps be described as cinematograph film in the sense of film which can, when cut into strips and otherwise treated, be used in a cinematograph. But the Act says 'cinematograph films,' not 'film,' and though it is true that one subdivision of cinematograph films is described as blank film, I think that any inconsistency which there may be between these two parts of subsection (1) must be reconciled by limiting the meaning of 'blank film' to such blank film as falls within the class of cinematograph films and not by

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

enlarging what is, in my opinion, the true meaning of 'cinematograph films' so as to include anything which might not improperly be described as 'blank films.'"

That is the finding of the learned Judge, and that is the view which he has expressed. Our attention has been directed to all the relevant portions of the evidence on this point. It is sufficient to say that although there may be in one place or, it may be, two places a certain ambiguity, I am not prepared to take the responsibility of saying that the learned Judge, on a question of fact, arrived at an incorrect conclusion. With regard to the construction of the section, in the part of it which is relevant to this matter, I think, with all respect, that the learned Judge was right. It seems to me, therefore, that so far as the second action is concerned, this appeal fails, subject to this, however, that the plaintiffs succeeded in obtaining a declaration which, on one view of it, is superfluous, and on another view of it goes beyond what is right, and I do not think that that declaration ought to stand.

With regard to the other question, that is to say, the question raised in the first of the two cases, different considerations arise. There the subject-matter under consideration was undoubtedly not a sheet but a strip, and a strip suitable in its then condition to be used, and intended in its then condition to be used, in what is called a miniature cinematograph. Here, clearly, we have passed beyond the region of the raw material and have got into the region of the manufactured article. But it is said that, although in all other respects this strip satisfies the requirements of the definition which is contended for of a cinematograph film, nevertheless it fails in the vital respect that it is too narrow. That argument depends upon a particular construction of this part of the subsection which describes, under the heading "Per linear foot of the standard width of 1⅜ inches," the various rates of Customs duties that are to be applied in the several cases. It is said that at the time when the Act of 1915, copied, so far as this part of it is concerned, afterwards into the Act of 1925, was passed there was no width for business purposes except the width of 1⅜in., and that Parliament was designating the particular and known articles which alone were to be the subject of Customs duty. That was the view which was ultimately accepted by the learned Judge. Sir Duncan Kerly has very frankly admitted, in the course of his argument, that if that view is right, all the words at the head of this table after the words "Per linear foot" are otiose, and, if otiose, easily misleading. If Parliament was dealing and intending to deal only with films or strips of the well-known width of 1⅜in., it would, I think, have been sufficient to say "Per linear foot." That is not what Parliament said. It chose to say: "Per linear foot of the standard width of 1⅜ inches." That seems to me to suggest a computation, just as the earlier part of the subsection, where it is dealing with motor-cars, musical instruments, and clocks, provides that the Customs duties shall be an amount equal to 33⅓ per cent. of the value of the article. The length of the film being ascertained, the width of the actual film being ascertained, the money rate can easily be applied on the basis of "Per linear foot of the standard width of 1⅜ inches"; and, indeed, at the time when that Act was passed, there were, so to say, lying in wait for it the provisions of the Customs Consolidation Act, 1876, which, by section 17, provides, among other things, that "all duties, rates, charges and drawbacks imposed and allowed according to any specified quantity or any specified value shall be deemed to apply in the same proportion to any greater or less quantity or value," and so on.

It seems to me, though I say it diffidently, that the learned Judge, on this part of the matter, came to a wrong conclusion, and that these words "of the standard width of 1⅜ inches," so far from limiting and circumscribing that which was to be the subject-matter of the Customs duties, were really providing a mode and a measure of calculation of the Customs duties to be applied to films of varying widths, it might be more or it might be less.

There was finally another argument faintly indicated with reference to this part of the matter, namely, that these baby films, as they are called, are not within the taxing section because they are not in the proper sense of the term intended for exhibition, and reference was made to the Cinematograph Act, 1909. But that Act was an Act imposing, for the safety of the public in particular, various safeguards with reference to the public exhibition of films, and especially films of a certain kind. Section 1 provided that "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with."

Then by section 7, subsection (4), it was provided that the Act should not apply "to an exhibition given in a private dwelling house to which the public are not admitted, whether on payment or otherwise." Even a slight acquaintance with the provisions of that Act makes it clear that it would have been ludicrous to apply the provisions of that Act to an exhibition in a private dwelling house to which the public were not admitted. But that does not make that which takes place in that house not an exhibition. On the contrary, this very subsection speaks of it as an exhibition—"this Act shall not apply to an exhibition given in a private dwelling house."

I think no assistance is to be derived from the vocabulary employed in that Act for the proposition that this kind of film, called a baby film, cannot be intended for exhibition, because it is used in fact only for private exhibition, though indeed the evidence shows that it is not always used merely for private exhibition.

It seems to me, therefore, that in this case the decision of the learned Judge ought to be reversed and that there ought to be judgment for the defendant in the action, the appellant in this Court.

Lord Justice Bankes said: I agree in the result that one of these appeals must be dismissed and the other must be allowed. The action in which the appeal is to be dismissed is an action which was brought to test the question whether or not a sheet of celluloid was liable to duty under section 3, subsection (1), of the Finance Act, 1925. The question really turned on the facts, and the learned Judge concludes his judgment on that point in this way: "I am not satisfied that the expressions 'raw film' or 'stock' have ever been applied in the trade to film which has not been at least cut into strips of standard width."

In an appeal from a Judge on a question of fact, this Court does not interfere except when it is satisfied that on the materials before the learned Judge it is quite plain that he has gone wrong. It is quite impossible in this case to come to any such conclusion. On the evidence before him the learned Judge was quite justified in refusing to be convinced.

I only want to make one further observation with

reference to that action, because I am not sure that I agree with the construction which the learned Judge puts upon the subsection. It is quite true that the subsection, in dealing with taxable articles, refers to cinematograph films, but when it comes to indicate the duty which is payable in respect of such films, it divides them into three classes. There are the negatives which are films properly so called, and something which is exactly described by reference to the knowledge of the trade, the experience of the trade, and the expressions which are used in the trade in reference to this particular thing; and what the statute says is that in addition to negatives and positives the duty is imposed on a blank film "on which no picture has been impressed, known as raw film or stock." I think that if the evidence before the learned Judge had satisfied him that that term was applied in the trade generally to this particular article, he ought to have held that it was taxable, although it was not a cinematograph film. But the learned Judge seems to have taken the opposite view of the section, because he says: "The Act says 'cinematograph films,' not 'film,' and though it is true that one subdivision of cinematograph films is described as blank film, I think that any inconsistency which there may be between these two parts of subsection (1) must be reconciled by limiting the meaning of 'blank film' to such blank film as falls within the class of cinematograph films and not by enlarging what is, in my opinion, the true meaning of 'cinematograph films' so as to include anything which might not improperly be described as 'blank films.'" I do not think that the question is material for decision in this particular case because of the view taken by the learned Judge on the evidence, but as the learned Judge has so expressed himself in reference to the section, I feel bound to express what my view would be if the case ever came up again for decision, which I do not suppose is likely on this particular point.

Then with regard to the other action which was one to test the liability for duty of what are called the baby films, the question again had reference to the construction of this subsection, and the meaning of that part of the subsection which indicated what the duty was to be, and it imposed a duty upon these three classes of films "Per linear foot of the standard width of 1⅜ inches." If the matter stood there, it seems to me so extremely improbable that the Legislature, in imposing a duty on this class of articles, would have left it open to the ingenious manufacturer to evade the duty by one-hundredth part of an inch in the width of his manufacture, that one would have attempted, apart from anything else, to read or construe this language as "Per linear foot of the standard width of 1⅜ inches or in the same proportion to any greater or less quantity." But any doubt on the matter seems to me to be completely set at rest by section 17 of the Act of 1876, because that is a section of general application to all future taxing statutes, and it provides that where, among other things, duties are imposed or allowed according to any specified quantity, they shall be deemed to apply in the same proportion to any greater or less quantity. And turning back to the subsection again it seems to me impossible to say that the duty here is not imposed according to a specified quantity when you find that the duty is "Per linear foot of the standard width of 1⅜ inches." For these reasons this appeal ought to be allowed.

Lord Justice Scrutton said: I agree with the result at which my Brothers have arrived.

The appeal in Harris's case was accordingly allowed, and that in Mansbridge's case dismissed.

[Solicitors—The Solicitor to H.M. Customs and Excise; Messrs. Bower, Cotton, and Bower.]

Court of Appeal. (Lord Hewart, C.J., and Bankes, L.J.) 1927. Jan. 25.

EX PARTE BREWSTER.*

Local Government—Poor law guardian—Alleged disqualification—Patient in hospital maintained out of rates—Payment for cost of treatment—Local Government Act, 1894 (56 and 57 Vict., c. 73), s. 46 (1) (*b*), (7).

Decision of the Divisional Court (43 *The Times* L.R., 224) affirmed.

This was an appeal by the applicant, Mr. Harry George Brewster, of The Broadway, Bexley Heath, a local government elector in the Bexley Urban District and the Dartford Union, from an order of the Divisional Court (Mr. Justice Salter and Mr. Justice Talbot) (43 *The Times* L.R., 224) refusing an application for an order directing the Dartford Guardians to show cause why a rule *nisi* for a writ of *mandamus* should not issue commanding them to declare vacant under section 46, subsection 1 (*b*) and subsection 7, of the Local Government Act, 1894, the office of guardian held by Mrs. Ellen Moira Pyne, of Erith, on the ground that, since her election as guardian, she had received "union or parochial relief."

While she was a guardian, Mrs. Pyne was a private patient in the King Edward-avenue Hospital, Dartford, which was maintained by the guardians out of the rates. She had paid the whole cost of her conveyance to and maintenance at the hospital.

The Divisional Court refused to make the order applied for on the ground that, as the guardians had been paid in full for every privilege and advantage received by Mrs. Pyne at the hospital, there was no evidence on which it could be said that she had received "union or parochial relief" within the meaning of the Local Government Act, 1894.

The applicant appealed.

Mr. R. C. Maxwell, for the appellant, said that an important question of principle was involved. He submitted that when a guardian became a patient in the guardians' hospital the guardian was thereby disqualified and the seat became vacant. The facts in this case were agreed and the proceedings were entirely friendly. The fact that the cost of Mrs. Pyne's relief had been repaid did not prevent disqualification. Counsel referred to *Chard v. Bush* (39 *The Times* L.R., 693; [1923] 2 K.B., 849).

The Lord Chief Justice, in giving judgment, said:—In my opinion there is no ground for interfering with the order of the Divisional Court. The judgment of the Divisional Court is right, for the reasons given.

Lord Justice Bankes said:—I agree. The grant of the writ is discretionary, and it seems to me that the Judges of the Divisional Court exercised a proper discretion.

[Solicitors—Messrs. May, Sykes, and Co.]

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

K.B. Div.
(Lord Hewart, C.J., Avory and Talbot, JJ.)
1927.
Feb. 4.

REX v. EDITOR OF THE "DAILY MIRROR" AND OTHERS—EX PARTE SMITH.

REX v. EDITOR OF THE "DAILY MAIL" AND OTHERS—EX PARTE SMITH.*

Contempt of Court—Publication of photograph of accused person—Possible question of identity.

Observations on the duty of persons responsible for the production of newspapers to exercise care as to the publication of a photograph of an accused person in cases where it should be reasonably clear to them that a question of identity may arise.

These were rules *nisi* for attachment for contempt of Court against Mr. Alexander Campbell, the editor, and Daily Mirror Newspapers, Limited, the proprietors of the *Daily Mirror*; and Mr. Walter George Fish, the editor, and Associated Newspapers, Limited, the proprietors of the *Daily Mail*.

The alleged contempt was in each case the publication of a photograph of Edgar William Smith, on the morning of the identification parade at which Smith, who was being charged with the attempted murder of Police-constable Dainty, was put up for identification.

Sir Patrick Hastings, K.C., and Mr. J. B. Melville showed cause for the *Daily Mirror*; Sir John Simon, K.C., and Mr. Giveen for the *Daily Mail*; Mr. A. M. Lyons supported the rules.

Sir Patrick Hastings said that the matter was regarded as of the gravest importance by his clients. During the existence of the *Daily Mirror*—more than a quarter of a century—it had never been suggested that they had been guilty of contempt of Court. But it had been their continuous practice to publish photographs of persons for whom warrants were issued, and in some cases at the request of the police.

The alleged attempt to murder Dainty took place on January 7. On the same day very detailed descriptions of the alleged assailant were circulated, and on January 9 Smith was arrested. On January 10 he was brought before the magistrates and charged with attempted murder only, though a hint was given that there might be further charges. On January 13 there was an identification parade. None of the persons asked to attend identified Smith except Dainty and a man named Browning, who identified him as a person whom he had helped with a motor-car on January 7. On that day, January 13, a photograph of Smith appeared in certain editions of the *Daily Mirror* and the *Daily Mail*. Each person before the identification parade was asked what newspapers they had seen, and in particular whether they had seen the *Daily Mirror* or *Daily Mail*. None had seen the *Daily Mirror*. Browning said that he had at home a copy of the *Daily Mail*, but had not had time to look at it; it was found that that copy was of an edition which had not the photograph.

On January 26 and 27 Smith was again before the magistrates and was committed for trial on the charge of attempted murder. Mr. Lyons then admitted that there was no question of identity, but outlined another line of defence. A charge was also preferred of assaulting Miss Farmer, but she was unable to recognize Smith as her assailant. There was no other identification and that charge was dismissed.

The Lord Chief Justice.—But could any intelligent person employed in a newspaper office have any doubt that a question of identity might arise? This newspaper for commercial purposes published a photograph so that anyone on payment of a penny could look at it. It goes much further than a mere description in words.

Sir Patrick Hastings.—It never entered the head of anyone that it could be contempt of Court.

The Lord Chief Justice.—The question is whether it ought to have done so.

Mr. Justice Avory.—We frequently have cases in which the evidence of identification is unsatisfactory because people were shown a photograph before the identification.

Sir Patrick Hastings.—It came as a complete surprise that it should be suggested that this could be contempt. From no quarter, judicial or executive, had any warning come to my clients that there was any objection to this practice which had been followed for a long period.

The Lord Chief Justice.—Your words suggest that the journalist sitting in his office thinking what best he can do for the public good is guided by the tradition of centuries of blameless predecessors. What is said against you is that, in pursuit of profit, you took the risk, involving the accused person in a far greater risk—not in pursuit of any public purpose, but in pursuit of money.

Sir Patrick Hastings submitted that there was no contempt, and was about to resume his seat when

The Lord Chief Justice said:—I have observed, and I am entitled to assume that it is deliberate, that throughout your argument there has been not a syllable by way of regret.

Sir Patrick Hastings said that his instructions were to fight this upon the basis that his clients had done no wrong. If, in spite of that, the Court should be of opinion that they had or could have committed a contempt the regret which he expressed—and which he was sure that Mr. Campbell, who was ill with influenza, would desire him to express—was complete and unqualified.

Sir John Simon associated himself, on behalf of the editor and proprietors of the *Daily Mail*, both with the argument and with the expression of regret offered by Sir Patrick Hastings. A wide proposition and a narrower one were involved. He would submit that the King's Bench would not be likely to lay down the proposition that the publication of a photograph of a defendant was contempt of Court merely because the initial stages of proceedings, civil or criminal, had begun. That would be far too wide; for there must be many cases of purely neutral aspect, and some in which publication was actually beneficial. But excluding that wide proposition, where the question of identity must arise there could be no contempt in respect of a charge which might be preferred in the future. At the date of publication of the photograph the only charge was that of attempted murder, in respect of which the question of identity did not arise. Even if a newspaper, hearing that the police wished to prefer a further charge, deliberately published a photograph which might prejudice the charge, it would be not contempt of Court but possibly an indictable conspiracy.

Mr. Lyons submitted that the contempt was a serious one. In consequence of an alleged assault on a young woman on the main road from Lincoln to

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Nottingham Police-constable Dainty had an encounter with a man. Smith was arrested and brought before the justices at a hearing from which the public were excluded, but the Press were present. He was then charged with attempted murder, and it was stated that there would be other charges. His (counsel's) submission was that in the circumstances of this case it must have been obvious that if and when other charges were made there must be a charge in respect of the assault on Miss Farmer.

It was not part of his case that anyone who went to the identification parade was in fact misled, but that there might have been a calamity. Just as the solicitor bought one of those newspapers, so might Miss Farmer, or one of the witnesses, and have had the photograph in her mind for half an hour or more before Smith was put up for identification. For the fact that no one saw the photograph the newspapers should not get credit.

Police officers were not allowed to show photographs of an accused person to witnesses before the identification parade (*Rex v. Goss,* 17 C.A.R., 196 ; *Rex v. Dwyer and Ferguson,* 41 *The Times* L.R., 186 ; [1925] 2 K.B., 799 ; *Rex v. Haslam,* 19 C.A.R., 59). Newspapers doing something for the purpose of profit and sensationalism could have no better right than the police.

There were, in fact, two parades : one at the hospital for identification by Dainty, and another later with respect to the charge of Miss Farmer. In that case identity was the sole and crucial feature ; it was quite true that a fortnight later he had said that identity was not in issue in Dainty's case, but the newspapers were wrong to anticipate what might be the defendant's considered position a fortnight later. As to Sir John Simon's contention, that contempt of Court could not be committed where no charge had been preferred, the accused person could be indicted for anything which might be disclosed by the depositions. The attitude of the Court was shown in *Rex v. Editor and Printers and Publishers of the Evening Standard* (40 *The Times* L.R., 833). He submitted that Smith had been put to an additional, illegal, and unfair risk.

The Lord Chief Justice, in giving judgment, said that the phrase "contempt of Court," as had been observed more than once, was, in relation to the kind of subject with which they were now concerned, a little misleading. The mischief consisted not in some attitude or supposed attitude to the Court itself, but in the prejudice to an accused person. It was not something which affected the status of the Court itself, but something which might profoundly affect the rights of citizens.

What was now complained of was that when a man named Smith had been arrested on a charge of attempted murder and brought before the magistrates, and before those proceedings had been completed, those two newspapers, the *Daily Mirror* and the *Daily Mail,* on January 13, printed photographs of the accused person. The wording accompanying the photographs was somewhat different, but it was not suggested that the information in the *Daily Mail* office was different from that in the office of the *Daily Mirror.*

The principles on which the Court acted in such cases had been stated on several occasions. In particular, in *Reg. v. Payne and Cooper* (12 *The Times* L.R., 321 ; [1896] 1 Q.B., 577) Lord Russell of Killowen said, at p. 580 :—

"The applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending."

In the same case Mr. Justice Wright said, at p. 581 :—

"In order to justify an application to the Court the publication complained of must be calculated really to interfere with a fair trial."

In the present case it was not alleged that there was on the part of anyone concerned an intention to prejudice the fair trial of Smith ; what was said was that the publication of those photographs was calculated to prejudice the fair trial of Smith.

In recent years the Court of Criminal Appeal had had, on more than one occasion, to consider the use of photographs of accused persons by the police. In 1923, in *Rex v. Goss* (17 C.A.R., 196), it was stated :—

"No doubt there are circumstances in which the police of necessity make use of photographs, but to make use of photographs beforehand to see whether important witnesses can identify an accused person whom they are afterwards going to see is to pursue a course which is not a proper one."

In the following year, 1924, the matter was further considered in *Rex v. Dwyer and Ferguson* (41 *The Times* L.R., 186 ; [1925] 2 K.B., 799, at p. 802) :—

"It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to show a photograph to persons in order to obtain information or a clue upon that question ; it is another thing for a police officer to show beforehand to persons who are afterwards to be called as identifying witnesses photographs of those persons whom they are about to be asked to identify. It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph."

The question was again considered in 1925 in *Rex v. Haslam* (19 C.A.R., 59, at p. 60) :—

"Two matters emerge clearly in this appeal. First, witnesses who were called on to pick out the appellant at an identification parade as being the wrongdoer had previously been shown a photograph of him. It is not suggested that the photographs were shown to the witnesses that the police might obtain a clue to the direction in which inquiries might usefully be made or to the person whom it would be proper to arrest. The appellant had already been arrested, and the effect of what was done was to give the witnesses—or certainly three of them—an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible. It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that witness, before the identification, should be shown a photograph of the accused person. One can see that sometimes it will happen that when a person has been shown a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification. That is a different thing from what happened here. In that case the person is asked to identify the accused person, notwithstanding the fact that he has previously seen a photograph. A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him."

The kind of mischief which the publication of the photograph of an accused person might bring about was indicated in those passages. No one would excuse a police officer if, bringing together all the persons among whom witnesses of identity might be found, he said : "I have arrested a man and am going to put him up for identification by you," and then showed them a photograph of the man whom they were going to be asked to identify, because, for

one reason among others, the witnesses would approach the important, and it might be crucial, task of identification with the knowledge that that particular man had been arrested.

The fact that a photograph was published in a money-making business did not excuse a newspaper for doing that which would be reprehensible in a police officer. In his opinion, in the publication of photographs no less than in the publication of news matter, it was the duty of a newspaper to take care lest prejudice should be caused to a man about to stand his trial. An attitude of cynical indifference was manifestly wrong.

By that he did not mean to lay down that a newspaper might never publish a photograph of a person who was a party to a civil or criminal proceeding; no one would dream of laying down so wide a proposition. But he did say that there was a duty to exercise care in the publication of the photograph of an accused person. If a newspaper published a photograph in such circumstances it ran a grave risk—a risk which in one sense affected the accused person, and in another sense affected those responsible for the newspaper.

In the present case the attempt to murder took place on January 7. Smith was arrested on January 9, and brought before the magistrates on January 10. It was not till January 13 that the identification parade was held, and it was while that identification parade was still pending and before it had taken place, that those photographs appeared. Was it, or was it not, reasonably clear that a question of identity might arise? He thought that it was clear. It certainly was not clear that a question of identity would not arise, and what the newspapers did was to take the risk.

It was quite true that when the identity parade took place only one person identified Smith; and it was quite true that later, on January 27, when Smith was committed for trial, his counsel said that the question of identity no longer arose; but that could not have been foreseen by those who published those photographs on January 13. They ought to have seen that the question of identity might arise, and he thought that they had published matter which was not intended, but was calculated, to prejudice the fair trial of Smith.

The question did not arise whether there could be contempt in a case where proceedings were said to be imminent, because in this case proceedings had begun. The other question might one day have to be decided, but for the present it was only necessary to refer to a passage in *Rex v. Parke* (19 *The Times* L.R., 627; [1903] 2 K.B., 432, at p. 437), where Mr. Justice Wills said:—

"Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the Court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

But that further and larger question did not arise. There was in this case a duty to take care, with reference to a case which had arisen, and to an accused person who was then under arrest. That duty was, perhaps, made even more manifest by the statement made in open Court and reproduced in the Press that there might be further charges.

In those circumstances he was of opinion that these rules ought to be made absolute, but as it was the first time that proceedings had been taken in respect of the publication of a photograph he thought that it was not necessary to impose any penalty. Very different considerations would apply if and when a similar case arose again. But in this case the rules would be made absolute, and would lie in the office subject to further order. The respondents must pay the whole costs of the proceedings.

MR. JUSTICE AVORY concurred.

MR. JUSTICE TALBOT said that he had entertained grave doubt whether material existed for the exercise of their jurisdiction, but as they were not deciding the wider question of contempt in respect of pending proceedings, he did not dissent.

[Solicitors—Messrs. Michael Abrahams, Sons, and Co.; Messrs. Lewis and Lewis; Messrs. Patersons, Snow, and Co., for Messrs. Langley, Stevens, and Phillips, Lincoln.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Feb. 2.

IN RE MONK—GIFFEN v. WEDD.*

Will—Construction—Charity—Gift of residue—Probable surplus—General charitable intention—Whether an intestacy as to surplus not immediately required.

A testator, who died in 1916, by his will made in 1913 left the residue of his personal estate on certain trusts for the benefit of the inhabitants of a small village, the trustees being directed to make loans without interest to the poor and deserving, no loan to exceed £100, no borrower to receive more than one loan, and the period for repayment not to exceed nine years. The testator directed that any surplus should be invested from time to time by the Charity Trustees. So far as could be foreseen there was bound to be a surplus as the number of possible borrowers was small and the residue was valued at about £20,000.

Held, that as there was a general intention on the part of the testator to devote the residue to charity, and as it was conceivable, though not probable, that all the loan fund might be required, there was no intestacy as to the surplus not immediately required for the purposes of the charity.

This was an appeal by the Attorney-General from a decision of Mr. Justice Tomlin, who had held that as the charitable intention of the testator was not sufficiently paramount and not likely to exhaust the residue of the estate, the next-of-kin were entitled to the surplus not immediately required for the purposes of the charity.

Robert Monk, the proprietor of the Robin Hood Hotel, Leicester, who died on August 5, 1916, gave,

* Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

by his will dated June 10, 1913, a life interest in his estate to his widow and, subject thereto and to the payment of certain legacies, left the residue upon certain trusts for the benefit of the inhabitants of Foxton, a small village near Market Harborough, where he was born and where he desired to be buried. The population of Foxton was under 400, and the testator's estate, after payment thereout of the legacies payable on the death of his widow, who died in May, 1924, was of the value of about £20,000.

The testator by Clause 7 of his will directed his original trustees to pay and transfer his residuary estate to the Foxton Parish Council, or to the Official Trustees of Charitable Funds if there were no parish council. No parish council had ever been formed for Foxton, and the Official Trustees held the funds.

After having set apart £800, for the purpose of establishing a coal fund for the distribution of coal among the poor and deserving inhabitants of Foxton, the trustees were to hold the rest of the estate to an account to be entitled "The Robert Monk's Foxton Charity Loans Fund," and were to apply the capital and income of the fund in making loans to the poor and deserving inhabitants of Foxton as thereinafter provided. No loan was to exceed £100, only one-sixth part of the loan fund was to be lent in any one year, the borrowers were to be inhabitants or residents of Foxton not over 35 years of age, the period for repayment was not to exceed nine years, and no interest was to be charged, but no borrower could be granted more than one loan.

Mr. Justice Tomlin declared that the will did not contain any general charitable intention in respect of the surplus of the residuary estate, and held that there was an intestacy of the surplus not required for the payment of the legacies, the death duties, and the making of provision for the coal fund and the loan fund, and he directed certain inquiries.

The Attorney-General appealed.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Dighton Pollock appeared for the appellant; Mr. Rolt, K.C., Mr. C. E. Loseby, and Mr. J. P. Stimson for the trustees of the will; and Mr. Gavin Simonds, K.C., and Mr. C. A. J. Bonner for the next of kin.

The MASTER OF THE ROLLS, in his considered judgment, after stating the facts, said that it was plain that the limitations contained in the will narrowed the number of possible borrowers to a small one. The testator, however, contemplated that there might be a surplus, and directed it to be invested from time to time by the Charity Trustees. It was said that so far as could be anticipated there was no prospect that the qualified borrowers in Foxton would become so numerous as to exhaust the resources of the Charity Trustees; that there must be a surplus; and that, as there was no paramount general charitable intention as to the whole, there was an intestacy of the unrequired surplus.

The authority of the judgment of Mr. Justice Parker in *In re Wilson* ([1913] 1 Ch., 314) was invoked, where that Judge defined broadly two categories into which the decided cases might be divided: (1) Where the paramount intention, according to the true construction of the will, was to give the property in the first instance for a general charitable purpose rather than a particular purpose, in which case, even though the precise directions could not be carried out, the doctrine of *cy-près* would be applied; and (2) where on the construction of the will no such general paramount intention could be inferred, and, it being impossible to carry out the particular purpose, the whole gift failed. It was contended that the present case came within the second category. Mr. Justice Parker in *In re Wilson* (*supra*) held that the whole gift, which was to provide the salary of a schoolmaster, was in the testator's mind dependent upon its being feasible and possible to carry out the particular directions. Other illustrations of the second category were *In re White's Trusts* (2 *The Times* L.R., 830; 33 Ch.D., 449); *In re Packe—Sanders v. Attorney-General* ([1918] 1 Ch., 437); and *In re Stanford—Cambridge University v. Attorney General and Others* (40 *The Times* L.R., 3; [1924] 1 Ch., 73). In the last case a balance was left of a fund provided to finance the publication of a literary work. In those cases the legacy was clearly given in favour of a particular purpose, and, in the first three, conditions precedent had to be fulfilled before the purpose could be effective.

Other cases were cited by the Attorney-General, such as *Incorporated Society v. Price* (1 Jones and La T., 498); *In re Davis* ([1902] 1 Ch., 876); and *Biscoe v. Jackson* (3 *The Times* L.R., 577; 35 Ch.D., 460)—a case where a sum was given to establish a soup kitchen and cottage hospital in a parish where land for it could not be found. In those cases a paramount charitable intention was found to exist, even though the particular form expressed for it had ceased or was not practicable as intended.

Where the gift could be read as devoting the property to charity, adding a condition subsequent to the gift, if the performance of the condition became impossible, the gift became absolute. But if the condition was precedent to the gift and became impossible, the gift failed altogether.

If that principle was applied to the present case it would be seen that the loan fund was practicable at the present time, even if not in the full measure which the sum available made possible. See *Attorney-General v. Bishop of Chester* (1 Bro. C.C., 444), where a legacy towards establishing a Bishop in America was held not to be void though none had been appointed. Lord Macnaghten referred with approval to that case in *Wallis v. Solicitor-General for New Zealand* (19 *The Times* L.R., 230; [1903] A.C., 173, at pp. 183, 184) and to *Chamberlayne v. Brockett* (L.R., 8 Ch., 206).

The next of kin in this case could only base their claim upon a mistake of quantum as to the loan fund in the purpose of the testator, and that was held in *Attorney-General v. Earl of Winchilsea* (3 Bro. C.C., 374) not to be a sufficient ground for upsetting the testator's charitable intention.

Lord Alvanley, Master of the Rolls, at page 379 said:—

"Wherever the intention has been to dispose of the whole property to certain purposes, as in the early case of *Thetford School* (8 Co. Rep., 130b), . . . the whole has been applied, the intention has been considered as such, and it has been only inferred that the testator has been mistaken merely as to the quantum."

If there was a large increase in value of the sum bequeathed after the testator's death, it might prove necessary in some cases to invoke the *cy-près* doctrine, as in *In re Avenon's Charity—Attorney-General v. Pelly* ([1913] 2 Ch., 261). Where the charity could be started at once there was no reason to defeat the general intention of the testator because it was prophesied that in time the quantum of his gift would be found too large for its purpose.

Applying those principles to the present case, and remembering that the Court leaned in favour of charity, he (his Lordship) thought that there was a general intention on the part of the testator to devote this

residue to charity. It was conceivable, if not probable, that all the loan fund might be required in the not remote future. The duly qualified borrowers might present themselves, just as the bishop did in the case already cited.

A further question arose, however, as to the validity of the direction for accumulating the surplus income. But when personal estate was given to charity it was taken entirely out of the scope of the law of remoteness. See *Chamberlayne v. Brockett* (*supra*). In his (his Lordship's) opinion there was an immediate and effective gift of the whole of the residue for charity, and the next of kin were displaced. The doctrine of *cy-près* could be at once applied, were it necessary to do so.

The appeal would be allowed, and the order of Mr. Justice Tomlin discharged. There would be liberty for the Attorney-General to apply for a scheme if and when so advised. The costs of all parties to the appeal as between solicitor and client would come out of the fund.

Lord Justice Sargant said that the first and most crucial point was whether the language of the testator's will indicated a general charitable intention coupled with specific directions as to the mode of carrying out that intention, or whether it merely indicated a specific and limited charitable intention. The indication of a general intention might arise from general prefatory words, as in *Wallis v. Solicitor-General for New Zealand* (19 *The Times* L.R., 230; [1903] A.C., 173), or in *Chamberlayne v. Brockett* (L.R., 8 Ch., 206, at p. 211), but such words were not necessary. In his (his Lordship's) judgment there were several definite indications of a general charitable intention. There was, after the death of the testator's wife and the payment of legacies, an abrupt termination of the duties of the original trustees, and there was a peremptory direction to transfer the residue to one or other of two sets of trustees, designated "Charity Trustees." The gift was immediate and absolute. In many analogous cases, where a share of a testator's estate had been given out and out and then settled on children upon trusts which did not exhaust the beneficial interest, it was definitely settled that there was no resulting trust for the next of kin. The principle was stated in *Lassence v. Tierney* (1 Mac. and G., 551), and had been restated in *Hancock v. Watson* ([1902] A.C., 14) and other cases. The reasoning in those cases was equally applicable to an original out and out gift to charitable trustees.

Next it was to be noted that the gift to the Charity Trustees was immediate and unconditional and their duties were to begin at once, and were such as would at once absorb part of the fund, and might in the view of the testator ultimately exhaust it. The case was one quite different from that of *In re Wilson* ([1913] 1 Ch., 314). If there should be any failure, it would be a partial failure by matter subsequent, not a total failure, through failure of a condition subsequent. Further, there was an even more cogent indication in the provisions for the investment and accumulation of so much of the fund as might not from time to time be required. Reference had been made to the restrictions on accumulation imposed by the Thellusson Acts, but it was elementary that those restrictions were immaterial for the purpose of construing a will or other document. Here it was the construction of the will only that was in question, and for that purpose a direction for indefinite accumulation seemed to be of the greatest weight, and completely negatived the suggestion that the gift to charity was not intended to be exhaustive. It was well settled that the question of general charitable intention was one depending on the construction of the particular will or other instrument, having regard to the principles laid down in the long line of cases on the subject. He (his Lordship) therefore thought the appeal should be allowed. But even if no general charitable intention was shown, there was still, in his opinion, an effective trust for the accumulation and investment of the fund so far as not employed for 21 years from the testator's death, *i.e.*, until August 5, 1937, so that even on that construction an immediate inquiry such as had been directed was premature.

Lord Justice Lawrence said that it was plain that the trusts declared by the testator concerning the Loan Fund were intended to continue for ever, and the persons who might benefit under them were limited only by the housing capacity of the parish of Foxton. The next of kin had asserted that the residue was larger than was reasonably required for the purposes of the trust, and that the portion not so required ought to be paid over to them. In his (his Lordship's) opinion the order of the learned Judge was wrong. It was not for the next of kin or even the Court to determine how much of the testator's estate ought to be devoted to the trust. That was a matter for the testator himself. Who could say that the fund was too large to meet all the claims which might in the future be made upon it? What was the reasonable time within which (according to the inquiry directed) the Court ought to find that the whole of the fund would not be required? Those were questions which in his (his Lordship's) opinion the Court ought not to embark upon. Nobody could foresee what the population of the parish might be in time to come. It was conceivable (though not probable) that the Loan Fund (which was to be publicly advertised) might attract persons to the parish. To constitute a partial failure of a charitable trust such as the present one, the next of kin would have to prove that it was impossible that the whole sum could ever be required for the purposes of the trust—a fact which was incapable of proof.

His Lordship then dealt with the effect of clause 23 of the will, directing the accumulation of the surplus income, and rejected the contention of the Attorney-General that there was no direction to accumulate within the meaning of section 164 of the Law of Property Act, 1925, because at any time the investments might be sold and applied for the benefit of the trust. The destination of the surplus income after the period allowed by law for accumulation of income depended upon whether there was to be found in the will a general intention to devote the residue to charity, and it was not disputed that, if there was, any such surplus income would be applicable *cy-près*, and would not pass to the next of kin. He agreed with Mr. Justice Tomlin that the point whether a general charitable intention could be gathered from the testator's will was a difficult one, on which he confessed it was not easy to make up his mind. On the whole he had come to the conclusion that the testator had sufficiently indicated his intention to dedicate the whole of the ultimate residue of his estate to charitable purposes, namely the relief of the deserving poor of the parish of Foxton. It was important to bear in mind the testator's direction to his original trustees to transfer the residue either to the parish council of Foxton or to the Official Trustees of Charitable Funds.

For those and other reasons given by the Master

of the Rolls and Lord Justice Sargant he (his Lordship) was of opinion that the testator, in spite of the particularity of his directions for application, had shown an overriding intention to devote the whole of his residue to charity. He concurred in the form of order proposed by the Master of the Rolls.

[Solicitors—The Solicitor to the Treasury ; Messrs. Mackrell, Maton, Godlee and Quincey, for Messrs. Plummer and Pike, Leicester.]

K.B. Div. (Salter, J.) } 1927. Feb. 10.

EAGLE, STAR AND BRITISH DOMINIONS INSURANCE COMPANY, LIMITED v. REINER.*

Insurance (Marine)—Reinsurance—Slip—Construction—"On a voyage."

The plaintiffs, as original insurers, insured a consignment of oranges from any port in Spain to Antwerp, and, after the ship had left Valencia and had been in wireless communication with Gibraltar, they reinsured with the defendant by a slip, which referred to the fact that the ship had been in such communication with Gibraltar and which contained the words "on a voyage," meaning, according to the evidence, that the risk should attach only from a named port in the course of the voyage. The ship stranded before she reached Gibraltar, the oranges were damaged, and the plaintiffs had to pay on the policy. In an action on the contract of reinsurance,

Held, that on the true reading of the slip the intention was to limit the risk to the voyage from Gibraltar, and the action failed.

This was an action in which the plaintiffs claimed £24 18s. 2d. from the defendant on a policy of reinsurance.

Mr. Le Quesne, K.C., and Mr. Simey appeared for the plaintiffs ; and Mr. Porter, K.C., and Mr. Somervell for the defendant.

The plaintiffs, as original insurers, insured a consignment of oranges from any port in Spain to Antwerp, and they reinsured the risk with the defendant and other underwriters. The oranges were loaded at Valencia for the voyage. In the course of the voyage the ship stranded at Gandia, and many cases of the oranges were damaged by sea water. The plaintiffs had to pay on the original policy, and they now claimed from the defendant his proportionate liability under the policy of reinsurance.

The defendant pleaded that the agreement which he made with the plaintiffs was one to reinsure the oranges "on the s.s. Sicilier at and from and off Gibraltar on a voyage to Antwerp."

The slip was in that form, but the policy when drawn up purported to insure from Spain to Antwerp, and, in that form, was signed by Lloyd's Signing Bureau on the defendant's behalf. The stranding took place before the steamer reached Gibraltar, and the defendant said that his risk was only to begin at and from Gibraltar and that he was, therefore, not liable. He counterclaimed to have the policy rectified to express the real intention of the parties that the risk should only begin at Gibraltar.

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

The material part of the slip was as follows :—

S. Valencia 23/12 W.T.
{ Gib. 27/12 apl } on a voyage
from
Spain Antwerp

Meaning : "Sailed Valencia Dec. 23, wireless telegram. Gibraltar Dec. 27 as per list." As originally drawn the words "on a voyage from," and the brackets, were not in the slip, but the defendant wrote them in and contended that they expressed the real intention of the parties.

Mr. Le Quesne, for the plaintiffs, submitted that the claim on the policy must succeed. The defendant said that the policy did not represent the true intention of the parties, and he claimed that it should be rectified to bring it into accord with what had been orally agreed. The only case in which rectification of a policy was permissible was that in which the policy had to be brought into conformity with the slip. Section 22 of the Marine Insurance Act, 1906, required that a contract of marine insurance must be embodied in a policy. That document must be in a particular form and must be properly stamped. If evidence of an oral agreement was admitted the effect would be to allow a contract to be enforced which had not been embodied in a policy.

Mr. Porter contended that as the policy in its present form did not carry out the real intention of the parties it ought to be rectified like any other document.

Mr. Justice Salter, in giving judgment, said that the action, which was one on a marine policy, raised a question of some importance with regard to words which were in customary use in cases of marine insurance where it was desired to take a risk on cargo which was at sea in the course of a voyage, and to limit that risk to begin from some particular point in the voyage. There was no question that on the policy as it stood the defendant would be liable. But the defendant said that the policy was in its present form by reason of a mistake common to both parties and did not represent the contract which was in fact made.

The true contract was alleged to be contained in the slip when properly construed, and he was asked to rectify the policy to bring it into accordance with the slip. It was not a case in which it was necessary to ask for rectification of both policy and slip to make both accord with some outside agreement, though *Spalding v. Crocker* (13 *The Times* L.R., 396 ; 2 Com. Cas., 189) seemed to show that the Court could do even that where there had been a common mistake. The question, therefore, was what was the true construction of the slip.

The plaintiffs instructed their agent to reinsure the risk for the whole voyage. A slip was accordingly prepared for insurance "Spain-Antwerp." The agent took the slip into the market, and observing that the steamer appeared in Lloyd's list as being reported from Gibraltar on December 27, he wrote on the slip, "Gibraltar 27/12 a p l." He then presented the slip to the defendant. At that time the information on it was that the steamer had left Valencia on December 23 ; had been in wireless communication with Gibraltar on December 27 as per list ; and was on a voyage from Spain to Antwerp.

The defendant refused to take up the insurance because he was not satisfied with the rate offered, and also because he desired the risk to attach only from Gibraltar. He said he would take it up if he might write the words "on a voyage from" in the

slip. The point was one of substance, because there was a danger of stranding in Spanish ports, and both parties understood what was meant. The plaintiff's agent finally agreed to the insertion in the slip of the words "on a voyage from."

The evidence showed that by a well-established usage of the marine insurance market the words "on a voyage" were used where it was desired that the risk should only attach from a named port in the course of a voyage. In its full form the expression would be "at off or from A. on a voyage from X. to Y." The essential words were "on a voyage," and where they appeared on a slip they showed that the intention was that the risk should only begin from a particular point.

His LORDSHIP, in construing the slip in this case, said that he attached the greatest importance to the position of the brackets, which included the words "on a voyage" but excluded the word "from." He thought that the true reading of the slip was, "Gibraltar, on a voyage," and the intention was to limit the risk to the voyage from Gibraltar.

By the insertion of the words "on a voyage from" the slip was modified from its original form and became an entirely different document. The provisions of the slip were then by mistake put into the policy without the modification, and he was satisfied that, owing to the common mistake, the policy was not in accordance with the true contract, which was that appearing on the slip. Both parties intended that the risk should attach only from Gibraltar, and the policy must be rectified accordingly. There must, therefore, be judgment for the defendant, both on the claim and on the counter-claim.

[Solicitors—Messrs. William A. Crump and Son; Messrs. Parker, Garrett and Co.]

K.B. Div. (Swift, J.) 1927. Feb. 3.

SILVERMAN v. IMPERIAL LONDON HOTELS, LIMITED.*

Contract — Turkish baths — Obligations of proprietor.

The keeper of Turkish baths, who allows persons to use them in return for payment, impliedly warrants that the couches are reasonably fit for reclining on, and he owes a duty to those persons to take reasonable care that no dangerous insects infest his premises.

This was an action by Mr. M. L. Silverman, manufacturer's agent, of Forest Gate, against the Imperial London Hotels, Limited, for damages for personal injuries. He alleged that he had been bitten by an insect while using the defendants' Turkish baths at Russell-square on August 25, 1925.

Mr. B. B. Stenham appeared for the plaintiff; Mr. E. F. Lever and Mr. F. Peregrine for the defendants.

The evidence for the plaintiff was that he and his brother, after spending a night in the baths, suffered from irritation and lumps, which they attributed to insect bites. A witness named Praegar stated that he was bitten by an insect on the night following the night of the plaintiff's visit. He brought an action for damages against the present defendants. The late Judge Parfitt decided that Praegar was bitten while he was on the couch, but gave judgment for the defendants on the ground that reasonable care had been taken.

Mr. LEVER submitted that there was no case, contending that the onus of proving absence of reasonable care was upon the plaintiff. He relied upon *Maclenan v. Segar* (33 *The Times* L.R., 351; [1917] 2 K.B., 325).

His LORDSHIP said that the defence must show that the insects were there in spite of precautions taken as distinct from lack of precautions.

Mr. Townsend, now assistant secretary, and previously manager, of the baths, said that since the complaints of the plaintiff the wooden couches had been replaced by iron bedsteads. At the time of the plaintiff's visit the baths were infested by mosquitoes; he saw two or three dozen.

The plaintiff's doctor was recalled. He stated that the bites had not been caused by mosquitoes, and Mr. PEREGRINE admitted that it was no part of the defence that the bites were by mosquitoes.

Attendants at the baths stated they had never seen any verminous insects, but had seen mosquitoes. The baths were used by 71 men on the day in question, and there were no other complaints.

Dr. Gardiner, who examined the plaintiff in February and March, 1926, said that the most probable cause of the bites described by the plaintiff was a verminous insect rather than a mosquito. In his opinion the cleansing precautions were quite inadequate.

Mr. Knott, secretary and assistant manager, said that there had been complaints of bites by mosquitoes.

In cross-examination he denied that a Captain Percy brought him specimens of verminous insects stated to have been found in the baths.

Three men who heard of the case in the morning came forward in the afternoon as witnesses. Captain Harry Percy, veterinary surgeon, stated that on one occasion he found three verminous insects on a couch. He drowned them in his cup of tea and afterwards mounted them on cardboard. Later he produced them to Mr. Townsend. When he complained he was given a free ticket.

Mr. C. Solomon said that he captured one of the insects on the bed and carried it to an attendant, who said that it was a young cockroach.

Mr. LEVER contended that the plaintiff had on the day and night in question visited a number of places where the possibilities of collecting certain insects were considerable. The baths, which the plaintiff's witnesses had used many times without any complaint, were entitled to be placed among the finest baths in this or any other country. Certainly no expense had been spared to make them all that could be desired. In the period covered by the plaintiff's witnesses the baths had been used by some 200,000 people. From that huge number it had been possible to bring only some half a dozen persons with complaints to support an allegation of negligence, and one of those witnesses had been a client for five years. Since the complaint made in this case the wooden couches had been replaced by iron bedsteads, but an improvement of appurtenances after a complaint ought not to be regarded as evidence of prior negligence (*Hart v. Lancashire and Yorkshire Railway Company, Limited*, 21 L.T., 261). There was here special reason for receiving the plaintiff's evidence with care, because he was claiming £10 per week for loss of income, and had admitted that he did not pay income-tax.

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* Reported by G. G. BEAGLEY and J. W. HALL, Esqrs., Barristers-at-Law.

MR. JUSTICE SWIFT delivered the following considered judgment :—

In the month of August, 1925, Mr. Maurice Silverman, who is a manufacturer's agent, was staying with his brother Mark Silverman at a furnished house hired by them jointly for the occupation of their families for a summer holiday at Margate. On the 25th of that month the two brothers both had occasion to visit London and to stay the night there. They left Margate some time in the morning, they arrived in London about midday, they then separated and went about their several businesses, meeting again in order that they might dine together in the evening. They dined at a restaurant in the West End and then proceeded to witness a boxing competition at the Ring, Blackfriars, and about 10.30 in the evening they went to the Imperial Turkish Baths, situate in Russell-square, for the purpose of having a Turkish bath, and afterwards staying there until the following morning. From the evidence before me it appeared that the Imperial Turkish Baths, belonging to the Imperial London Hotels, Limited, were established in 1913 and were constructed on the most scientific, hygienic and up-to-date principles, and it is claimed by their proprietors that they "are without doubt the finest in the world." Apart from the matters which form the subject-matter of complaint in this action, the evidence was unanimous that the defendants' baths were extremely well managed and in every way well appointed and up-to-date. When a customer visits the building for the purpose of a Turkish bath it appears that he is shown into a large hall partitioned off into cubicles containing beds or couches with cupboards for the reception of clothing; and in those cubicles the customer undresses, and, wrapping himself in towels provided by the bath attendants, he then walks into the room or series of rooms comprising the Turkish baths, and afterwards, returning to his cubicle, reclines on the bed or couch wrapped up in a sheet until he has sufficiently rested and cooled to be able again to go out into the open air. It appears that customers of the baths who go there late in the evening are allowed to remain in the cubicle until early the next morning. For the use of the cubicle by them before and after the bath and the bath and attendance the customer is charged an inclusive sum of 5s. On the morning of August 26, when they left the Turkish baths, both Mr. Maurice Silverman and his brother found themselves to be suffering from an irritation of the skin which was afterwards diagnosed to be occasioned by the bites of bugs. In consequence of that irritation the plaintiff, Mr. Maurice Silverman, suffered considerable pain and inconvenience. He was for a time incapacitated from following his business and he incurred some medical expenses. He brings this action alleging that he sustained personal injuries with consequent damage to himself from bug bites received by him whilst on the defendants' premises, and he alleges that the defendants are liable to compensate him for the damage which he has suffered because they have either broken their contract with him or they have been guilty of negligence which has resulted in the injuries which he alleges he sustained. I am quite satisfied that on August 26 the plaintiff was suffering from the effects of recently inflicted bug bites, and I am quite satisfied that the effect of those bites was to cause him the pain and suffering and the monetary loss which I hereafter deal with. The questions which I have to decide are whether those bug bites were sustained by the plaintiff in the defendants' Turkish baths, as he alleges, and, if so, whether the defendants are in such a way responsible for them as to be liable in law to compensate the plaintiff for the injury which he sustained.

The evidence is that when the plaintiff and his brother went to the baths about 10.30 on the night of August 25 there was no mark or sign of any sort on their bodies indicating the bite of any insect. They were stripped and in that condition saw each other, and they were also under the observation of the bath attendant, who waited upon them whilst they were in the baths. They have both sworn that neither had any mark upon him and they felt no irritation, and I am quite satisfied and find as a fact that when they went to the baths they had not been bitten. I am equally satisfied that when they left the baths in the morning both of them had been bitten and bitten very extensively. I do not think that either of them at first realized the extent of his own or his brother's injuries. The plaintiff says that from the time when he woke up he felt considerable irritation, but he did not think anything of it, and his brother had not begun to appreciate that he had been bitten until later on in the day, but I am quite satisfied that they had both been bitten when they left the baths in the early morning of August 26. It follows, therefore, that in my view the plaintiff and his brother were bitten by bugs whilst on the defendants' premises during the night of August 25 and 26, 1925.

This, of course, does not dispose of the case. In the first place it was contended by the defendants that even assuming that the plaintiff was bitten on their premises it did not follow that he was bitten by a bug or bugs which were on those premises before he went there. It was contended that coming from a furnished house in Margate in a third-class railway carriage, spending the afternoon and evening in London, dining in a crowded restaurant and afterwards visiting a boxing competition he might easily have picked up and carried with him to the Turkish baths the insect or insects which subsequently caused his injury. I think this contention would have been of great weight had the plaintiff alone been bitten whilst on the defendants' premises. But there was the clearest evidence before me that not only was the plaintiff bitten on the night of August 25, but that his brother also was bitten, and that two other persons, quite independently of and quite unknown to the plaintiff, had been bitten in the same way in the defendants' hall on the previous night. There was also evidence before me, quite apart from the allegation of the plaintiff, that there have been complaints made to the defendants' servants of persons having been bitten upon previous occasions, and there was evidence that bugs had been seen by at least two people in the defendants' premises on occasions other than that upon which the plaintiff visited them. In these circumstances I am satisfied, and I find as a fact, that the injuries which the plaintiff sustained were occasioned by bug bites inflicted upon him by bugs which were in the defendants' premises on the night of August 25 and that the plaintiff was in no way instrumental in taking these bugs there or responsible for their being there. It was then contended by counsel for the defendants that they had not been shown to be in any way responsible to the plaintiff for the injuries which he had sustained, because there was no implied warranty in the contract which they had entered into with him that he should not be bitten, and there was no negligence on their part which resulted in the plaintiff's injuries, inasmuch as they had taken all reasonable steps to see that their premises

were free from bugs. In my opinion by the contract made between the plaintiff and the defendants the latter impliedly warranted that their premises were reasonably fit for use as Turkish baths in the way in which such baths are ordinarily used, and amongst other things that the beds or couches in the cubicles were reasonably fit for reclining or sleeping on after the bath had been taken. I am also of opinion that the defendants owed a duty to the plaintiff to take reasonable care that no bugs or other dangerous insects should infest their premises. The contract made between the plaintiff and the defendants was that for the sum of 5s. the defendants should, *inter alia*, provide the plaintiff with a place in which he could spend the night. It seems to me that such a contract implies a term that the place provided shall be reasonably fit for that purpose. I accept the definition of an implied contract laid down by Lord Justice Bowen in the case of *The Moorcock* (5 *The Times* L.R., 316 ; 14 P.D., 64, at p. 68) cited to me by Mr. Lever on behalf of the defendants : "Now an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side ; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men ; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

Applying those words I cannot come to any other conclusion but that the parties in this case contemplated that the cubicle and bed or couch in which and on which the plaintiff was invited to lie should be free from bugs or other insects which might inflict harm upon the plaintiff, and I am of opinion that in the contract between them there was implied a term that the premises should be so free from bugs as to be reasonably fit for the purpose for which they were to be used. If there was such an implied contract it matters nothing what steps the defendants had taken to render their premises fit ; they have contracted that they shall be reasonably fit, and if the premises are not so and the plaintiff is thereby injured it avails the defendants nothing although they have taken every possible step in an endeavour to make them fit.

Apart from contract the defendants were, in my opinion, under an obligation to a person using their premises to abstain from negligence—and if they did not and the plaintiff was injured thereby he can recover. The plaintiff was, in my opinion, in a better position than a mere invitee, he was a person using the defendants' premises for payment. The defendants therefore owed to him a wider duty than that laid down by Mr. Justice Willes in *Indermaur v. Dames* (L.R. 1 C.P. 274, at p. 288) as the duty owed to a person going to premises upon business which concerns the occupier and upon his invitation, express or implied, where they are bound to see that the premises which they invite the plaintiff to use for payment are reasonably safe, and if they are not safe and the owners could know of the dangerous condition and negligently did not know of it they are liable for damages caused. See *per* Lord Justice Scrutton in *Hayward v. Drury Lane Theatre* (33 *The Times* L.R., 557 ; [1917] 2 K.B., 899, at p. 914) and *Mersey Docks and Harbour Board v. Gibbs* (L.R., 1 H.L. 93, at p. 104), and *Parnaby v. Lancaster Canal Company* (11 Ad. and E., 223). *A fortiori* the defendants would be liable to the plaintiff if they knew of the dangerous condition of the premises and did not rectify it, but allowed the plaintiff to use them without warning whilst the danger continued. From the evidence as to the statement made by the defendants' manager at the interview with the plaintiff and his brother on the Tuesday after the plaintiff had been bitten, I am satisfied that the defendants knew of the danger, and they allowed the plaintiff to use the premises without rectifying it or warning him of it. I think that in many ways the defendants took great precautions to ensure the cleanliness of their premises and the freedom of the latter from dirt or insects. Detailed evidence was given to me of elaborate brushing, washing, spraying and disinfecting of the beds and couches and of the cubicles and hall which contained them. In my opinion, those precautions were not sufficient. A witness for the plaintiff, Miss Charlotte Mahoney, who is a domestic servant, told me that "you do not get bugs in a house which is kept clean," and a witness for the defendants, a bath attendant named Bampton, said, "If you keep the place clean you do not get bugs." Now the evidence before me is : so far back as 1922 a witness named Hillain was badly bitten by bugs and he killed "well over a dozen" ; that in May or June, 1926, Captain Percy, a veterinary surgeon, was bitten by bugs and that he caught three, which he took to the defendants' manager; that in July or August, 1926, a Mr. Solomon caught a bug and took it to one of the defendants' servants ; and that on August 24, 1925, a Mr. Prague and another man (unidentified) were badly bitten by bugs in the defendants' premises, and complained to the attendants. When the plaintiff and his brother complained some days after August 25 to the defendants' manager the latter stated that he had had complaints before, and asked the plaintiff to send in a medical report. I am forced by this evidence to the conclusion, and I find as a fact, that bugs were on August 25, 1925, in the cubicle occupied by the plaintiff and his brother in such quantities as to render that cubicle unfit for use, and I find that they were there in such quantities because the defendants had not taken all reasonable steps to get rid of them after they had received numerous complaints that they were there. I do not think that it could be urged that the presence of one bug upon one occasion would be proof of a breach of this warranty or neglect of their duty, and it seems to me that what I have to determine in this case is whether on the night of August 25 bugs were present in such quantities as to render the premises unfit for use as Turkish baths or so as to show that the defendants had failed to take reasonable care that such dangerous insects should not be upon their premises. Taking the whole of the evidence into consideration, I have come to the conclusion that upon that night there were upon the defendants' premises

bugs in such quantity as to render the cubicle which was assigned to the plaintiff and his brother unfit for use as a sleeping or reclining place, and that they were there in breach of the defendants' warranty and because of the defendants' negligence, and that the plaintiff had suffered damage in consequence of such breach of warranty and negligence.

I now come to consider the damages which the plaintiff is entitled to recover in consequence of the injuries he sustained. I am quite satisfied on the evidence that he was very severely bitten about the face, chest, back, and arms, and that in consequence he suffered very considerable pain, irritation, and annoyance; after obtaining some lotion from a chemist in an effort to alleviate his sufferings he on August 30 consulted a doctor. Acting upon medical advice which I cannot say was unreasonable or improper, he was away from his work for about a fortnight, and he incurred medical expenses. It is a little difficult to estimate the amount which he lost at his business as he keeps no books and had no figures relating to his earnings. He himself says that they average between £5 and £10 per week. In January, 1926, the plaintiff was again ill, and received medical treatment, but I am not satisfied that that illness was in any way occasioned by the injuries which he had received on the defendants' premises. Giving full weight to the whole of the plaintiff's special damage as I find it to be proved, and compensating him as I think adequately for his pain and suffering and inconvenience, I award to him the sum of £52 10s., and I give judgment for him for that amount, with costs. In my view, on the authority of *Kelly v. Metropolitan Railway Company* (11 *The Times* L.R., 366; [1895] 1 Q.B., 944) that judgment will carry with it costs upon the High Court scale, but in order to obviate any question on the matter, I state that I am satisfied that there was sufficient reason for bringing the action in the High Court, and I make an order allowing the costs on the High Court scale.

[Solicitors—Messrs. Peet and Manduell; Messrs. Robinson and Blaber.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Feb. 14.

REX v. MINISTER OF HEALTH—EX PARTE DORE.*

Local Government—Disallowance and surcharge by auditor—Persons aggrieved—Remedies—*Certiorari*—Appeal to Minister of Health—Application for *certiorari*—Refusal—Subsequent application to Minister—Order of remittal—Jurisdiction—Poor Law Amendment Act, 1844 (7 and 8 Vict., c. 101), ss. 35, 36—Poor Law Audit Act, 1848 (11 and 12 Vict., c. 91), s. 4.

Where a party aggrieved by a disallowance or surcharge by a district auditor applies for a writ of *certiorari* to quash it and fails in his application, there is no subsequent appeal to the Minister of Health for an order remitting the disallowance or surcharge.

This was a rule *nisi* for a *certiorari* to quash an order of the Minister of Health.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

On June 6, 1923, Mr. A. Carson Roberts, the district auditor, disallowed to the extent of £5,000 the wages charges of the borough of Poplar for the year ending March 31, 1922, and surcharged that sum upon a number of councillors of the borough.

The surcharged councillors obtained a rule *nisi* for a *certiorari* to quash the disallowance and surcharge. The rule was discharged by the Divisional Court on November 21, 1923 (*Rex v. Roberts—Ex parte Scurr and Others*, 40 *The Times* L.R., 116; [1924] 1 K.B., 514). On June 23, 1924, the Court of Appeal, by a majority, reversed the Divisional Court's decision and quashed the surcharge (40 *The Times* L.R., 769; [1924] 2 K.B., 695). The House of Lords on April 3, 1925, reversed the decision of the Court of Appeal and restored the order of the Divisional Court (*Roberts v. Hopwood and Others*, 41 *The Times* L.R., 436; [1925] A.C., 578).

On April 14, 1925, Mr. W. H. Thompson, the solicitor who had acted in the proceedings for the surcharged councillors, wrote to the Minister of Health asking for a remission of the surcharges. Mr. Thompson's letter went on to say:—

"With reference to the future attitude of the council upon the question of wage payments I am desired to say that the council under protest and with great reluctance propose to consider the whole question of the wages with a view to bringing the wages into conformity with the decision of the House of Lords."

The Minister of Health on July 14, 1925, wrote to the Town Clerk of Poplar notifying him of the application made on behalf of the councillors and stated:—

"In view of the fact that the proceedings before the Courts were in the nature of a test case, the Minister is not unwilling to entertain the application, provided that he receives a satisfactory indication of the intention of those concerned to place the matter for the future on a footing which would prevent the constant recurrence of similar incidents."

After further negotiations with the Ministry, the council having adopted reduced scales of wages and paid the auditor's costs, the Minister on May 20, 1926, remitted the surcharges.

On July 29, 1926, Mr. John Buchanan Dore, a ratepayer of the borough, obtained a rule *nisi* for a *certiorari* to bring up and quash the order of the Minister of Health remitting the surcharges, on the grounds, that (1) the persons surcharged had moved the King's Bench Division to quash the surcharge and there was thereafter no right of appeal to the Minister of Health; (2) no appeal against the disallowance and surcharge was in fact made to the Minister of Health; (3) if there was a right of appeal to the Minister of Health, and if an appeal was in fact made, and/or if it was in his power to entertain and decide upon an application for a remission of the surcharge, his decision upon the appeal and/or application for remission of the surcharge was *ultra vires* and in excess of the powers conferred upon him, inasmuch as (*a*) it was not made on a consideration of the question whether the subject-matter of the disallowance was incurred in such circumstances as made it fair and equitable that the disallowance should be remitted, and/or (*b*) he proceeded upon the view that he could take into consideration promises made by the council as to the action to be taken by it in the future.

By the Poor Law Amendment Act, 1844:—

"Section 35 . . . it shall be lawful . . . for every person aggrieved by such disallowance or surcharge

. . . to apply to the Court of Queen's Bench for a writ of *certiorari* to remove into the said Court the said . . . disallowance or surcharge. . . .

"Section 36. Provided always that it shall be lawful for any person aggrieved as aforesaid, by any allowance, disallowance, or surcharge, in lieu of making application to the Court of Queen's Bench for a writ of *certiorari* to apply to the said Commissioners—[now the Minister of Health]—to inquire into and to decide upon the lawfulness of the reasons stated by the auditor for such allowance, disallowance, or surcharge, and it shall thereupon be lawful for the said Commissioners to issue such order therein under their hands and seal as they may deem requisite for determining the question."

By the Poor Law Audit Act, 1848, section 4 :—

"Where any appeal shall be made to the said Commissioners against any allowance, disallowance or surcharge made by any auditor in the accounts of any guardians, overseers, or their officers, it shall be lawful for the said Commissioners to decide the same according to the merits of the case ; and if they shall find that any disallowance or surcharge shall have been or shall be lawfully made, but that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that the disallowance or surcharge should be remitted, they may, by an order under their seal, direct that the same shall be remitted upon payment of the costs, if any, which may have been incurred by the auditor. . . ."

By the Public Health Act, 1875, section 247, sub-section 8 :—

"Any person aggrieved by disallowance made may apply to the Court of Queen's Bench for a writ of *certiorari* to remove the disallowance into the said Court, in the same manner and subject to the same conditions as are provided in the case of disallowances by auditors under the laws for the time being in force with regard to the relief of the poor . . . or in lieu of such application any person so aggrieved may appeal to the Local Government Board—[now the Minister of Health]—which Board shall have the same powers in the case of appeal as it possesses in the case of appeals against allowances, disallowances and surcharges by the said poor-law auditors."

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. W. Bowstead showed cause for the Minister of Health ; Mr. Croom-Johnson appeared for the Poplar Borough Council, who had been served with the rule through their Town Clerk ; Mr. Scholefield, K.C., and Mr. H. A. Hill supported the rule.

Mr. Bowstead referred the Court to the sections set out above, and said that no doubt the applicants would rely on the words "in lieu of making application" in section 36 of the Poor Law Amendment Act, 1844. Those words might have constituted a formidable obstacle, but the view taken by the Minister was supported by a very weighty *dictum* of a most careful and experienced Judge. In the case of *Reg. v. Cockerton* (17 *The Times* L.R., 165 ; [1901] 1 K.B., 322, at p. 350), Mr. Justice Wills, in a considered judgment, said :—

"I do not suppose that anyone will ever wish that the gentlemen surcharged, who, I do not doubt for a moment, honestly did what they conceived to be their duty, should be mulcted in the amounts surcharged or in any other amounts. There can be no doubt that the importance of the subject demands that the questions raised should be decided by the House of Lords. Until that is done there can hardly be any disturbance of the existing order of things without the most enormous inconvenience. When the question is finally set at rest, if the views I have expressed be maintained, I can see nothing whatever to prevent the appellants from applying to the Local Government Board under the provisions of 11 and 12 Vict., c. 91, section 4, to remit the surcharges."

Counsel said that that case went to the Court of Appeal (17 *The Times* L.R., 402 ; [1901] 1 K.B., 726), but that *dictum* was not differed from, and had since been acted upon regularly. Clearly there could be no appeal to the Minister on a point of law after the decision of the Court on a writ of *certiorari*.

The Attorney-General supplemented the argument for the Minister. If the view was taken that an application for a *certiorari* destroyed the Minister's power to remit, obviously no one would go to the Court, and the inconvenience would be great. The Court should be slow to depart from a construction that had been followed for 80 years and judicially recognized 27 years ago, though he did not deny that there was a difficulty.

Mr. Scholefield contended that the power to remit was merely ancillary to the right of appeal, and that when once the appellate jurisdiction of the Court was invoked the right to go to the Minister had gone.

Mr. Justice Avory read the considered judgment of the Court :—On July 29, 1926, this Court granted a rule *nisi* on the application of John Buchanan Dore, a ratepayer of the Metropolitan borough of Poplar, calling upon the Minister of Health to show cause why a certain certificate of remission of surcharge of the sum of £5,000, made by the district auditor upon certain councillors of the borough, should not be removed into this Court with a view to its being quashed upon the grounds, (1) that, the persons surcharged having moved the King's Bench Division to quash the surcharge, there was thereafter no right of appeal to the Minister of Health ; (2) that no appeal against the disallowance and surcharge was in fact made to the Minister of Health ; and (3) that if there was a right of appeal to the Minister of Health, and if an appeal was in fact made and/or if it was in his power to entertain and decide upon an application for a remission of the surcharge, his decision upon the appeal and/or application for remission was *ultra vires* and in excess of the powers conferred upon him.

The material facts are that on June 6, 1923, the district auditor certified that in the accounts of the council of the borough for the year ended March 31, 1922, he had disallowed to the extent of £5,000 charges in respect of wage payments made by the council, and had surcharged the £5,000 upon certain of the councillors named in his certificate. On June 26, 1923, this Court granted, on the application of the persons surcharged, a rule *nisi* for a writ of *certiorari* to remove into this Court the said certificate of disallowance and surcharge with a view to its being quashed. On November 21, 1923, this Court, after argument, discharged the rule *nisi* and affirmed the decision of the district auditor (*Rex v. Roberts*, 40 *The Times* L.R., 116 ; [1924] 1 K.B., 514). On June 23, 1924, the Court of Appeal reversed this decision (40 *The Times* L.R., 769 ; [1924] 2 K.B., 695), but on appeal to the House of Lords the order of the Court of Appeal was, on April 3, 1925, reversed, and the order of this Court restored (41 *The Times* L.R., 436 ; [1925] A.C., 578). An April 9, 1925, the borough council of Poplar, purporting to act on behalf of the surcharged councillors, made an application to the Minister of Health that the surcharge should be remitted, and, after negotiation with the council,

the Minister, on May 20, 1926, made an order remitting the surcharge of £5,000.

The question to be determined is whether he had power in the circumstances to make this order of remission.

Section 32 of the Poor Law Amendment Act, 1844, provides for the disallowance by the auditor of items in the accounts and for the surcharge of moneys improperly or illegally expended upon the persons authorizing the payment or otherwise answerable for such moneys. By section 35 any person aggrieved by such disallowance or surcharge is empowered to apply to the King's Bench Division for a writ of *certiorari* to remove the disallowance or surcharge into the said Court. By section 36 of the same Act it is provided that any person aggrieved by such disallowance or surcharge may, in lieu of making application to the Court for a writ of *certiorari*, apply to the Poor Law Commissioners (now the Minister of Health) to inquire into and decide upon the lawfulness of the disallowance or surcharge, and thereupon the Commissioners may make such order therein as they deem requisite for determining the question.

Section 4 of the Poor Law Audit Act, 1848, provides that where an appeal is made to the said Commissioners against any such disallowance or surcharge, and they find that it has been, or may be, lawfully made, they may, under certain conditions, remit the same, and it is under the power conferred by this section, if any, that the Minister of Health purports to have made the order of remission in this case.

In the present case there was no appeal to the Minister of Health under section 36 of the Act of 1844, or under section 4 of the Act of 1848 against the disallowance or surcharge, the persons aggrieved having chosen the alternative remedy by *certiorari* under section 35 of the Act of 1844 ; and, as the jurisdiction to make an order of remission only arises upon such an appeal to the Minister of Health, the order in this case appears to have been made without jurisdiction and cannot be supported.

This view is confirmed by reference to section 247, subsection 8, of the Public Health Act, 1875, which applies to urban authorities that are not the council of a borough, and provides the same alternative remedies in the case of a disallowance or surcharge, and confers upon the Local Government Board (now the Minister of Health) the power to remit, but only in the event of an appeal to the Local Government Board against the disallowance or surcharge.

Our attention was called to an observation made by Mr. Justice Wills in *Reg. v. Cockerton* (17 *The Times* L.R., 165 ; [1901] 1 K.B., 322, at p. 350), to the effect that there was nothing in that case to prevent the applicants from applying to the Local Government Board under the provisions of 11 and 12 Vict., c. 91, section 4, to remit the surcharge, but the point had not been argued. The difficulty that arises in the present case was clearly not present to the mind of the Judge in that case, and this *obiter dictum* cannot, we think, be accepted as authority to support the respondents' contention.

Having come to the conclusion that the rule should be made absolute on the ground that the Minister of Health had no jurisdiction to make the order of remission, it is unnecessary for us to consider whether, in the circumstances of this case, the order could properly be made.

[Solicitors—The Solicitor to the Ministry of Health; Mr. W. H. Thompson ; Messrs. Charles G. Bradshaw and Waterson.]

K.B. Div. (Talbot, J.) 1927. Feb. 3.

PALMER v. CRONE AND OTHERS.*

Justices—Jurisdiction—Distress warrant—Poor rate—Weekly tenant—Summons — Failure of tenant to appear at hearing — Seizure of tenant's furniture — Act of justices in excess of jurisdiction — Error on question of fact on proper evidence — Action for trespass — Liability of justices—Justices' Protection Act, 1848 (11 and 12 Vict., c. 44), ss. 1, 2—Poor Rate Assessment and Collection Act, 1869 (32 and 33 Vict., c. 41), s. 2.

A poor rate was declared against a weekly tenant of certain premises, and a demand made for an amount in excess of the amount which the tenant was liable to pay under s. 2 of the Poor Rate Assessment and Collection Act, 1869. On the failure of the tenant to comply, a summons was issued. The tenant did not appear at the hearing, and the justices, after hearing the evidence of the overseers, issued and signed a distress warrant against the tenant's goods, which were accordingly distrained upon and sold. The tenant appealed to quarter sessions, and his appeal was allowed. He then brought an action in trespass against the justices for issuing the warrant that had authorized the distress.

Held, that the justices were not liable, as they had merely come to an erroneous decision in regard to their jurisdiction on a question of fact on evidence properly before them, as distinct from a wrong decision of law in regard to such jurisdiction.

Calder v. Halket (3 Moo. P.C., 28) applied.

This was an action brought by Mr. Arthur Robert Palmer, of 37, Litchfield-gardens, Willesden Green, Middlesex, in respect of an alleged illegal distress of his goods. The defendants were Dr. J. S. Crone and Mr. P. Hewlett, two justices of the peace for the county of Middlesex ; the overseers of the poor for the parish of Willesden ; James Carless, a constable ; and Messrs. Flood and Sons, auctioneers. The two justices were sued for issuing the warrant which authorized the distress, the overseers for seizing the plaintiff's goods by their servant or agent Carless ; and the auctioneers for selling and converting the goods so seized. The defendants, other than the two justices, relied on the Constables' Protection Act, 1750. The justices denied that they issued the warrant wrongfully and/or without jurisdiction, and contended that the action was not maintainable against them by reason of sections 1 and 2 of the Justices' Protection Act, 1848.

The plaintiff at all material times was the weekly tenant of the ground floor of the premises referred to above. On April 3, 1924, a poor rate was duly made for the parish of Willesden to meet expenses incurred before March 31, 1925. It was made leviable in two instalments, the second instal-

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

ment becoming due on October 1, 1925. The overseers, in November, 1924, issued a demand note upon the plaintiff for £4 1s., being as to £2 15s. the amount of the second instalment, claimed in advance. At the same time they served a typewritten notice, addressed to weekly tenants generally, notifying them of their option to pay the rate by weekly instalments, and to deduct the same from the rent due to the landlord.

Relying upon section 2 of the Poor Rate Assessment and Collection Act, 1869, the plaintiff did not comply with the demand, and a summons was issued against the plaintiff on February 5, 1925. The summons came on for hearing before the justices on February 14. At the hearing Miss Winifred Rush, daughter of the plaintiff's landlord, desired to give evidence that the plaintiff's tenancy was a weekly tenancy only, but the justices declined to hear her. The plaintiff did not appear, and, evidence having been given on the part of the overseers, the justices signed and issued a distress warrant against the plaintiff's goods.

On May 13, 1925, the overseers, by Carless, a constable acting on their behalf, entered the plaintiff's premises and seized and took possession of certain furniture, the property of the plaintiff. On May 25, 1925, Messrs. Flood and Sons sold the furniture by public auction. On July 20, 1925, the plaintiff appealed to the Middlesex Quarter Sessions against the distress warrant, and the appeal was allowed, but without costs.

The plaintiff claimed as special damages £38 15s. 8d., the costs of the appeal, and £10, the value of the furniture sold.

At the trial it was admitted by the plaintiff's counsel (1) that the plaintiff had not complied with section 6 of the Constables' Protection Act, 1750, which requires that a demand of the perusal and copy of the warrant shall be made in the manner prescribed by the Act and provides that an action shall not lie unless the same has been refused or neglected for six days, and (2) that in consequence the action against the overseers, the constable, and the auctioneers was not maintainable. Judgment was accordingly entered for the defendants other than the two justices.

With regard to the action against the justices, his Lordship left three questions to the jury :—(1) Did Miss Rush intimate to the justices that the plaintiff was a weekly tenant at the beginning of the proceedings ?—No. (2) Did she do so before the warrant was signed ?—Yes. (3) Damages ?—£50.

By the Justices' Protection Act, 1848, section 1 : ". . . Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort ; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause ; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

By section 2 : " . . . For any act done by a justice of the peace in a matter of which by law he has not jurisdiction or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any . . . warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause : . . ."

By the Poor Rate Assessment and Collection Act, 1869, section 2 : "No such occupier [including weekly tenants] shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year."

Mr. Wilfrid Rutherford and Mr. A. E. Phelps appeared for the plaintiff ; Mr. Konstam, K.C., and Mr. Villiers Bayly for the justices ; and Mr. R. T. Monier-Williams for the other defendants.

His Lordship reserved judgment.

Mr. Justice Talbot delivered a considered judgment as follows :—

This action was brought to recover damages for an alleged illegal distress of the plaintiff's goods. The defendants were two justices of the peace for the county of Middlesex ; the overseers of the poor for the parish of Willesden ; James Carless ; and Flood and Sons. The two justices were sued for issuing the warrant which authorized the distress ; the overseers for seizing the plaintiff's goods by their servant or agent Carless ; and Flood and Sons, who are auctioneers, for selling the goods so seized. The defendants, other than the two justices, relied on the Constables' Protection Act, 1750. Section 6 of that Act protects "any constable, headborough, or other officer" and anyone acting "by his order and in his aid" against any action "for anything done in obedience to any warrant under the hand or seal of any justice of the peace," until a demand of the perusal and copy of such warrant has been made in the manner prescribed by the Act and the same has been refused or neglected for six days. It has been decided in *Harper v. Carr* (7 T.R., 270) that overseers are officers within the protection of this statute, and the other defendants are clearly persons acting by their order. It was admitted that the demand required by the statute as a condition precedent to an action against these defendants was not made. I therefore gave judgment for them at the hearing.

On the question of the liability of the justices for issuing the distress warrant, I had the assistance of an argument in which many authorities were cited by counsel for the defendants. Counsel for the plaintiff did not think it necessary to discuss these, and I took time to consider them. [After referring to the facts, his Lordship continued.]. When the plaintiff appealed to quarter sessions on July 20, 1925, under section 7 of the Poor Relief Act, 1743, the appeal was allowed, but costs were refused on the ground that the contention that the distress was illegal had not been made before the justices. The contention depends on the Poor Rate Assessment and Collection Act, 1869, by which, under sections 1 and 2, the occupier of a rateable hereditament let to him for a term not exceeding three months shall not be compelled to pay to the overseers at one time a greater amount of the poor rate than would be due for one quarter of the year. It has been decided (*Hammond v. Farrow*, 20 *The Times* L.R., 497 ; [1904] 2 K.B., 332) that a weekly tenant is a tenant for a term not exceeding three months within this statute.

The poor rate on the plaintiff's tenement for the year in respect of which the distress in question was levied was £5 10s., a quarter of which is £1 7s. 6d., and it follows that a distress for £2 15s. was in fact contrary to the statute. The demand for the half-year's rate was good (*Walton-on-the-Hill Overseers v.*

Jones, [1893] 2 Q.B., 175), but, if the plaintiff had proved before the justices that the tenancy was a weekly one, it would have been their duty to issue a warrant for £1 7s. 6d. only. See *Mansel v. Itchen Overseers* (22 *The Times* L.R., 228 ; [1906] 1 K.B., 221). Moreover, as between these parties the contention that the distress warrant was wrongly issued is *res judicata* by the judgment of the quarter sessions. The question remains whether the defendant justices are liable to the plaintiff in an action of trespass for issuing it. If they are, the damages found by the jury are £50.

The justices' first defence was that whatever was in fact their knowledge on the subject, and although Miss Rush did inform them of the weekly tenancy before the warrant was actually signed, they were not entitled to regard anything not regularly proved before then, and that, as the plaintiff had not called any evidence and, indeed, had not appeared to claim the protection of the statute, they did right, and not wrong, in issuing the warrant. Apart from the judgment of quarter sessions, this appears to me to be right. See *Reg. v. Tompkins* (31 J.P., 470.) But, as I have said, the question is, in my opinion, *res judicata* on this point and is not open to the defendants.

They next rely on the Justices' Protection Act, 1848. The effect of section 1 is that in an action against a justice for any act done by him in the execution of his duty as such justice with respect to any matter within his jurisdiction, malice must be alleged and proved. The plaintiff on his part denies that, in issuing the warrant, the justices acted within their jurisdiction. He says that, on the contrary, they acted without jurisdiction, and that having been injured by what they did he has, by section 2, the same right of action, without alleging or proving malice or want of reasonable and probable cause, as he would have had before the passing of the Act. It is unnecessary to consider the provisos to section 2 of the Act, as it is admitted that they do not apply to this case. The principle of the law is plain. If a judicial officer acts outside his jurisdiction he is not acting as a judicial officer at all, and is in no better position than anyone else. But it does not follow that, because the enforcement of an order of a Court of limited jurisdiction will be prevented on the ground that in fact the matter was not within its limited jurisdiction, an action lies against the Judges of the Court for something done in obedience to the order. See *per* Mr. Justice Blackburn in *Pease v. Chaytor* (3 B. and S., 620, at pp. 640-4). There are many cases which illustrate this distinction. If justices have before them a matter apparently within their jurisdiction, and then it is alleged that, because of some fact collateral to the merits of the case, they have no jurisdiction, though they must inquire into the truth of the fact alleged in order to see whether they are to proceed or not, their decision is always open to review by the High Court, and will be corrected, if erroneous, by the appropriate writ. See *Bunbury v. Fuller* (9 Ex., 111, at p. 140) ; *Rex v. Bradford* (24 *The Times* L.R., 195 ; [1908] 1 K.B., 365). But in an action of trespass the justices are not liable because they have come on evidence properly before them to an erroneous decision on their jurisdiction on a question of fact (*Calder v. Halket,* 3 Moo. P.C., 28, at p. 77), though it is otherwise if upon the facts so found they have decided wrongly in point of law (*Houlden v. Smith,* 14 Q.B., 841). So in the present case if the plaintiff had appeared before the justices, and it had been proved or admitted that he was a weekly tenant, and they had nevertheless issued a distress warrant for £2 15s. poor rate, they would have been liable in damages for the distress levied under it, inasmuch as by the Act of 1869 they had no jurisdiction to issue it. But in fact there was before them evidence sufficient *prima facie* to found their jurisdiction, and no evidence of any fact ousting their jurisdiction, because the true facts were not proved (*Pease v. Chaytor,* 3 B. and S., at p. 643, following *Lowther v. Earl of Radnor,* 8 East, 113 ; *Pike v. Carter,* 3 Bing., 78).

The justices were, in my opinion, right in disregarding statements made to them irregularly, and the finding of the jury as to what was said to them by Miss Rush is, therefore, immaterial. What is said in some of the cases in regard to facts which were known to the justices or which they had the means of knowing refers, I think, to knowledge or means of knowledge which they had in their judicial capacity, that is, based on materials regularly before them.

For these reasons judgment must be entered for all the defendants with costs.

[Solicitors—Messrs. W. Drake and Co. ; Mr. C. W. Radcliffe ; Messrs. Sharpe, Pritchard and Co., for Mr. E. A. Pratt, Kilburn.]

Prob., Divorce, and Adm. Div. (Hill, J.) — 1927. Feb. 14.

GULBENKIAN v. GULBENKIAN.*

Divorce—Variation of settlements—Assurance on husband's life—Policy moneys to be paid to wife if surviving—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 192.

On this motion his Lordship held that a policy of assurance, under which money was to be paid to the wife of the assured if she survived him, was a settlement within the meaning of section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. After the petitioner, Nurses Gulbenkian, and the respondent, Satenig Gulbenkian, were married, the petitioner took out two policies of assurance upon his life, the first with the New York Life Insurance Company for £2,000, payable to him on May 14, 1940, if he were then living, or on proof of his prior death to his wife, Satenig Gulbenkian ; and the second with the Equitable Life Assurance Society of the United States for £500, payable on June 14, 1936, to the petitioner if living, or upon proof of his prior death to his wife, if living, or if not, to the petitioner's executors, administrators, or assigns.

The husband obtained a decree *nisi* of divorce against the wife on December 7, 1925, and the decree was made absolute on June 14, 1926. He filed a petition for variation of settlements on September 9, 1926, and on January 31, 1927, the Registrar made a report in which he submitted that the policies be varied as post-nuptial settlements by extinguishing the interests of the respondent thereunder.

Section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides :—

"The Court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children

* Reported by Clifford Mortimer, Esq., Barrister-at-Law.

of the marriage or of the parties to the marriage, as the Court thinks fit, and the Court may exercise the powers conferred by this subsection notwithstanding that there are no children of the marriage."

Mr. T. Bucknill moved to confirm the report. He said that there was no opposition. The insurance companies had been given notice of the motion and submitted to any order which the Court might make. He referred to *Stedall v. Stedall* (18 *The Times* L.R., 254).

Mr. Justice Hill.—Either this lady has no interest at all under these policies, or she has an equitable interest as prospective *cestui que trust*. If she has no rights at all under the policies, no harm is done to her by striking her name out of them. If she has rights, it can only be because by these documents her husband has settled sums of money on her in certain contingencies. The other parties to the contracts agree to the proposed variation, and I therefore confirm the report.

[Solicitors—Messrs. McKenna and Co.]

K.B. Div. (Salter, J.) } 1927. Feb. 15.

LORDEN v. BROOKE-HITCHING AND OTHERS.*

Landlord and Tenant — Covenant — Lessee's covenant—Trades not to be carried on—Alehouse, beerhouse, tavern, licensed victualling—Restaurant—Wine and beer licence—Condition—Consumption only at meals.

A covenant in a lease that the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, or licensed victualler should not be carried on on the demised premises is not broken by the carrying on of a restaurant with a wine and beer on-licence subject to the condition that alcoholic liquor should only be served with meals.

This action was brought by Mr. John William Lorden, of Ravenswood, West Hill, Putney, to recover from the late Sir Thomas Brooke-Hitching, of 8, Hereford-gardens, Park-lane, W., and Messrs. Callard, Stewart and Watt, Limited, of 49, Old Bond-street, W., damages for the alleged breach of a covenant that the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, or licensed victualler should not be carried on or exercised at Nos. 513, 515, Oxford-street, being part of the premises demised by an indenture of lease dated June 11, 1920, made between the plaintiff, as lessor, and the defendant, Sir Thomas Brooke-Hitching, as lessee. The material facts appear from the judgment.

Sir Leslie Scott, K.C., and Mr. Blanco White appeared for the plaintiff; Mr. J. D. Cassels, K.C., and Mr. N. L. C. Macaskie for the defendant Sir Thomas Brooke-Hitching; Mr. Jowitt, K.C., and Mr. H. H. King for the defendants Callard, Stewart and Watt, Limited.

Mr. Justice Salter delivered the following considered judgment:—This is an action by a landlord to enforce a covenant in the lease restricting the use of the demised premises. The question is whether the use of the premises as a restaurant with a beer and wine on-licence is a breach of a covenant not to use them for the trades of an alehouse keeper, beerhouse keeper, tavern keeper or licensed victualler.

By a lease dated May 31, 1920, the Duke of Westminster, the freeholder, demised to the plaintiff certain land and premises at the corner of Oxford-street and Park-lane for 88½ years from Lady Day, 1914. Clause 11 of the lease contains a covenant by the tenant enumerating various trades which are not to be carried on on the demised premises during the term without the permission of the lessor. The plaintiff spent a large sum of money in building on the demised land, and by a sub-lease dated June 11, 1920, he sub-let the premises, being Nos. 509, 511, 513 and 515, Oxford-street, and 40, Park-lane, to the defendant, the late Sir Thomas Brooke-Hitching, for 88½ years, less ten days, from Lady Day, 1914, at a rent of a peppercorn for the first six years, and thereafter rising from £10,000 to £14,000 a year. Clause 11 of this lease is identical with clause 11 of the head lease, except that the permission both of the lessor and the freeholder is required.

By a sub-lease dated November 8, 1920, Sir Thomas Brooke-Hitching sub-let a part of the premises, being Nos. 513 and 515, Oxford-street, to Maude and Co. This sub-lease contains a covenant by the tenants to use the premises only for the business of pastry-cooks, confectioners, tea rooms, and general restaurateurs and caterers unless with the lessor's consent, and that, in the event of such consent being obtained, they would not carry on any business which might depreciate the value of the premises, or become a nuisance or annoyance to the occupiers of any other part of the building, or which might affect the amenities and privacy of the residential portion of the buildings, nor use the premises for an illegal or immoral purpose.

Maude and Co. carried on a restaurant on these premises, and they obtained a licence dated April 1, 1921, to keep open the premises as a refreshment house. They had no licence for the sale of excisable liquor. Maude and Co. assigned their interest to the defendants, Callard, Stewart, and Watt, Limited. These defendants carry on the business of confectioners and restaurant keepers.

The benefit of the refreshment house licence obtained by Maude and Co. was transferred to them on June 8, 1921. They had no licence to sell excisable liquors, so that, if their customers desired such liquors with their meals, they had to send out for them.

To avoid this inconvenience their representative gave notice on January 3, 1922, of his intention to apply for a justices' licence authorizing the grant of an Excise licence to sell by retail wine and beer for consumption either on or off the premises. On March 3, 1922, the justices granted their licence authorizing the applicant to hold an Excise licence to sell beer and wine by retail at the premises known as Stewart's Restaurant for consumption on the premises, subject to the conditions endorsed on the licence. These conditions are as follow:—

"No bar to be erected. Wine or beer to be sold only with *bona-fide* meals. No wine or beer to be sold off the premises. The sum of £150 as a monopoly value to be paid to the Commissioners of Customs and Excise."

In pursuance of this licence the second defendants' representative obtained an Excise licence dated October 1, 1922, authorizing him to carry on the trades of retailer of beer, retailer of wine, and dealer in tobacco, "he having paid for this licence, being an ordinary restaurant licence, the undermentioned

* Reported by J. W. Hall, Esq., Barrister-at-Law.

duties." Justices' and Excise licences have been obtained each year in the same terms and subject to the same conditions. The result is that since October 1, 1922, the defendants' customers, while still obliged to send out if they require spirits, can obtain beer or wine with their meals without sending out for it. The restaurant is admittedly well conducted and causes no annoyance to anyone.

The Finance (1909-1910) Act, 1910, section 45, provides that where premises are adapted for a restaurant and are *bona-fide* so used, and it is shown that the receipts from the sale of intoxicating liquor are less than a certain proportion of the total receipts, the licence duty payable shall be a reduced duty bearing the same proportion to the full duty as the receipts for the sale of intoxicating liquor bear to the total receipts. Under the provisions of this section these defendants have always paid a licence duty much less than the full duty. Before the Licensing (Consolidation) Act, 1910, the justices often imposed conditions in granting their licence, and, if such conditions were not observed, no doubt the renewal of the licence was imperilled, but the licence-holder ran no other risk. Now, however, breaches of such conditions can be dealt with summarily.

The justices have thus the power to grant a licence which is, in effect, useless except for a restaurant, and this power, coupled with the provision of a lower licence duty for restaurants, has, I think, created what may fairly be described (as it is described in the Excise licence here) as a "restaurant licence." It is a licence more limited and less costly than a regular, unconditional licence—a licence to sell drink, not as the main business of the licensee, but as ancillary to his main business.

The covenant is in a familiar form. The premises are not to be used, except with the permission of the lessor and the freeholder, as a place of public entertainment, or for the carrying on of a long list of trades, among which are those of alehouse keeper, beerhouse keeper, tavern keeper, and licensed victualler. The general words are :—

"Or any other art, trade, business or employment whatsoever which shall be dangerous or a nuisance or annoyance to the tenant or occupier of any messuage, suite, flat or any other hereditament in the neighbourhood of the premises hereby demised."

The object of the covenant is plainly to maintain the amenity of the neighbourhood and to prevent any annoyance to adjoining occupiers whether by noise, smell, dirt, dust, smoke, crowds, or disorder. The parties have spared no pains to make it clear that this is their object, and to make it clear that this is their only object. The use of the demised premises for business purposes is contemplated. There is no prohibition of retail trade and none of the sale of excisable liquor. The prohibition of each trade, or group of trades, must be read in the light of the general words which follow the enumeration.

The language of the clause is popular and untechnical, and trades are separately mentioned which are very similar if not identical. The words relied on by the plaintiff are : "alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler." I think these words must be read, with the rest of the clause, in their ordinary and popular meaning. In *Holt and Co. v. Collyer* (16 Ch.D., 718) the covenant was not to use the house as a publichouse, tavern, or beerhouse. The tenant opened a grocer's shop and sold beer under an off-licence as ancillary to his grocer's business. Mr. Justice Fry held that there was no infringement of the covenant, and said :—

"Now is there anything here from which I can infer that the word 'beerhouse' was not used in its primary and popular sense? The covenant which the plaintiff desires to have enforced against the defendant is contained in an indenture of lease, which is not a trade instrument in any sense of the term. It is an ordinary lease by a landlord, who is not shown to be a brewer or connected with the brewing trade, to a person who was not, according to the plaintiff's own statement, connected with the business of selling beer at that time, and in respect of whom there is no evidence to show that he was engaged in any way with the business."

If the words "alehouse keeper and beerhouse keeper" have, or had, any technical meaning, I think they mean persons who held licences under the Alehouse Act, 1828, and the Beerhouse Act, 1830, respectively. I think "tavern keeper" never was a technical term. A tavern has been held to be an inn, and the tavern keeper subject to the liabilities and entitled to the rights of an innkeeper. (See the case of *Thompson v. Lacey*, 3 B. and Ald., 283.) In this sense the defendants are certainly not tavern keepers. As to the popular sense of the words, I think that "alehouse," "beerhouse," and "tavern" all imply a place where people can go and buy intoxicating drink and consume it without necessarily buying anything else.

The words most relied on were "licensed victualler." These defendants are certainly victuallers in the sense that they sell victuals, and they are licensed both to keep their premises open as a refreshment house and to sell beer and wine there on conditions. It was admitted that the refreshment house licence did not make them licensed victuallers within this covenant, but it was submitted that the beer and wine licence did. In my opinion they are not licensed victuallers within the meaning of this covenant, either in a technical or a popular sense.

In so far as these words ever had a technical meaning, they applied to a person who held a victualler's licence under the Alehouse Act of 1828. The corresponding modern licence is the publican's full on-licence. In *Reg. v. Surrey Justices* (4 *The Times* L.R., 540 ; 52 J.P., 423) a confectioner who held a wine licence and supplied luncheons obtained, without any condition, a justices' licence to hold a full on and off Excise licence. The question was whether he was a person about to keep a victualling house within 9 Geo. IV., c. 61, section 1. In dealing with this question Mr. Justice Wills refers to the expression "licensed victualler," and says :—

"The applicant came clearly within the description of a victualler, and when he got his licence he became a licensed victualler, the name usually given to those who hold this general licence."

In ordinary and colloquial language a licensed victualler means a publican, one who keeps a place where people can go to drink and for no other purpose. In *Pease v. Coates* (L.R., 2 Eq., 688) the covenant was not to carry on certain offensive trades, or any business which was or might be deemed a public or private nuisance, nor to use any building "as a publichouse for the sale of beer, wine, malt liquors, or spirits." It was held to be no breach to sell beer by retail under an off-licence.

Sir W. Page Wood, V.-C., said, among other grounds of his judgment :—

"Further than this, the covenant is directed against nuisances of a local character, arising from offensive smells, and the noise and disturbance that would be occasioned by a parcel of tipplers congregating about any of the houses or the property. I can-

not, therefore, hold the sale of beer under a licence not to be drunk on the premises to be within the restriction contained in the covenant."

It must be admitted that the reading of the covenant which I have adopted gives much the same meaning to the terms "alehouse keeper" and "licensed victualler," but I feel no difficulty about this having regard to the terms in which the other prohibited trades are enumerated. In *Stuart v. Diplock* (6 *The Times* L.R., 104 ; 43 Ch.D., 343) the covenant was not to permit the business of ladies' outfitting. The defendants carried on business as hosiers, and sold articles the sale of which was usual with hosiers and was also part of the business of ladies' outfitters. It was held that there was no breach of the covenant. So here these defendants sell wine and beer, and licensed victuallers sell wine and beer, but this does not of itself make the defendants licensed victuallers.

In *Duke of Devonshire v. Simmons and Another* (11 *The Times* L.R., 52) the covenant was not to "use the premises as a publichouse or beershop, or for carrying on any offensive trade or business whatsoever." The defendant kept a private hotel, and to save her customers inconvenience she obtained from the justices a full on-licence subject to an undertaking to have no public bar and to supply only visitors to the hotel. At the hearing she further undertook not to sell beer. Mr. Justice Stirling, in refusing an injunction, relied on the limited and conditional character of the licence and on the Inland Revenue Act, 1880, section 43, subsection 4, which provided for lower licence duty in the case of premises structurally adapted for use as an hotel and mainly so used. This section is very similar to section 45, subsection 1, of the Finance (1909-1910) Act, 1910, which is referred to above. So far as decided cases can afford any guide to the construction of a document, the authorities seem to me to support the view of this covenant which I have expressed.

It was, however, urged that, whatever view I might take of the intention of the parties as expressed in these words, I was bound to hold that the second defendants were carrying on one or other of these four prohibited trades by reason of the provisions of section 31 of the Beerhouse Act, 1830, and section 44 of the Refreshment Houses Act, 1860. The former section provides that restrictive covenants in any lease or contract between landlord and tenant whereby the trade of victualler or publican is prohibited, or a place is prohibited from being used as a publichouse or alehouse, shall apply and extend, and shall be construed to apply and extend, to persons and places licensed under that Act.

When this section was enacted Parliament was creating a new form of licensed house. There were in existence many covenants between landlord and tenant referring in various terms to licensed persons and places as theretofore existing, and in the absence of some such enactment it would have been difficult to say whether the parties had covered by their language a form of licence which they could not then foresee. No such difficulty arises in regard to covenants made after the Act had passed.

If the section is to be applied to such covenants it must be read subject to a condition that the parties have not expressed a contrary intention. That is, it must be read with one meaning as applied to then existing covenants and with another meaning as applied to subsequent covenants. In my opinion the section applies only to covenants existing at the time of the passing of the Act. Similar observations apply to section 44 of the Refreshment Houses Act, 1860. I think there is nothing in either section to prevent me from gathering the intention of the parties from the words they have used.

The alleged breach of this covenant has not been proved, and there must be judgment for both defendants.

[Solicitors—Mr. W. H. Bellamy ; Messrs. Stanley Evans and Co. ; Messrs. Richardson, Sadlers, and Callard.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Feb. 22.

INLAND REVENUE COMMISSIONERS v. TRUSTEES OF ROBERTS MARINE MANSIONS.*

Revenue — Income-tax — Charity — Boarding-house at reduced charges—Claim to exemption —Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*)—Finance Act, 1921 (11 and 12 Geo. V., c. 32), s. 30.

By a declaration of trust "a home or place of residence" was founded and endowed, "where persons requiring temporary rest and change of air for the benefit of their health may obtain the same." About half the income of the home came from payments from visitors, who included convalescents, persons needing rest and change, and holiday applicants. On a claim by the trustees for exemption from income-tax on the ground that the trust was established for charitable purposes only,

Held, that since, on the construction of the trust deed, there was throughout an overriding charity which fulfilled the character of a charitable convalescent home, the trustees were entitled to the exemption claimed.

Decision of Rowlatt, J. (43 *The Times* L.R., 52) reversed.

This was an appeal from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 52).

Mr. Justice Rowlatt, reversing a decision of the Commissioners for the Special Purposes of the Income Tax Acts, had held that the present appellants, the Trustees of the Roberts Marine Mansions, were not entitled to exemption from income-tax for the period of two years ending April 5, 1925, on the ground that the trust was not established for charitable purposes only.

The material words of the trust, which was established by Sir John Reynolds Roberts, draper, by a declaration of trust dated July 14, 1903, were as follow :—

"Whereas it is desired to found a home or place of residence where members of the drapery and allied trades and others requiring temporary rest and change of air for the benefit of their health may obtain the same . . . it is hereby agreed and declared . . . that . . . the trustees shall stand and be seised of [the Marine Hotel, Bexhill-on-Sea, Sussex] and any other property which may be conveyed to them . . . upon trust that the trustees do and shall permit such premises to be occupied and used as a home or homes or place or places of residence (primarily) for members of the drapery and allied trades and (secondarily) for members of other trades and professions where persons

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqs., Barristers-at-Law.

requiring temporary rest and change of air for the benefit of their health may obtain the same."

The home was supported by the income from investments, including the original endowment; by subscriptions and donations (mainly from firms in the drapery and allied trades); and by payments by visitors. The payments by visitors formed about one-half of the income of the home.

Letters of recommendation were issued to subscribers and donors to the institution, the number of such letters issued to each subscriber or donor depending on the amount of his contribution. Visitors to the home were admitted either with or without letters of recommendation, but only about 10 per cent. came without a letter. A visitor coming without one had to have a letter of introduction.

There were three categories of visitors to the home:—

(1) Convalescents from illness, who had to furnish a medical certificate; (2) persons resting, *i.e.*, persons in need of rest and change of air for the benefit of their health; and (3) holiday applicants.

It was contended on behalf of the trustees, *inter alia*:—(1) That the trust was for the benefit of an important section of the community; (2) that the trust was for the relief of poverty; (3) that the trust was for the benefit of the health of the beneficiaries; and (4) that the trust was established for charitable purposes only and the income of the trust had been applied to charitable purposes only.

It was contended on behalf of the Crown, *inter alia*:—(1) That, as the benefits of the trust were not confined to poor persons, the trust was not one for the relief of poverty; (2) that, as the benefits of the trust were primarily confined to members of the drapery and allied trades, the trust was not one for the benefit of the community as a whole; (3) that, even if the trust could be regarded as a trust for the benefit of the health of the beneficiaries, such a trust was not necessarily a charitable trust; (4) that, as the trustees had power to admit and did, in fact, admit, purely holiday applicants irrespectively of considerations of health, the trust was not one exclusively for the benefit of the health of the beneficiaries; and (5) that the trustees were not a body of persons or trust established for charitable purposes only, and their income was not, by virtue of the declaration of trust, applicable to charitable purposes only.

The Special Commissioners held that the trust was one for charitable purposes only and that the claim for exemption succeeded.

Mr. Justice Rowlatt reversed that finding. He thought that there was nothing on the face of the deed to show that there was a paramount intention to relieve poverty. Moreover, the trustees could admit people to the home who were not ill. In cases where the law had recognized a valid charitable trust the relief of poverty had appeared prominently in the intention of the donor, but the present case failed to satisfy the requirements of the law in regard to charities.

The trustees appealed.

Mr. Raymond Needham appeared for the appellants; the Solicitor-General (Sir Thomas Inskip, K.C.), Mr. R. P. Hills, and Mr. Alan Bell for the Crown.

Mr. Needham said that for a scheme to be a good charity the element of poverty was not necessary. A scheme of benevolence for the relief of others and the furtherance of objects beneficial to the community would be enough. He referred, *inter alia*, to *In re Pleasants—Pleasants v. Attorney-General* (39 *The Times* L.R., 675), where a gift was made to provide prizes for the best kept cottage gardens; *In re Estlin—Prichard v. Thomas* (72 L.J., Ch., 687), where a fund was given to endow a home of rest for women teachers (each teacher to pay a small sum); *In re Gray—Todd v. Taylor* (41 *The Times* L.R., 335; [1925] Ch., 362), where a bequest of £300 was made to provide a sports fund for a cavalry regiment; and *In re Wedgwood—Allen v. Wedgwood* (31 *The Times* L.R., 43; [1915] 1 Ch., 113), where a residue was given "for the protection and benefit of animals." In each of these cases it was held that there was a good charitable gift.

The Solicitor-General said that he agreed that poverty was not an essential element; but it was not enough to find an object beneficial to the community to constitute it a charity. A trust might have an object of great liberality and great public utility, and yet not be charitable. The present trust was certainly not one for the relief of poverty; it was to provide a pleasant summer holiday at a specially cheap rate for persons engaged in drapery or an allied trade.

The Master of the Rolls, having stated the facts and read the opening recital of the trust deed and certain other clauses, said that the question raised was not the same as that which had been decided in *In re Macduff—Macduff v. Macduff* (12 *The Times* L.R., 233, 452; [1896] 2 Ch., 451). There the question was whether a gift could be charitable if it could be used for "philanthropic" purposes and the bequest failed. Nor was it the same as in *Attorney-General v. National Provincial and Union Bank of England* (40 *The Times* L.R., 191; [1924] A.C., 262), where it was held that a patriotic purpose was not necessarily charitable. The Court, in the recent case of *In re Monk—Gifden v. Wedd* (43 *The Times* L.R., 256), had discussed other cases in which an overriding charitable intention could be found. If it could be found, it was effective to deal with the property settled with that object.

Here it was said by way of criticism that, although the home was mainly provided for persons requiring rest and change of air, there were further powers given to the trustees which were inconsistent with these objects. But under clauses 21 and 22 the trustees might make alterations in the scheme for the purpose of more effectually fulfilling the objects of the trust. Lastly, it was said against the trustees that, if there was a balance of income not needed for the maintenance of the home, the surplus might be disposed of at the discretion of the committee either (*a*) for the benefit of the trust, or (*b*) for the benefit of the drapery and allied trades.

It would not, however, be possible for the trustees to select any object different from the object of the trust deed. The home at the Marine Mansions was to be conducted as a home of rest for persons who were or might have been suffering in their health but were now convalescent, but it was to be conducted on the lines of a boarding-house or hotel rather than on those of a convalescent home or hospital. That regulation was inserted in order to modify the strictness of the rules of a hospital, which some might regard as irksome. The place was to be run, not by segregating people in a ward, but on more homelike lines. It was a regulation wholly consistent with the Marine Mansions having the character of a convalescent home, but with a greater degree of privacy and freedom than would generally be allowed.

His Lordship then referred to the rules for the selection of visitors and to the statement in the case that visitors were divided into three different classes. Proceeding, he said that in respect of all these persons their payments formed only one-half of the income of the home. The visitors were given, by the bounty of

the founder, advantages beyond their real means. It was said that such an institution should be treated as a boarding-house—perhaps a cheap though happy one. But, for the reasons which he (his Lordship) had given, when the system was examined it appeared that there was throughout an overriding charity which fulfilled the character of a charitable convalescent home.

On that point it was important to consider the decision of the Special Commissioners, who, following *In re Estlin—Prichard v. Thomas* (72 L.J., Ch., 687), thought that the home was a charitable institution. He considered that their view was well founded. The holiday applicants had to come to the home with letters either of recommendation or of introduction. The case therefore fell into the group of cases in which relief had been allowed for income-tax purposes under section 30 of the Finance Act, 1921, and section 37 (1) (*a*) and (*b*) of the Income Tax Act, 1918. In *In re Estlin—Prichard v. Thomas* (*supra*) it was decided that a home of rest for women teachers who contributed something to their own support was a charity, and the present case fell into the same class. The Court regretted to have to differ from Mr. Justice Rowlatt, who felt that the case was a difficult one and lay on the border line. They did not differ from him on any question of law, but only on the construction of the trust deed.

Lord Justice Sargant and Lord Justice Lawrence delivered judgment to the same effect, both agreeing that the question to be decided depended entirely on the construction of the trust deed, and did not raise any general principle.

[Solicitors—Messrs. Ashurst, Morris, Crisp, and Co.; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hewart, C.J., Bankes and Scrutton, L.JJ.)

1927. Feb. 9.

ALBERT E. REED AND CO., LIMITED v. PAGE, SON, AND EAST, LIMITED, AND ANOTHER.*

Ship — Seaworthiness — Warranty — Bad stowage.

The plaintiffs employed the first defendants, who were lightermen, to provide barges to convey wood pulp from a ship at Erith to Farncombe and to stow the pulp in the barges. The first defendants employed the second defendants, who were stevedores, to do the stowage. The quantity of pulp put on board one of the barges was in excess of her capacity, and the result was that cracks in her upper structure admitted water and she sank while still alongside the ship and the pulp became a loss. In an action for damages the Judge at the trial held that the first defendants were liable, as the bad stowage, making the barge in question unfit to undergo the ordinary perils which might arise at all stages of the work contracted for, was a breach of the warranty of seaworthiness, but that the second defendants were not liable, as they had no knowledge of the capacity of the barge and had merely acted according to the instructions of the first defendants. On an appeal by the first defendants,

Held, that there was evidence to support the Judge's finding against the first defendants, and the appeal failed.

Decision of Roche, J. (42 *The Times* L.R., 744) affirmed.

This was an appeal by the first defendants against a decision of Mr. Justice Roche (42 *The Times* L.R., 744).

The plaintiffs claimed damages for the loss of a quantity of wood pulp which had been sunk in a barge in the Thames.

The wood pulp had been brought by a steamer, the Borgholm, from Oslo to Erith. The plaintiffs employed the first defendants, a firm of lightermen, to provide barges to convey the pulp from Erith, where the steamer unloaded, to Farncombe; and the second defendants were the stevedores who carried out the unloading and stowed the pulp on the barges.

One of the barges, the Jellicoe, had a capacity of 170 tons, but by some negligence a quantity of pulp exceeding 190 tons was placed on her. That made her so low in the water that certain cracks in her upper structure admitted water, and during the night, after being loaded, she sank while still alongside the Borgholm. The persons actually responsible for stowing the pulp on the barge were the first defendants, but they employed the second defendants to do the work for them. The plaintiffs claimed against both defendants alternatively.

Mr. Justice Roche held that the first defendants, the lightermen, were liable, because the bad stowage which made the barge unfit to undergo the ordinary perils that might arise at all stages of the work contracted for was a breach of the warranty of seaworthiness; but that the second defendants were not liable because they had no knowledge of the capacity of the barge and had merely acted according to the instructions of the first defendants.

The first defendants appealed.

Mr. S. L. Porter, K.C., and Mr. Wilfrid Lewis appeared for the appellants; and Mr. A. T. Miller, K.C., and Mr. H. Atkins for the respondents.

The Lord Chief Justice, in delivering judgment, said that the appeal was from the judgment of Mr. Justice Roche on a claim by cargo-owners against two sets of defendants for damages for loss of the plaintiffs' cargo. Mr. Justice Roche found in favour of one set of defendants, the stevedores, but against the other defendants, the lightermen, who now appealed.

His Lordship stated the material facts, and said that it had been made clear by the evidence, and it was not disputed, that the barge—the Jellicoe—exhibited certain cracks. As the process of loading went on, those cracks became—through, perhaps, more causes than one—both larger and more dangerous. The Judge in the Court below found that there were certain cracks exposed, as they ought not to have been, to the presence and action of river water which was consequently let in. The Judge went on to say:—

"I am not prepared to find that of themselves the presence of those cracks on the upper part of the deck of this lighter constituted unseaworthiness. The test applied, and I think rightly applied, by Mr. Justice Channell in *McFadden Bros. and Co. v. Blue Star Line* (21 *The Times* L.R., 345; [1905] 1 K.B., 697, at p. 706), if and when put to myself here, must

* Reported by E. J. M. Chaplin and T. W. Morgan, Esqrs., Barristers-at-Law.

be answered in a sense favourable to the lighter. 'If the defect existed the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.' Applying that to this case, in my view a prudent lighterman would not have refrained from sending his lighter to do this job of work had he known and realized that the cracks on the deck were open to the limited extent to which I find they were open. The truth is that those parts became of that importance owing to the overloading of the Jellicoe which they had never assumed before. It was the overloading which was the real cause of the loss of the Jellicoe, and it was the overloading which made the cracks significant as they would not otherwise have been."

In this case the conclusion at which the Judge arrived was as follows :—

"I think that, inasmuch as wrong loading, excessive loading, can amount to unseaworthiness and constitute unseaworthiness if the vessel is, at the end of the loading stage, so overloaded as to be a danger to herself and her cargo, there is a breach of the warranty, which I find exists, that she shall be fit to complete, or enter upon and carry out, the next stage of the contract. . . . I hold, as was held in the case of *The Galileo* (30 *The Times* L.R., 612 ; [1915] A.C., 199) . . . that, as there the imposition of all risks upon the cargo owners, so here the imposition upon the cargo owners of responsibility, is not sufficient or effective to obliterate the responsibility on the part of the lightermen for the underlying or overriding obligation on them to provide a vessel or lighter, when the various stages of the contract of employment are entered upon, which shall be fit and seaworthy for the purpose of the work the subject-matter of the contract."

In his (the Lord Chief Justice's) opinion the Judge came to a right conclusion in law. The doctrine of stages had been explained in a case decided over 60 years ago—namely, *Bouillon and Others v. Lupton* (33 L.J., C.P., 37), where Mr. Justice Willes said, at page 42 :—

"Let us see, therefore, what the assured undertake by the policy. In the first place they undertake that the vessel shall be seaworthy. Now, that means different things on different parts of the voyage ; a vessel that was seaworthy for the voyage down the Rhône would not be seaworthy when she left Marseilles. And, indeed, there is an intervening part of the voyage, which gives rise to a third set of considerations—namely, that between Arles and Marseilles ; you are here not in the river, but you are still not on the open sea. The question, therefore, arises—inasmuch as change was necessary, where was the proper place to make it? That is a question of evidence."

It was urged on behalf of the respondents in this case that, in the true sense of the term, the barge was unseaworthy at the commencement of the adventure. In *Atlantic Shipping and Trading Company, Ltd. v. Louis Dreyfus and Co.* (38 *The Times* L.R., 534 ; [1922] 2 A.C., 250), Lord Sumner said, at p. 260 :—

"Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them ; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

In this case the contract was to collect and to carry, and it was clearly open to the Judge, on the evidence, to come to the conclusion that the stage of loading had been completed and that the next stage had begun. The next stage had begun as soon as the loading stage had been completed. The Judge found that at the beginning of the second stage this vessel was unseaworthy. He was entitled so to find and the appeal must be dismissed.

Lord Justice Bankes, in concurring, said :—The defendants contended that the warranty of seaworthiness attached to the barge only at the commencement of the voyage, and that it was not a continuing warranty. That was not disputed as a matter of law. The defendants then alleged that the voyage of the barge in question here commenced when she was sent to Erith to take delivery of this cargo under the contract, and the learned Judge has found that she was seaworthy at that time, and they contended that in those circumstances the plaintiffs had failed to prove any breach of that warranty. Then it was contended, on the other side, that this is a case in which there were stages in this voyage, and that the barge was not seaworthy at the commencement of one of these stages. The answer to that was that assuming that there were stages, and assuming that one of the stages was the loading stage, the barge was seaworthy at the beginning of the loading stage, though unfortunately she sank before that stage was completed, or, at any rate, before the next stage began ; and that in those circumstances there is a failure to prove any breach of this warranty of seaworthiness. That was the case on the one side and on the other.

It assists one very much, in the determination of this question of law, to look at the contract as a whole and to realize that in this particular contract, even if there are not stages, there are a number of different operations to be performed ; and, in my opinion, it is misleading, for the purpose of determining when the warranty of seaworthiness attached to this barge, to speak of the voyage commencing when the barge was dispatched to Erith to load. I agree entirely with what Lord Justice Vaughan Williams said in the case of *Wade v. Cockerline* (21 *The Times* L.R., 296 ; 10 Com. Cas., 115), that it is a much more correct way to look at the matter to ask oneself what were the stages in what he calls the transaction, or what I would prefer to call the contract undertaken ; and when one considers the contract which was undertaken in this case, namely, to send the barge from wherever she was lying to Erith, to place her in a position in which she could load, and to look after her in a proper way while she was being loaded, and to do whatever was necessary while she was lying there before the tug came to pick her up, and then when one considers that the barge had to be towed to Nine Elms, and at Nine Elms the proper steps had to be taken to moor her in a position to be unloaded —when one considers that all these operations were covered by this contract, it seems to me that it assists one in taking a clear view of the liability of a person who enters into a contract such as that, to speak of the stages of the contract undertaken rather than the stages of the voyage. And from that point of view I think that Mr. Justice Channell's judgment in *McFadden Brothers and Co. v. Blue Star Line* (21 *The Times* L.R., 345 ; [1905] 1 K.B., 697), and Lord Justice Vaughan

Williams's judgment in *Wade v. Cockerline* (*supra*), are in no conflict, because they both point out that there are stages in the contract undertaken, and that in many of those stages it seems more appropriate to speak of the fitness of the vessel than the seaworthiness of the vessel; and that, in considering whether or not a vessel is fit to load, one has to take different matters into consideration from those which must be taken into consideration when one is considering whether she is fit to proceed to sea; because, as Mr. Justice Channell points out in *McFadden Brothers and Co. v. Blue Star Line* (*supra*), there may be many things that would have to be done to a vessel that was fit to load, before she would be fit to proceed to sea.

But no difficulty of that kind arises here, because it seems to me to be quite plain that in this contract undertaken there was a stage in which it was necessary that the vessel should be fit for loading, and if she was fit for loading when the loading commenced, and she sank before the loading was completed, I agree with what Lord Justice Vaughan Williams pointed out in the case of *Wade v. Cockerline* (*supra*), that it becomes immaterial to consider whether she would or would not be fit when the next stage commenced.

In this case, however, there is no doubt about the matter. The learned Judge has found, upon the clearest evidence, that the loading was completed before the barge sank. He finds it in terms, and he had before him the evidence of the lighterman, who said that he had gone ashore for his tea, because the loading was completed, and in order to telephone to his superior officer that the vessel was ready to be towed to Nine Elms, clearly indicating that the loading was in fact completed.

If it was in fact completed, it seems to me that there cannot be any intermediate stage, which was not for this purpose a stage at all. The next stage must be either a separate stage of lying ready to commence her voyage in the ordinary sense, as the learned Judge seems to treat it, or, as it seems to me rather more accurate to say, as soon as this particular barge was loaded the stage commenced when she must be seaworthy in the sense of being ready to be towed to Nine Elms. And whichever way you treat the matter, whether you treat it as a stage of lying in the river ready to be picked up by a tug, or whether you consider that the stage of actually commencing the voyage in the ordinary sense had commenced, is immaterial, because it seems to me that when once you come to the conclusion that the stage of loading was completed and that the vessel sank in the next stage of this contract undertaken, whatever it was, you must come to the conclusion that the learned Judge took the right view in law and that he decided rightly in awarding the plaintiffs the damages that they claimed.

Lord Justice Scrutton also agreed. His Lordship said:—There is some confusion in the authorities with regard to the warranty of seaworthiness, due, I think, to two causes: First, the word "seaworthiness" is used in two senses, (*a*) fitness of the ship to enter on the contemplated adventure of navigation, and (*b*) fitness of the ship to receive the contemplated cargo, as a carrying receptacle. A ship may be unfit to carry the contemplated cargo, because, for instance, she has not sufficient means of ventilation, and yet be quite fit to make the contemplated voyage, as a ship; secondly, the fact that there are these two meanings of seaworthiness, and that there may be different stages of seaworthiness according to different stages of the adventure, has led to some confusion of statement.

As the Court said in *Cohn v. Davidson* (2 Q.B.D., 455, at p. 461), "Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires." A ship, when she sails on her voyage, must be seaworthy for that voyage, that is, fit to encounter the ordinary perils which a ship would encounter on such a voyage.

But she need not be fit for the voyage before it commences, and when she is loading in port. It is enough if, before she sails, she has completed her equipment and repair. But she must be fit as a ship for the ordinary perils of lying afloat in harbour, waiting to sail. She must, in my view, be fit as a ship, as distinguished from a carrying warehouse, at each stage of her contract adventure, which may, as in *Cohn v. Davidson* (*supra*), commence before loading. And she may as a ship after loading be unfit to navigate because of her stowage, which renders her unsafe as a ship. The case of *Kopitoff v. Wilson* (1 Q.B.D., 377) is a good example of this; there armour plates were so stowed that there was danger of their going through the ship's side, and they did. As Lord Sumner says in *Elder Dempster and Co., Limited v. Paterson, Zochonis and Co., Limited* (40 *The Times* L.R., 464; [1924] A.C., 522 at p. 561: "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo."

Wade v. Cockerline (21 *The Times* L.R., 296; 10 Com. Cas., 115) illustrates the latter part of the quotation. The ship was quite fit as a ship to carry the cargo that she had on board if properly stowed; the bad stowage did not make the ship unfit as a ship, but did endanger the cargo. Looked at from the point of view of a ship to sail the sea, the highest measure of liability will be when she starts on her own voyage, and this is often spoken of as the stage when the warranty attaches, but what is meant is that it is the time when that highest measure of liability attaches. There are previous stages of seaworthiness as a ship, applicable to proceeding to the loading port, loading, and waiting to sail when loading is completed.

On the other hand, the highest measure of liability as a cargo-carrying adventure, that is, of "cargo-worthiness," is when cargo begins to be loaded. It has been decided that, if at this stage the ship is fit to receive her contract cargo, it is immaterial that when she sails on her voyage, though fit as a ship to sail, she is unfit by reason of stowage to carry her cargo safely.

Thus, in *The Thorsa* ([1916] P., 257), when the ship sailed with chocolate and cheese stowed together, so that the chocolate was damaged, the Court of Appeal declined to hold the ship unseaworthy. This case was approved in *Elder Dempster and Co., Limited v. Paterson, Zochonis and Co., Limited* (*supra*) in the House of Lords, where stowage of oil in casks, so that it was damaged by the weight of cargo on top, the stowage not affecting the sailing of the ship, was held not to be unseaworthiness for sailing. This limitation of the warranty of cargo-worthiness is expressly made because negligent stowage of a seaworthy ship is something happening after the warranty of cargoworthiness has been complied

with, and, so long as the negligent stowage does not make the ship unseaworthy as a ship, does not affect a warranty which has already been complied with.

It was argued that the doctrine of stages was only a question of difference of equipment, and that overloading was not equipment. But damages unrepaired at the commencement of a new stage, collision during loading, and starting on the voyage with that damage unrepaired, may obviously be unseaworthiness at the commencement of the voyage stage. I see no reason for defining stages only by difference of equipment.

Applying the above statement to the facts of the present case, the barge was sent to the ship's side to carry 170 tons, and she was fit to carry that quantity. The warranty of cargoworthiness was complied with when loading commenced. But then 193 tons were put into her, some 14 per cent. more than her proper load. With that cargo in, she had a dangerously low freeboard in calm water. I think that at any rate one of her gunwales was awash, and water could continuously enter through cracks, which would be only an occasional source of leakage if she were properly loaded. She had to lie so loaded for some unascertained time in the river till a tug came. The ship was not bound to let the barge lie moored to the ship's side. She might have to navigate under oars to a barge road. She was exposed to all the wash of passing vessels, and the more water she took on board, the more dangerous she would become. It is clear that she was quite unfit to lie in the river for any time exposed to the wash of passing vessels and the natural "send" of the water. It is still clearer that she was quite unfit to be towed, and that she was in such a condition that she would soon go to the bottom. I am clearly of opinion that the barge was unseaworthy as a barge from the time when loading finished, unfit to be in the river, and still more unfit to be towed.

I accept the view of Mr. Justice Channell in *McFadden Bros. and Co. v. Blue Star Line* (21 *The Times* L.R., 345; [1905] 1 K.B., 697) that the warranty of cargoworthiness, if complied with at the commencement of a stage, is not continuous during the stage, but this view does not negative the position that at the commencement of a new stage of the adventure there is a renewed warranty of seaworthiness as a ship. It seems to me clear that there would be a renewed warranty when the towing started, and that this overloading would be a breach of the warranty. If the three leaks found by Mr. Justice Channell in *McFadden Bros. and Co. v. Blue Star Line* (*supra*), had admitted so much water that the safety of the ship was endangered, and if the leaks were incapable of being remedied on the voyage, there would clearly have been a breach of the warranty of seaworthiness as a ship, on sailing on the voyage. It seems equally clear that if an overloaded barge, seaworthy in the calm waters of a dock, went out into the river to wait for a tug, there would be a renewed warranty of fitness to navigate and wait, which would be broken by overloading rendering the barge unfit to lie waiting in the river. And I think that in the present case, when the loading was finished and the man in charge, apparently in the ordinary course of his business, left her unattended in the river waiting for a tug, and unfit in fact either to lie in the river or to be towed, there was a new stage of the adventure, a new warranty of fitness for that stage, and a breach of that warranty which prevented the exceptions from applying.

The appeal was accordingly dismissed with costs.

[Solicitors—Messrs. J. A. and H. E. Farnfield; Messrs. Constant and Constant.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Feb. 18.

TODD v. EGYPTIAN DELTA LAND AND INVESTMENT COMPANY, LIMITED.*

Revenue — Income-tax — Company—Residence —Management abroad—Whether resident in this country—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Cases IV. and V.

Although a company, which is registered in this country but has its control and management abroad, resides where it is controlled and managed, yet it does not reside there exclusively, but it necessarily resides in this country so as to be liable to income-tax, because it is obliged by law to perform in this country certain duties which cannot be performed abroad, such as having a registered office and keeping a register of shareholders.

Decision of Rowlatt, J. (43 *The Times* L.R., 70), affirmed.

This was an appeal by the company from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 70).

The Egyptian Delta Land and Investment Company, Limited, whose registered office was at 211-214, Gresham House, Old Broad-street, appealed to the General Commissioners of Income Tax for the City of London against assessments to income-tax under Cases IV. and V. of Schedule D in respect of the years 1919, 1920 to 1924, and 1925.

The company was incorporated in England in 1904, and among its objects were the purchase of lands in Egypt and the development of the resources of those lands. In 1907 by a special resolution of the company it was resolved:—"That it is desirable that the business and affairs of the company should henceforth be managed and directed entirely from Egypt and that accordingly the articles of association be varied."

In pursuance of that resolution the business of the company was in 1907 transferred to Cairo and had since been controlled, managed, directed, and carried on entirely in Cairo. All the London directors retired in that year and a new board, the members of which were all permanently resident in Cairo, was appointed. No directors' meeting had since been held in the United Kingdom. The secretary resided in Egypt, and the seal and all books of the company were kept in Egypt. The company's banking account was with the National Bank of Egypt at Cairo, the company's account with the London agency not being entirely closed, but being used only for the payment of small disbursements, to the amount of £8 or £9 annually, made by the agency on instructions from Egypt. The register of transfers was kept in Cairo, where transfers of shares were passed before being registered in London. The accounts were made up and audited, and dividends were declared and paid, exclusively from Cairo.

In order to comply with the requirements of the Companies Acts there was a registered office of the company in London at which the registers of members and directors and bearer warrants were kept. To meet those statutory requirements the company paid a fee to Mr. F. J. Horn, who provided

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

them (together with several other companies) with a registered office at his address at Gresham House, where their name appeared on the door. No room or part of a room was appropriated to the company, and there were in fact more companies than rooms.

The London secretary performed the statutory duties of filing the annual summary with the Registrar (after it had been checked and signed in Egypt), and also dealt with correspondence from shareholders and transmitted to Cairo applications for share warrants and transfers which might be sent to the registered office. His position was purely formal; he had no power of attorney and no power to do anything more than the law required the company to do here.

The company contended that the case of *Swedish Central Railway Company, Limited v. Thompson* (41 *The Times* L.R., 385; [1925] A.C., 495) was distinguishable; that the company was resident in Egypt and not in the United Kingdom; and that the mere fact that it had a registered office here and complied with the statutory requirements of the Companies Acts did not constitute residence for the purposes of the Income Tax Acts.

The Crown contended that the case was not distinguishable from *Swedish Central Railway Company, Limited v. Thompson* (*supra*); that the essential and important elements of incorporation in this country, of the situation of the registered office here, and of the activities required by law to be performed here, were present in this case; and that the activities of the London secretary were appreciable and important.

The General Commissioners held that *Swedish Central Railway Company, Limited v. Thompson* (*supra*) was distinguishable, and that the company was not resident here.

Mr. Justice Rowlatt reversed that decision. On the facts he held that, wherever it might be actually managed, the company was always "at home" in this country. Having an establishment and keeping a register in this country constituted the idea of residence.

The company appealed.

Sir John Simon, K.C., and Mr. Bremner appeared for the appellants; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

The MASTER OF THE ROLLS, in delivering judgment, said that the obligations and duties of a company registered here involved having a registered office in London at which the registers of members and bearer warrants would be kept. There was also the annual summary to be filed with the Registrar, and various statutory duties as to the registration and inspection of mortgages had to be performed.

Mr. Justice Rowlatt had held that a company incorporated and registered here which performed the duties laid upon it by Parliament must be held to reside in this country, even though the facts showed that its activities were carried on elsewhere. The question at issue had been fully discussed in *Swedish Central Railway Company v. Thompson* (41 *The Times* L.R., 385; [1925] A.C., 495). Until that decision, no case had decided that a company could have more than one residence. In that case the Lord Chancellor (Lord Cave) said, at p. 501:—

"When the central management and control of a company abides in a particular place, the company is held for purposes of income-tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence (see *Cooper v. Cadwalader*, 5 Tax Cas., 101), and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence."

That judgment was concurred in by Lord Dunedin and Lord Sumner, and supported by Lord Buckmaster.

In the cases of *Calcutta Jute Mills Company, Limited v. Nicholson*, and *Cesena Sulphur Company, Limited v. Nicholson* (1 Ex. D., 428) each company carried on business abroad. The Cesena Company worked mines in Italy; the Jute Company had mills near Calcutta. Both were held to be resident here, because their activities were directed from London. The question of dual residence was referred to but not decided, the decision turning on the answer to the question—to quote Baron Huddleston's phrase—Where was *le centre de l'entreprise*? He said (at p. 453):—

"Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance."

Those two cases were said to decide that the true test of residence was the place of the control of the business. That, no doubt, was the test applied, but the possibilities of a dual residence were left open. Those cases did not decide that the place of control was the only possible test of residence.

In *De Beers Consolidated Mines, Limited v. Howe* (22 *The Times* L.R., 756; [1906] A.C., 455) it was decided that a foreign corporation registered abroad might reside here and be subject to tax. Lord Loreburn said (at p. 459):—

"It is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations."

Lord Loreburn rejected the test that a company resided where it was registered and nowhere else, but it would not be proper to treat that rejection as connoting a decision that the incorporation and registration of a company could not indicate the residence of a company. Dual residence was not considered. What was advanced was that a company could have only one residence, the place of its foundation; but, without over-ruling the *Cesena* and *Calcutta* cases (*supra*), that argument could not have been accepted. He (the MASTER of the ROLLS) could not accept the *De Beers* case (*supra*) as affirming the proposition that a company could have only one residence, and that that residence was where the central management and control of the business might abide.

The case of *Egyptian Hotels, Limited v. Mitchell* (30 *The Times* L.R., 457; [1914] 3 K.B., 118; 31 *The Times* L.R., 546; [1915] A.C., 1,022) was much discussed in the *Swedish Railway* case (*supra*) and in the present case. In *Egyptian Hotels, Limited v. Mitchell* (*supra*) Lord Justice Buckley said in the Court of Appeal ([1914] 3 K.B., at p. 132):—"This company is incorporated in the United Kingdom; it is therefore resident 'here.'" An attempt was made to show that he had modified his opinion by what he said in *Bradbury v. English Sewing Cotton Company, Limited* (39 *The Times* L.R., 590; [1923] A.C., 744, at p. 767), but his later words did not seem to indicate that he had really changed it. Further, in the *Swedish Railway* case (*supra*) Lord Dunedin said that it was impossible to hold that the test of where the business was really managed alone afforded a

test of the sole residence possible in the case of a company.

Those authorities suggested that on the question of the dual residence of a company there was no sufficient authority for holding the seat and control of the business to be the only test of residence; and there certainly seemed authority for holding that the place of incorporation, the place whose laws determined the company's status and the social contract between the shareholders, ought to be held to be one of a company's residences.

In the *Swedish Railway* case (*supra*) Lord Justice Warrington said in the Court of Appeal ([1924] 2 K.B., at p. 268) that he was prepared to hold that

"the registered office is a residence of the company, and that it must be regarded as residing there, at whatever other place, at home or abroad, it may also reside."

Lord Justice Atkin said that, in principle, he would have thought that the place of incorporation and of the registered office was conclusive of residence.

In the House of Lords the Lord Chancellor said (41 *The Times* L.R., at p. 388; [1925] A.C., at p. 505):—

"I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here."

But those words did not exclude the possibility that registration, coupled with the functional activity required by law, would be held by him to be sufficient.

Where a company incorporated and registered here owed its status to the laws of this country; where it had to do, and did, certain acts in conformity with those laws, and could not cast those duties aside; where its shareholders' rights and its own dissolution were governed by those laws—was it possible to hold in such a case that the company could claim to be non-resident here? So, by analogy, it would seem that a man with a local habitation, bound by and compelled to do certain acts in accordance with the local laws, even if his compliance with them was in some measure formal, could hardly prevent the inference from being drawn that he "kept house" in that locality. The appeal must therefore be dismissed, with costs.

Lord Justice Sargant said that the Crown had throughout relied on the broad general proposition that the Companies (Consolidation) Act, 1908, imposed continuing obligations on all companies registered under that Act, at any rate on all companies limited by shares, and that those obligations necessarily involved a residence here on their part sufficient to render them liable to income-tax. The Master of the Rolls had dealt with the authorities, and it was unnecessary to do so again, but they seemed to tend strongly in favour of the Crown and to be almost if not quite conclusive. In the *Swedish Railway* case ([1924] 2 K.B., 255) Lord Justice Warrington distinctly expressed the view, as one of the foundations of his judgment, that a company registered under the Companies Acts must necessarily have a residence here for the purposes of income-tax; and Lord Justice Atkin appeared to take the same view, though to express it somewhat less emphatically. In the House of Lords (41 *The Times* L.R., 385; [1925] A.C., 495) the Lord Chancellor, in an opinion concurred in by the majority, preferred to base his decision on the view that the fact of registration, together with certain other trifling circumstances, entitled the Court to find that the Swedish company had a residence here, but it did not seem as if he intended to cast any doubt on the views of Lords Justices Warrington and Atkin, or to do more than keep the general question open so far as the ultimate tribunal was concerned.

The important difference between the present case and the *Swedish Railway* case (*supra*) was that there the Special Commissioners had found as a fact that the company had a residence in England, whereas here the General Commissioners had found that the company "was not resident in this country for the purposes of the Income Tax Acts."

His Lordship dealt with the requirements of the Companies (Consolidation) Act, 1908, in regard to companies registered in the United Kingdom, from section 2, as to the initiation of the company, to section 131, dealing with the Court's jurisdiction to wind up companies, and said that in his view the cumulative effect of those sections was decisive, and led irresistibly to the conclusion that a company regulated by that Act had a residence, though not necessarily a sole residence, in this country, analogous to the residence of an individual. Such a company from its birth onwards was subject to continuing statutory regulations which defined the limits of its powers towards others and controlled the relations of the company with its members, and of members *inter se*, in vital respects. Though the centre of its business activities and management might be in Egypt, the centre of its constitution as a company and of its domestic arrangements was definitely fixed in this country and at its registered office. That Act of 1908 enabled the company to be born, and necessarily kept it domiciled here throughout its existence, and though residence might be less than domicile and might often occur without domicile, yet it seemed doubtful whether an obligatory and continuous domicile in England, resulting from that Act of 1908, did not necessarily involve residence at the place of domicile. In his (Lord Justice Sargant's) view, the requirements of the Act kept the company here, and made it "at home" here, to such an extent as to give it a notional residence in this country sufficient to create a liability to income-tax. The appeal must be dismissed.

Lord Justice Lawrence said that the cases cited during the hearing had illustrated the difficulty of determining the residence of a company by analogy from the residence of a human being. In view of the judgment of Lord Justice Warrington in the *Swedish Railway* case ([1924] 2 K.B., 255) and the judgments delivered in the present case, with which he concurred, he (Lord Justice Lawrence) did not propose to state at any length his reasons for concurring. But it seemed to be one of the basic conceptions of the Companies Acts that a company incorporated under them should, during its entire existence, have a permanent home in that part of the United Kingdom where its registered office was situate, where it must always be in residence, wheresoever else it might reside in order to carry on its business. There, at its registered office in the United Kingdom, it must always be found in residence by its creditors, its shareholders, the Registrar of companies and the Board of Trade. That was shown by the elaborate provisions contained in the Acts for safeguarding the interests of creditors and shareholders, many of which provisions would be rendered more or less futile if the company could remove itself from the country where it was incorporated and could set up its abode exclusively in some distant foreign land. To mention a few of those provisions, the company and its responsible officials were subjected to the jurisdiction

of the Courts of this country, and all offences made punishable by fines might be prosecuted under the Summary Jurisdiction Acts ; shareholders' rights and liabilities were defined by reference to our Courts ; the company was bound to keep its register of members and charges, and to give facilities for inspection. The company could only reduce its capital by leave of the Court, and must keep in close touch with the Registrar ; while the Board of Trade could cause an investigation to be made into the company's affairs. In contrast to this, however, was the power given to a company to keep a branch register in any colony where it transacted business.

The analogy of the birth in England of a human being who subsequently went to reside permanently and exclusively abroad did not seem to be at all applicable to an English company incorporated under the Companies Acts. It would seem therefore that every company incorporated under the Acts resided at its registered office for the purposes of liability to income-tax.

[Solicitors—Messrs. Herbert Smith and Co. ; the Solicitor of Inland Revenue.]

K.B. Div. (Shearman, J.) } 1927. Feb. 24.

SOCIETE ANONIME DES GRANDS ETABLISSEMENTS DU TOUQUET PARIS-PLAGE v. BAUMGART.*

Gaming — Loan—Purpose of gaming—Cheque given in exchange—Action on the loan—Gaming Act, 1710 (9 Anne, c. 14), s. 1—Gaming Act, 1835 (5 and 6 Wm. IV., c. 41), s. 1.

Where a person lends money to another in a foreign country for the purpose of gaming, the game not being illegal by the law of that country, and receives from him a cheque for the amount, the lender, though not entitled to sue the borrower on the cheque in the English Courts, may sue him in those Courts on the loan.

This was an action in which the Société Anonime des Grands Etablissements du Touquet Paris-Plage, the proprietors of the casino at Le Touquet, sued Mr. Moss Baumgart, of 35, Osbaldeston-road, Stamford-hill, on three dishonoured cheques—two for £100 each drawn by the defendant on August 14, 1926, and one for £200 drawn by the defendant on August 15, 1926. Alternatively, they claimed £400 as money lent by the plaintiffs to the defendant.

The defendant alleged that the money was paid to him in respect of gaming and wagering transactions, and was not recoverable in law.

Mr. J. B. Melville appeared for the plaintiffs ; Mr. J. B. Matthews, K.C., and Mr. B. M. Goodman for the defendant.

Mr. MELVILLE said that while it was true that the cheques sued on were given in the casino, it was not true that the money received was for gaming ; it was for any purpose which the defendant might choose. The casino contained a theatre, two restaurants, and a reading-room, besides two gambling rooms, in one of which boule was played for small stakes, and in the other baccarat and chemin-de-fer.

It was very common for people known to the manager, or introduced by someone known to him, to come and get money in exchange for cheques. Such money might or might not be used at the tables ; it might be equally well used for hotel bills or travelling. The defendant was introduced to the manager by a Mr. Sydney Jay, and asked for £100, which, at the current rate of exchange, was 17,400f. That amount was handed to him in notes. A few hours later he came and asked for a further £100, and on the following day for £200.

M. André Jean Hughes, the manager of the casino, gave evidence corroborating counsel's opening statement.

In reply to Mr. MATTHEWS, in cross-examination, the witness agreed that the defendant might have said :—"I have lost all my money and want £100 to try my luck again." He never asked what people wanted it for. On the second occasion the defendant simply said that he wanted some more money. The three transactions were not all in one session. The defendant did not say that if he lost the third sum he would stop playing. If he (the witness) had known that the defendant had already lost £200 he would not have advanced the further £200.

Maître Augustin Jean Duhamel, a French advocate and a member of the English Bar, said that by French law the games in question were lawful, and an action could be maintained in the French Courts in respect of gaming losses or cheques given for gaming, or to recover money lent for gaming.

In cross-examination, the witness said that an action would lie either on the cheque or on the loan. He referred to a case of *Depoux v. Ducis* in the Cour de Cassation in 1922.

Mr. MATTHEWS, opening the case for the defendant, said that the material statute was the Gaming Act of 1710 (9 Anne, c. 14), section 1 of which stated :—

"All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice tables, tennis, bowls or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting, as aforesaid, or that shall during such play so play or bet shall be utterly void, frustrate and of none effect to all intents and purposes whatsoever. . . ."

The defendant was a young man who went to the casino with a large sum of money of his own. He was not, as Mr. Melville had rather suggested, an exploiter of the casino.

MR. JUSTICE SHEARMAN.—He had £400 from the casino, and now finds that he can't afford to repay. I am not concerned about the morality of it, but do not put a halo round him.

Mr. Moss Baumgart, the defendant, said that he was a commercial traveller, aged 27. He took with him to Le Touquet about £220 of his own money. He lost that, and Mr. Jay introduced him to the manager and then left.

He (the witness) told the manager that he had lost all the money he had and wanted another £100. Having received the money he went back to the gaming rooms and took the bank at chemin-de-fer in his turn. The £100 lasted him about an hour. He went back to the manager and told him that he

* Reported by J. W. HALL, Esq., Barrister-at-Law.

had lost the £100 and would like another £100. That lasted about as long as the first. At about 12.30 a.m. he went to the manager again and said that he had lost the second £100. He asked if he could have another £200, and said that if he lost that he would not play any more. He went on till about 5.30 a.m., by which time he had lost it all. He did not play later on the Sunday, August 15. He remembered saying that as the hour was after midnight he must date his cheque the 15th.

In cross-examination the witness said that he did not pay his hotel bill; it was paid for him. It would be quite natural for the manager to think that he had expenses and was going to meet them.

M. Hughes, recalled, said that the defendant was wrong about the dating of the third cheque. They had to have cheques dated the day on which the session began, even though it lasted into the following morning.

Mr. Justice Shearman said that on the facts he accepted the plaintiffs' evidence rather than that of the defendant, but he thought that the money was advanced substantially for the purpose of gaming at the casino.

Mr. Melville said that in view of that finding he would not submit that he could succeed upon the cheques, but would rely on the cause of action for money lent.

Mr. Matthews said that there were three states of fact which might arise: (1) Where the action was on a cheque: that was settled by *Moulis v. Owen* (23 *The Times* L.R., 348; [1907] 1 K.B., 746). (2) The case where no cheque was given, but money was lent abroad. In that case also the law was clearly settled by *Saxby v. Fulton* (25 *The Times* L.R., 446; [1909] 2 K.B., 208).

Those cases gave no trouble. The difficulty arose in the third case, where money was lent for gaming and a security was given, but the plaintiff sought to discard the cheque and sue on the loan. The statute of 9 Anne was amended by the Gaming Act, 1835, by which, where the security was given contrary to the statute of Anne, the consideration was by the statute deemed to be illegal. He would submit that the plaintiff could not hark back to that consideration and sue on the loan. Before the statute of William IV., Lord Mansfield held, in *Robinson v. Bland* (1 W. Bl., 234), that there was no objection to falling back upon the consideration and suing for money lent.

There were two possible views of the effect of the statute of William IV. It might be argued that its effect was to prevent any action on the consideration at all, or that it was to protect assignees who took a cheque without notice. He referred to *Applegarth v. Colley* (10 M. and W., 723). In his submission the case was decided by *Moulis v. Owen* (*supra*) and *Saxby v. Fulton* (*supra*). He submitted that *Quarrier v. Colston* (1 Ph., 147) was not material.

The games played were legal in France, but in England there was a double-barrelled illegality. They were illegal games and played in a gaming house.

Mr. Melville referred to *Société des Hôtels Réunis v. Hawker* (29 *The Times* L.R., 578). He was stopped.

Mr. Justice Shearman said that he did not think that the point had ever been decided. The defendant exchanged three cheques with the plaintiffs' manager for French notes. He thought that the manager knew that the notes were to be used to a large extent for playing games which would be illegal games if played in this country. He was satisfied that they were lawful in France, and that money lent for those games could be sued for in France either on the security given or on the loan itself instead of the security.

It was well decided by *Moulis v. Owen* (23 *The Times* L.R., 348; [1907] 1 K.B., 746) that in such a case, if the plaintiffs sued on the cheque, the action was not maintainable. On the other hand, if they disregarded the cheque and relied on the consideration, *Robinson v. Bland* (1 W. Bl., 234) and, to some extent, *Quarrier v. Colston* (1 Ph., 147) were said to give the plaintiffs a right of action. It had been held in those cases that an action lay on a loan for gaming purposes where no security was given.

Although it was a curious state of affairs, he thought that he ought to follow *Robinson v. Bland* (*supra*), *Quarrier v. Colston* (*supra*), and *Saxby v. Fulton* (25 *The Times* L.R., 446; [1909] 2 K.B., 208). It did not seem reasonable to hold that if the plaintiffs had not taken a cheque they could succeed, but that because they did so they could not, and he thought that they were entitled to recover on their alternative claim.

[Solicitors—Mr. Burnett L. Elman; Messrs. Redding Bloomer and Co.]

House of Lords.
(Viscount Cave, L.C., Viscount Sumner, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Carson.)

1927.
Feb. 24.

INGLE v. FARRAND.*

Revenue—Income-tax—Clerk in employment of county council—Assessment for 1921-22 under Schedule E—Schedule D the proper Schedule—Alteration of law by statute—Schedule E made proper Schedule—Subsequent additional assessment for 1921-22 under Schedule E—Whether statute retrospective—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 125—Finance Act, 1922 (12 and 13 Geo. V., c. 17), s. 18.

The appellant, a clerk in the employment of a county council, was assessed in December, 1921, to income-tax for 1921-22 under Schedule E, though at that time he ought to have been assessed under Schedule D. On July 20, 1922, the Finance Act, 1922, was passed, and that statute by s. 18 (1) made Schedule E the proper Schedule and provided by subsection (6): "The provisions of subsection (1) and subsection (3) of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income-tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two, in respect of any employment (other than that of a weekly wage-earner employed by way of manual labour) under any public department, or under any company, society or body of persons or other employer mentioned in Rule 6 of the Rules applicable to Schedule E."

In September, 1922, owing to a revision of the appellant's salary and bonus, an additional assessment under Schedule E was made on the

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

appellant for 1921-22 under s. 125 of the Income Tax Act, 1918. In fact the appellant had already paid more under Schedule E than if he had originally been properly assessed under Schedule D on figures including the revised salary and bonus.

Held (Lord Atkinson dissenting), that s. 18 (6) of the Finance Act, 1922, had not the retrospective effect of validating the additional assessment under Schedule E.

Decision of the Court of Appeal ([1925] 2 K.B., 728) reversed.

This was an appeal from an order of the Court of Appeal ([1925] 2 K.B., 728) reversing a judgment of Mr. Justice Rowlatt upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the parish of St. Martin-in-the-Fields.

The appeal was against an additional assessment to income-tax in the sum of £77 made on the appellant on September 13, 1922, in respect of the financial year 1921-22, and the substantial question raised by the appeal was whether such additional assessment was rendered valid by virtue of the provisions of section 18, subsections 1 and 6, of the Finance Act, 1922.

The facts of the case and the material provisions of the Act of 1922 are set out in the opinion of the Lord Chancellor.

Mr. Konstam, K.C., and Mr. J. L. D. Ridsdale appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the respondent.

The Lord Chancellor: My Lords, this is an appeal against an additional assessment to income-tax in the sum of £77 made on the appellant on September 13, 1922, in respect of the tax year 1921-22, and raises a question as to the effect of section 18 of the Finance Act, 1922. The amount in dispute is small; but the case is said to be a test case, the result of which will affect a large number of assessments made in respect of that tax year.

The appellant is an assistant clerk in the employment of the London County Council, and receives a salary and bonus. It had been the practice of the Revenue authorities to assess him (with some other persons in the same position) under Schedule E of the Income Tax Act, 1918, as the holder of a "public office or employment of profit." On July 16, 1921, he returned his income for the tax year 1921-22 as £359; and on December 21, 1921, a notice was given assessing him to tax on that amount in accordance with Schedule E. In fact a revision of his salary and bonus in the month of September had increased his income for the year to £436; but this was of course unknown to him when he made his return, and was also unknown to the Revenue authorities when they made the assessment. There was no appeal against the assessment on £359, and it became final and conclusive under section 136, sub-section (1), of the Income Tax Act, 1918, in the month of January, 1922.

On March 2, 1922, this House gave judgment in the case of *Great Western Railway Company v. Bater* (38 *The Times* L.R., 448; [1922] 2 A.C.1), and by that judgment (which reversed the decision of the Court of Appeal) held that a clerk in the employment of a railway company did not hold a "public office or employment" within the meaning of the Income Tax Acts and accordingly was assessable, not under Schedule E on his actual profits for the year of assessment, but under Schedule D on the average amount of his profits and gains for the three preceding tax years. It has been assumed throughout these proceedings that this decision applied to persons in the position of the appellant; and this assumption has not been contested by the Attorney-General on the present appeal. Upon this footing the appellant ought, as the law stood in December, 1921, to have been assessed, not on £359, but on £259, which was the average amount of his remuneration for the three preceding years; but as the time for appeal had gone by, the assessment of £359 could not be, and has not been, disputed by the appellant.

On July 20, 1922, the Royal Assent was given to the Finance Act, 1922, and by section 18 of that Act (so far as it is material to the present case) it was enacted as follows:—

"18.—(1) Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income-tax under Schedule D . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that schedule shall apply accordingly subject to the provisions of this Act.

"(3) Rule 7 of the Rules applicable to Schedule E (which relates to the charge of tax in respect of offices and employments of profit held under a railway company), shall apply to all offices and employments held under, and pensions paid by, a railway company.

"Provided that nothing in this subsection shall affect the provisions relating to the quarterly assessment and the collection of income-tax in the case of weekly wage-earners employed by way of manual labour.

"(6) The provisions of subsection (1) and subsection (3) of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income-tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two, in respect of any employment (other than that of a weekly wage-earner employed by way of manual labour) under any public department, or under any company, society or body of persons or other employer mentioned in Rule 6 of the Rules applicable to Schedule E."

There is no doubt that the appellant, as the holder of an office or employment (though not a public office), falls within the provisions of subsection (1) of the above section, so as to be chargeable in respect of the tax year 1922-23 and subsequent years under Schedule E of the Act; nor is there any doubt that his employment comes within the description contained in the concluding words of subsection (6) as being held under an employer mentioned in Rule 6 of the Rules applicable to Schedule E.

On October 13, 1922, the Commissioners of income-tax gave notice to the appellant of an additional first assessment of £77, being the amount by which his remuneration had been increased in September, 1921, the notice being headed "Notice of additional assessment under Schedule E in the case of persons undercharged in the first assessment." Against this additional assessment the appellant appealed to the General Commissioners, who decided against him and confirmed the assessment subject to a case stated for the opinion of the High Court. The case was argued before Mr. Justice Rowlatt, who discharged the assessment; but on appeal to the Court of Appeal that Court held that full retrospective effect must be given to section 18 of the Act of 1922, and that the effect of subsection (6) of that section was that, in considering

the validity of the additional assessment, the original assessment under Schedule E must be deemed to have been in accordance with law ; and they accordingly reversed the decision of Mr. Justice Rowlatt and restored the additional assessment. The appellant has now appealed to this House.

My Lords, with the greatest respect for the opinion of the learned Judges of the Court of Appeal, I am unable to agree with their decision As the law stood in December, 1921, the original assessment then made on the appellant not only was not insufficient, but exceeded by £100 the sum at which he should have been assessed. Now the jurisdiction of the Commissioners to make an additional first assessment upon the appellant arose (if at all) under section 125 of the Income Tax Act, 1918, which provides that such an additional assessment may be made if the surveyor discovers that a person chargeable has been "undercharged" in the first assessment; and how the appellant, who was not undercharged but was overcharged to the amount of £100 in the original first assessment, can come within these words, I am unable to discover. It is true that subsection (6) of section 18 of the Act of 1922 provides that for the purpose of "any assessment" made after May 1, 1922, in respect of the profits of an employment there described the provisions of subsection (1) shall be deemed always to have had effect ; but, even if it be assumed that the expression "any assessment" there used includes an additional first assessment, still the only result of that enactment is to substitute Schedule E for Schedule D so far as that additional assessment is concerned, and not to validate that assessment if it is for other reasons invalid.

The argument for the Crown appears to be that, so soon as the surveyor considers (whether rightly or wrongly) that he has discovered an undercharge in an assessment made in a previous year, and gives notice of an additional assessment in respect of the supposed undercharge, then section 18 (6) requires that the rules under Schedule E shall be applied, not only to the additional assessment, but also incidentally to the earlier assessment to which the additional assessment relates, although that earlier assessment was made and became conclusive before May 1, 1922. It appears to me that this construction gives no effect to the limiting words "for the purpose of any assessment to income-tax which is made or becomes final and conclusive after the first day of May, 1922"; for if on the mere making of an additional assessment after the date there mentioned subsection (1) is to have effect as regards an assessment which was made and became conclusive before that date, then the limiting words might as well have been omitted altogether. Those words appear to me to mean that, while you are to apply Schedule E for the purpose of assessments made after May 1, 1922, and also for the purpose of assessments made before that date which had not then become final and conclusive, you are not to apply it to assessments which were made and became conclusive before that date ; and in the present case it is only if Schedule E is applied to the earlier assessment, which was made and became conclusive before May 1, 1922, that the earlier assessment is found to be insufficient. The words "and shall be deemed always to have had effect," upon which so much stress was laid in the Court of Appeal, appear to me to apply quite naturally to an assessment which though made before May 1 had not become final or conclusive on that date ; but I do not think that they can, without running counter to the limiting words which appear later in the section, be applied to an assessment which at that date had actually become final and conclusive.

The argument may be put in another (and alternative) way. Let it be assumed in favour of the Crown that for all the purposes of the additional assessment Schedule E must be applied, and that the appellant ought to be and ought always to have been assessed to tax in respect of the sum of £77 mentioned in that assessment ; even then you have only got half-way. You have still to consider whether on that footing there has been an undercharge in the earlier year, and in so doing you must apply to the assessment of that year the law which obtained when it was made ; and if in the present case that course is followed, it will be found that there was in fact no undercharge. The appellant has paid the full tax both in respect of the amount at which he should rightly have been assessed in December, 1921, and in respect of the additional sum since discovered by the surveyor ; and while I agree that effect must be given (so far as the context allows) to the retrospective words contained in section 18, subsection (6), of the Act of 1922, I cannot hold that the effect of those words is to make the appellant liable to pay more.

The result is that I find myself in agreement with the conclusion of Mr. Justice Rowlatt in this case, and I am of opinion that the appeal should be allowed and that the judgment of the Court of Appeal should be discharged and the order of Mr. Justice Rowlatt restored with costs here and below, and I move your Lordships accordingly.

Lord Atkinson.—My Lords : I regret very much that I find myself unable to concur in the judgment which has just been delivered by my noble friend on the Woolsack and I take a different view from him.

The appellant in this case was at all material times a second clerk in the employment of the London County Council. His duties were of a clerical character. His remuneration took the shape of a yearly salary with an added bonus. In the year 1921-22 his salary was £194 7s. 3d., the bonus £241 9s. 2d., making together £436 6s. 5d. On October 6, 1921, he was first assessed for income-tax for the financial year 1921-22 in respect of his office on the sum of £359. It is not disputed that this assessment was made under Schedule E ; neither is it disputed that, having regard to the decision in the case of *Great Western Railway Company v. Bater* (38 *The Times* L.R., 448 ; [1922] 2 A.C., 1), he was not liable to be assessed under that Schedule, inasmuch as the office he held was not of a public nature, and, therefore, that he was properly assessable under Schedule D on the average of the profits and gains received by him in respect of his office during the three years immediately antecedent to the year of assessment. It is not disputed that had this latter method been adopted he would have been assessed only on a sum of £259 14s. 5d., practically £100 less than the sum at which he had been actually assessed. On December 21, 1921, he received notice from the Income Tax Authorities that he had been assessed on the sum of £359, yet notwithstanding the aforesaid facts, he never objected to this assessment, never appealed against it or otherwise questioned it, but paid the amount of the income-tax found to be due by him on the assumption that the higher of the two possible assessments was the proper and valid one, and in paragraph 3 of his case it is stated that he does not now seek to disturb this assessment on £359.

The 99th section of the Income Tax Act of 1918

requires that the assessors shall within the time directed by the precept of the General Commissioners give a particular notice to every person chargeable within the limits wherein they act, requiring him within such time as shall be limited by the precept to prepare and deliver to the assessors all such lists, declarations and statements as are required by this Act to be delivered. The 100th section provides that every person chargeable under this Act, when required to do so by any general or particular notice given in pursuance of the Act, shall within the period limited by such notice prepare and deliver to the assessor a true and correct statement in writing, as required by the Act, signed by him, containing amongst other things the amount of the profits or gains arising to him from each and every source chargeable according to the respective schedules, estimated for the period, and according to the provisions and rules of the Act. By subsection 4, it is provided that every person upon whom such a particular notice has been served by an assessor requiring him to deliver a statement of any profits or gains or income in respect of which he is chargeable under Schedules D or E, shall deliver a statement in the form required by the notice whether or not he is so chargeable. A penalty can be inflicted for the omission to comply with this notice.

In the case stated it is set forth that the first assessment was made on the appellant on October 6, 1921, and that notice thereof was given to him on December 21, 1921. The first matter to be considered is the force and effect of an assessment.

In the oft-cited case of *Allen v. Sharp* (2 Ex., 352), Baron Parke at page 366 uses these words : "*An assessment not appealed from stands precisely in the same situation* as one confirmed *after appeal.*" That statement has been quoted, apparently with approval, by Mr. Justice Avory in *Rex v. Bloomsbury Income Tax Commissioners* (31 *The Times* L.R., 565 ; [1915] 3 K.B., 768, at p. 790).

The subject of assessment, its methods and consequences, are dealt with fully in Part VI. of the Income Tax Act of 1918. I have already referred to the section which imposes upon a person in the receipt of an income the statutory duty of making a return of that income. The 107th and some of the following sections of this Statute prescribe the action to be taken if the taxpayer neglects to discharge this duty. The first-named of these sections enacts that "a person who neglects or refuses to deliver, within the time limited in any general or particular notice, or wilfully makes delay in delivering a true and correct list, declaration, or statement, which he is required under this Act to deliver shall—(*a*) if proceeded against before the general commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and such penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment ; or (*b*) if proceeded against by action or information in any court forfeit a sum of fifty pounds." Then comes in subsection 2 the following important provision : "The commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid." By section 112 it is enacted that "if the assessor does not receive a statement from a person liable to be charged to tax, he shall, to the best of his information and judgment—(*a*) make an assessment upon that person of the amount at which he ought to be charged under Schedules A, B, and E." Under subsection (*b*) he must "estimate the amount at which that person ought to be charged under Schedule D, and make a return to the commissioners of the name and address of that person and any other particulars which the commissioners may require." The following section (section 113) requires that every assessor shall deliver to the commissioners on or before the day appointed by them his certificates of assessments under Schedules A, B, and E, and all statements and lists which have been received by him before the appointed day. Subsequent provisions prescribe the use the commissioners may make of these documents. I have referred to these provisions and the machinery set up by them to show that the first assessment made against the appellant is a formal and valid thing ; that it cannot now be set aside or even qualified, although it was in fact based on a wrong schedule. Nor can the additional assessment be, in my view, dealt with as if its validity depended on the result as it were of an account to be taken between the appellant and the Income Tax Department, and the additional assessment be held invalid because the appellant was overcharged £100 on the first assessment.

Section 125 of the Act of 1918 deals with additional assessments. It provides that if the surveyor discovers that any properties or profits chargeable to tax have been omitted from the assessment, he may make an additional assessment. The appellant's case comes within this provision. He has not delivered any statement, and he was undercharged on the first assessment, even if it was rightly based on Schedule E. Under that Schedule E he ought to have been assessed on an income of £436 6s. 5d., instead of on an income of £359. The first assessment was not appealed against. The fact that some of the income of the taxpayer was omitted from it would not make it invalid. If it be taken as valid and binding as on its face it must, in my view, be taken, then the appellant was undercharged to the amount of £77.

Your Lordships were referred to several authorities laying down the principle upon which the question should be determined whether a statute acts retrospectively or not. Amongst those authorities *Smith v. Callander* ([1901] A.C., 297) and Lord Justice Lindley's judgment in *Lauri v. Renad* (8 *The Times* L.R., 536, 637 ; [1892] 3 Ch., 402) were included. The rule which according to those authorities is to be applied is thus stated in Maxwell on Statutes, page 382. "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessity and distinct implication." If, however, a clause in a Statute says in so many plain words that the Statute shall have retrospective operation, then it must not be construed so as to defeat those express words. Now in the present case it is not disputed that the first assessment was made on October 6, 1921, that notice of it was duly given to the appellant on December 21, 1921, that he did not appeal against or question it in any way and that it consequently became valid and binding. On September 13, 1922, after May 1, 1922, the additional assessment, the subject of this appeal, was made. The words of subsection 6 of section 18, of the Finance Act, 1922, enact as plainly as words can that subsections 1 and 3 of section 18 shall have retrospective operation. The words run thus :—

"The provisions of subsection 1 and subsection 3

of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income-tax which is made or becomes final and conclusive after May 1, 1922." I do not know what more direct and conclusive language could be used to make those provisions of this Statute (to which the Royal Assent was given on July 20, 1922) retrospective in its operation for the purpose indicated. I confess I am utterly unable to construe those words so as to put the additional assessment outside their real application. I think that they clearly and directly apply to it and I am consequently of opinion that the appeal fails. If this construction of this Statute enables the income tax authorities to bring up State demands against a taxpayer under the form of additional assessments, that evil should be corrected by legislation, not by a faulty construction of a retrospective clause in an existing statute.

The other noble and learned LORDS concurred in the judgment of the Lord Chancellor.

[Solicitors—Messrs. Stanley and Co. ; the Solicitor of Inland Revenue.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. Jan. 17.

GILBEY v. GILBEY.*

Divorce—Maintenance—Husband's large income—Principles governing award of maintenance to wife—Matrimonial Causes Act, 1907 (7 Edw. VII., c. 12), s. 1 (1) (2)—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190 (1) (2).

In fixing the amount of maintenance to be awarded to a wife on dissolution of marriage, the Court is not bound by any arithmetical rule to allot a definite proportion of the husband's income, or by the practice of the Ecclesiastical Courts in fixing alimony after divorce *a mensa et thoro*. Where the husband has an ample fortune over and above the needs of the matrimonial home, the maintenance to be awarded to the wife must be dependent on what is necessary to maintain her station in life.

Kettlewell v. Kettlewell (14 *The Times* L.R., 96 ; [1898] P., 138) followed.

The parties were married on January 26, 1884. On July 1, 1912, they entered into a deed of separation whereby the husband agreed to pay the wife during their joint lives the sum of £1,600 a year, and, should he predecease her, he agreed that his executors should pay her the sum of £800 a year for the remainder of her life. There was a provision that in the event of a reconciliation and a resumption of cohabitation, or of a dissolution of the marriage or a judicial separation, the annuity should cease. On October 20, 1925, the wife petitioned for divorce on the ground of her husband's cruelty and adultery, and after the verdict of a jury a decree *nisi* was granted to the wife on March 23, 1926. On April 9, 1926, the wife filed a petition for permanent maintenance, and on September 26 the decree *nisi* was made absolute.

The registrar in his report dated December 1, 1926, found that the husband's gross income was about £24,300 a year, derived mainly from a business concern. He reported in favour of the husband's being ordered to secure to the wife for her life the annual sum of £3,500 less tax, and that he be ordered to pay her during their joint lives or until further order the further annual sum of £500 less tax.

Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacting section 1 (1) and (2) of the Matrimonial Causes Act, 1907, provides :—

" (1) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable, and the Court may for that purpose order that it shall be referred to one of the conveyancing counsel of the Court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

" (2) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable :

" Provided that—. . . where the Court has made any such order as is mentioned in this subsection and the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order. . . ."

Mr. R. F. BAYFORD, K.C., who appeared with Mr. T. BUCKNILL for the wife, moved to vary the registrar's report by increasing the annual sum to be secured to the wife during her life from £3,500 to £4,500, making the total maintenance £5,000 a year less tax. He submitted that the Court should not depart from the practice derived from that of the ecclesiastical courts of allowing one-third of the joint income (in this case the wife had no separate estate) up to £15,000 of such income. The amount of maintenance was not limited to £3,000 a year as suggested in *Hulton v. Hulton* (32 *The Times* L.R., 319 ; [1916] P., 57). It was suggested in *Sykes v. Sykes* (13 *The Times* L.R., 579 ; [1897] P., 306) and *Kettlewell v. Kettlewell* (14 *The Times* L.R., 96 ; [1898] P., 138) that £3,000 per annum would be an adequate jointure for the widow of a very wealthy man, and therefore an adequate allowance for such a man's wife by way of maintenance. But £5,000 a year now meant an actual income of £3,768 after deduction of tax, and as regards the remainder its purchasing value was much less than in the 'nineties. In fact £5,000 now was worth less than £3,000 then.

The Hon. VICTOR RUSSELL, appearing for the husband, submitted that the decreased purchasing power of money and the heavy increase in taxation affected the husband's income just as much as the wife's. The gross income of just over £24,000 was reduced by taxation to about £13,000 a year. By the separation deed of 1912 the wife accepted an income of £1,600 a year during their joint lives, which was a guide to the Court as to the wife's scale of maintenance and accustomed mode of life before dissolution of the marriage.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

The PRESIDENT.—I have no information as to the husband's income in 1912.

Mr. RUSSELL said that the husband's income fluctuated according to the profits of a business in which he was interested, and submitted that the registrar's report be adopted.

The PRESIDENT delivered a written judgment in which he stated the facts reproduced above and said :—

Before the Registrar, the respondent claimed that the petitioner's maintenance should be determined by and with regard to the terms of a separation deed made in 1912, in the lifetime of the respondent's father, which secured to the petitioner an income of £1,600 during the joint lives and £800 for her life in case she should survive the respondent. The Registrar rightly took the view that this deed, made in view of an intended continuance of the marriage state, could not govern the decision of the Court after dissolution of the marriage, and the respondent's contention was not insisted on before me save to the extent to which the amount of the agreed income bears upon the question of the petitioner's accustomed mode of life and usual scale of maintenance before the petition for divorce.

On the petitioner's behalf, it was contended before me that after a divorce, as after judicial separation, regard must be had to a rule derived from the practice of the Ecclesiastical Courts so that in a normal case a wife who has obtained dissolution of the marriage shall be secured one-third of the husband's income. I was invited to proceed on the footing of a rule of settled application in cases where the total income in question is below, say, £1,500 per annum and upon consideration of cases like *Sykes v. Sykes* (13 *The Times* L.R., 579 ; [1897] P., 306), *Kettlewell v. Kettlewell* (14 *The Times* L.R., 96 ; [1898] P., 138), and *Hulton v. Hulton* (32 *The Times* L.R., 319 ; [1916] P., 57), to exercise a discretion as to the increased annuity to be awarded in respect of a larger fortune, and to say that the increased burden of taxation in this country and the decreased value of money since these several cases were decided justify and require reconsideration of the limits within which the suggested rule of practice ought to to be regarded as obligatory.

On the respondent's behalf it was submitted that regard is had in all such cases to the sources of the husband's income and to the question whether they are of a permanent or of a precarious character ; and reliance was placed, as before mentioned, on the separation deed as evidence of an agreed scale of living.

It is always necessary to bear in mind in cases like the present, that the practice as to alimony which was observed in the Ecclesiastical Courts does not govern, as of course, the amount of maintenance after dissolution of marriage. By the Matrimonial Causes Act, 1857, and sections 16, 17, and 22 of that Act in particular, the practice in the Ecclesiastical Courts must be duly regarded in awarding alimony upon judicial separation and in some other cases, subject always to the judicial discretion of the Court. As to any permanent provision after dissolution of marriage, the rule applicable is that contained in the Statutes which confer and control the power of the Court to award such maintenance, formerly the Matrimonial Causes Act, 1857, section 32, the Matrimonial Causes Act, 1866, section 1, and the Matrimonial Causes Act, 1907, section 1, subsection 1, now re-enacted in the Judicature (Consolidation) Act, 1925, section 190. These provisions deal with maintenance and support. The sidenote to section 32 of the Act of 1857 was "alimony." What is to be secured is such gross or annual sum as the Court shall deem reasonable having regard to the fortune, if any, of the wife, the means of the husband and the conduct of the parties, or a monthly or a weekly sum for maintenance and support. It is no doubt true that the considerations of good sense and fairness which apply in fixing alimony must have due weight in determining the proper award for maintenance, if such an award is required. The considerations urged on behalf of the petitioner can properly be taken into account in determining the reasonable sum which is to be fixed. But the assumption of a fixed arithmetical rule and an indispensable process of applying that rule simpliciter, or in a form dependent for its modifications upon other arithmetical considerations, is erroneous, in that it disregards the nature of the duty imposed upon the Court by the statutes. In the discharge of this duty the Court is not bound by the practice of the Ecclesiastical Courts.

A third of the husband's means might well be what is required for the wife's maintenance, when those means consist of an income which has sufficed for and has been expended on the requirements of the matrimonial home. But when, beyond everything called for by such requirements in the most comprehensive view of them, he possesses an ample fortune of which he can dispose for external purposes, the amount of his income affords no definite guidance as to what sum is required for his personal, domestic, and social expenses, and what sum will supply to his sometime wife the necessaries, comforts, and advantages incidental to her station in life. It is useful, too, to bear in mind, in distinguishing the award of permanent maintenance from the award of alimony in the Ecclesiastical Courts, that alimony after divorce *a mensa et thoro* was limited to the joint lives of the parties, and that under the express terms of the statutes permanent maintenance may be secured for the life of the petitioner, as it will be in this case. The annuity or periodical payment for life is obviously the better and more advantageous provision.

The judgment of Lord St. Helier in *Kettlewell v. Kettlewell* (*supra*) and the award of maintenance made in *Hulton v. Hulton* (*supra*) illustrate the true view as to maintenance. Each case deals with a petitioner where the divorced respondent was a man of large fortune, and in each what was deemed reasonable was so deemed, not with regard to a notional rule granting to the petitioner a life interest in a defined proportion of her husband's fortune, but on the broader grounds indicated in the statute. In *Kettlewell v. Kettlewell* (*supra*) the maintenance provided for was at the rate of £3,000 a year (including £1,400 a year under the marriage settlement) against an income of £19,000. In *Hulton v. Hulton* (*supra*) it was £5,000 less tax, reducible to £3,500 on re-marriage, against an income estimated by the petitioner at £70,000 and admitted to be £29,000. A test was applied in *Kettlewell v. Kettlewell* (*supra*) which had been suggested in the Court of Appeal in *Sykes v. Sykes* (*supra*), and has often been found useful, and is useful here : would the proposed maintenance have been an adequate portion if the petitioner had become the widow of the respondent ? I am satisfied that the submission of the registrar has been arrived at with proper regard to the law applicable and to the facts of this case, and, whether I regard it in the light of the decisions to which I have referred, or independently in order to form my own opinion of what is reasonable, I am satisfied of the adequacy of the

maintenance proposed. I accordingly confirm this report.

[Solicitors—Messrs. Lewis and Lewis; Messrs. Baileys, Shaw, and Gillett.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P., and Hill, J.) } 1927. Feb. 8.

WALLER v. WALLER.*

Husband and wife—Jurisdiction of justices—Separation order — Husband's application for rescission—Time limit for proceeding—Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), ss. 1, 11—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), ss. 7, 8.

An application by a husband under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, for the discharge of an order for maintenance on the ground of adultery committed by his wife since the date of the order is a "complaint" within s. 1 of the Summary Jurisdiction Act, 1848, upon which the justices "shall have authority by law to make any order for the payment of money or otherwise." Such an application is therefore subject to the time limit of six months provided in s. 11 of the Act of 1848. The justices have no jurisdiction to discharge an order under the latter part of s. 7 of the Act of 1895 unless complaint of an act of adultery by the wife subsequent to the order is brought within six months of the time when the adultery was committed.

On March 4, 1912, Mrs. Vannagasta Lilian Waller, having made a complaint that her husband, Charles Waller, had deserted her, was granted a separation order by the Windsor justices directing that she should no longer have to cohabit with her husband, and that he should pay her £1 a week for maintenance. On August 27, 1926, on the husband's complaint, a summons was issued against the wife to show cause why the order should not be rescinded, on the ground that since the order was made, *i.e.*, in 1915, she had committed adultery. After hearing the evidence the justices on November 4, 1926, discharged the separation order. The wife appealed.

The Summary Jurisdiction (Married Women) Act, 1895, section 7, provides:—

"A court of summary jurisdiction, acting within the . . . district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds.

If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them . . . shall commit an act of adultery, such order shall upon proof thereof be discharged."

Section 8 of the same Act provides:—

"All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts. . . ."

The Summary Jurisdiction Act, 1848, section 1, empowers justices to issue summonses (*inter alia*) "in all cases where a complaint shall be made . . . upon which . . . they have . . . authority by law to make any order for the payment of money or otherwise."

Section 11 of this Act provides:—

"In all cases where no time is already or shall hereafter be specially limited for making any such complaint . . . such complaint shall be made . . . within six calendar months from the time when the matter of such complaint . . . arose."

Mr. G. O. Slade, for the appellant wife, founded his appeal *inter alia* on the grounds: (1) That the justices were wrong in law in that more than six months had elapsed between the date of the second complaint and the date of the act of adultery alleged against the wife, and that there was therefore no jurisdiction to discharge the separation order; (2) That the justices were wrong in law in discharging retrospectively the order as from September 30, 1915, the date upon which the justices had found as a fact that adultery had been committed by the wife; (3) That the justices' finding was against the weight of evidence, and that they improperly admitted in evidence an undated letter purporting to be a confession by the wife of an act of adultery in 1911, prior to the date of the separation order.

Counsel argued that under the sections of the 1895 and 1848 Acts cited above the six months' time limit applied in this case, and that the words "at any time" in section 7 of the former Act referred only to applications to alter, vary, or discharge an order upon fresh evidence. These words were omitted from the second part of the section dealing with the discharge of an order by reason of the wife's adultery. He referred to *Ellis v. Ellis* (12 *The Times* L.R., 514; [1896] P., 251) and *Outerbridge v. Outerbridge* (43 *The Times* L.R., 33) as to the retrospective effect of the order of November, 1926.

The President:—In *Ellis v. Ellis* (*supra*) there was a charge of neglect.

Mr. J. W. Eddy, for the respondent, submitted that the words "at any time" governed the whole of section 7 of the 1895 Act. He cited *Weightman v. Weightman* (22 *The Times* L.R., 362). In that case more than six months after the separation order had been made the husband discovered that the wife had committed adultery before the order was made. This was held by the President, Sir Gorell Barnes, and Mr. Justice Bargrave Deane to be fresh evidence justifying the discharge of the order. The then President said that the six months' limit did not apply in that case at all.

Mr. Slade replied that the application in *Weightman v. Weightman* (*supra*) was held to be in effect one for a new trial. He added that the husband in the present case was taking proceedings for divorce.

Lord Merrivale.—This case raises some important points. The state of facts out of which the proceedings between the husband and wife arose is that many years ago—namely, in 1912—an order had been made on the wife's complaint that she be no longer bound to cohabit, that the custody of the

* Reported by William Latey, Esq., Barrister-at-Law.

three children of the marriage, who were named, be committed to her while under the age of 16, and that the husband should pay her a weekly sum of £1 for her maintenance. The husband seems not to have been regular in his compliance with that order, but, except that he was once committed to prison, it is said in 1915, because of long arrears under the order, no material incident between 1915 and 1926 has been brought to the notice of the Court. In 1926 the husband made a complaint before the justices that since the date of that order the wife had committed an act of adultery, and a summons was issued to the wife to appear before the justices to show cause why the order of 1912 should not be revoked. The parties duly appeared, they had legal assistance, and the husband claimed to prove, and was held by the justices to have proved, a series of facts which show that the wife, in 1911, that is, before the order of 1912, and in 1915, had committed adultery with one Rowe.

The justices had a considerable body of evidence before them, and they had a document which, upon serious grounds, they believed to be a written admission by the wife that in 1911 she had been guilty of an act of adultery with the man Rowe, and they had other evidence that in 1915 she had been guilty in like manner. They had a substantial case before them. The complaint and the summons depended upon an act of adultery since the date of the order, so that the jurisdiction of the justices under the summons rested upon an alleged act of adultery in 1915. The justices, after a careful hearing, as I think, of all that could be said upon both sides, proceeded to discharge the order as from the date of the alleged adultery of 1915, and they discharged it by an order with retrospective effect so as to annul the liabilities of the husband which had arisen under the order during the period between 1915 and the date of the hearing—liabilities which are said to amount between those two dates to a very large sum.

The wife appeals on the ground that the justices could only discharge the order as from the date of the order of discharge. The contrary proposition has not really been argued, and it has not been argued, at any rate, in the sense in which the other questions in the case have been argued, but I can have no doubt that the power of the justices was to make an order which should take effect as from its date.

The wife therefore succeeds, in my judgment, as to that ground of appeal with regard to the point of time at which the justices' order should take effect.

Next after that point it is submitted that the justices improperly admitted evidence. It is said that they were wrong in receiving what was alleged to be a written confession by the wife of an act of adultery which was not the act of adultery relied upon in the charge. If the justices had had a written confession of a previous act of adultery and no proof of any subsequent misconduct, that would have been a very cogent complaint, but the justices seem to me to have had evidence of adultery before and after the date at which the order had been made, and, having regard to the practice of this Court, and I think to the common sense of the matter, I do not see my way to hold as a matter of law that an adulterous relationship in 1911 might not be evidence to support a charge of adultery in 1915, or that admitted adultery of 1911 might not be admissible to explain the terms in which, as was alleged, an admission was made of adultery said to have been committed in 1915.

So, though I regard with apprehension an admission of evidence which is not strictly relevant to the charge which the justices have to consider, I cannot say that the justices were wrong in point of law in receiving proof of a previous relationship of the parties. A ground upon which they might easily have gone wrong would have been the mode in which they applied that proof. I think that the second ground of complaint fails.

There is another ground of appeal based upon the terms of a section in the Summary Jurisdiction (Married Women) Act, 1895, which, subject to modification in the recent Statute of 1925, governs the jurisdiction of the justices upon complaints of this kind. Section 7 of the 1895 Act makes two classes of provisions. It provides that justices, after an order has been made within their jurisdiction under the Statute, can hear either husband or the wife to show cause upon fresh evidence why the justices should not alter, vary, or discharge any such order. With regard to that provision, it is comprehensive enough to be employed at any time. No doubt its primary purpose is to enable justices upon fresh evidence to retry an issue, but its effect is not exhausted by retrial of an issue. Its effect extends, in the specified case of change in the means of the parties, to the consideration and variation of an order upon matters which have occurred since the making of the order. I am not professing to delimit the operative effect of the respective parts of the provisions in the first part of section 7, but I need say only this, that that part of the section deals with matters which may be dealt with at any time.

Within that part of the section, upon a complaint properly made, it was open to the justices to receive proof that their order of 1912 had been an unjust order, because the wife was an adulterous wife, and if the summons which was before the justices when they made the order now appealed from had proceeded in respect of the adultery of 1911, it may well be that the justices would have felt it their duty to deal with the order of 1912. No summons was before them which provided for a rehearing of the case on which the order had been made. What was before them was a charge of subsequent adultery.

Now the question is, whether the comprehensive provision in the first part of the section, which enables the justices at any time to discharge an order upon new evidence, relates to this case, in which evidence of adultery subsequent to the order was received and acted upon, although it was evidence of an act of adultery alleged to have taken place eleven years before the hearing before the justices.

On behalf of the appellant it has been said that the second part of the section relates specifically to this matter, and that the jurisdiction of the justices, in respect of acts of adultery after the order, is to discharge the order under the second part of the section whereby if any married woman upon whose application an order shall have been made shall commit an act of adultery "such order shall upon proof thereof be discharged."

There is no doubt of the peremptory authority of the justices to discharge an order upon proof of an act of adultery committed after the making of the order. It may have been the intention of the Legislature that that should be the extent of the authority of the justices with regard to that class of misconduct. What has happened here is that, the order being

14 years old, an act of adultery which was eleven years old has been alleged with no particulars of it upon a summons issued in August, 1926. The wife appeals against the order of the justices, so far as this ground is concerned, upon the authority of section 11 of the Summary Jurisdiction Act, 1848, which by reference is incorporated in the Summary Jurisdiction (Married Women) Act of 1895.

In order to see the effect of the Summary Jurisdiction Act of 1848 upon the Act of 1895, it is necessary to have a clear regard to its terms. The first section provides that in all cases where an information shall be laid "that any person has committed or is suspected to have committed any offence or act within the jurisdiction of such justice or justices for which he is liable by law, upon a summary conviction for the same before a justice or justices of the peace, to be imprisoned or fined," that act of his may be the subject of a summons which will direct him to appear before the justices. This case is not within that provision. There is no information here for any offence within the jurisdiction of the justices for which the defendant on the summons, the wife, was liable to be imprisoned or fined, or otherwise punished within the meaning of the distinction in the Act of 1848.

But there is another power besides that of summoning persons guilty or suspected of being guilty of offences. That power relates to cases "where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise." There is a like provision that in every such case it shall be lawful for the justices to issue a summons requiring the appearance of the accused party before them. That is the provision of section 1 of the Act of 1848, and section 11 limits the time for proceeding to within six calendar months from the time when the matter arose.

The first question here is whether the summons to the wife in this case was issued upon a complaint within the meaning of section 1 of the Summary Jurisdiction Act of 1848. The complaint which is referred to there is a complaint in a case where the justices have authority by law to make an order for the payment of money, or otherwise, and those who are familiar with summary jurisdiction know that increasingly, as time has gone on, matters within the jurisdiction of the justices where they have authority to make an order, which are not matters punishable by fine or imprisonment but are matters upon which they have jurisdiction, are brought before the justices by summons on a complaint. This is not a complaint on which the justices had authority to make an order for the payment of money. The ordinary complaint under the Summary Jurisdiction (Married Women) Act, 1895, would have been such a complaint—the complaint which invokes in the first instance the jurisdiction of the justices.

The real question on this part of the case is whether the matter alleged is a matter of complaint in respect of which the justices have authority to make an order otherwise than for payment of money. In my judgment the order which they made discharging the order of 1912 is included within the terms of section 1 of the Act of 1848. It is not an order for the payment of money, but it is an order otherwise than for the payment of money. It is an order to discharge an order for the payment of money. The complaint was one on which the justices had jurisdiction to find the accused person, so far as that jurisdiction extends, guilty of adultery. In my judgment, therefore, when the justices dealt last year with a complaint that the wife, the now appellant, had been guilty of adultery in 1915, and proceeded thereupon to make an order for discharge of a previous order, that was a proceeding which was outside the jurisdiction of the justices by reason that within the meaning of section 11 the matter of such complaint arose at the time when the alleged act of adultery was committed—namely, in 1915.

It may well be said—at least the observation will occur—does not such a view place a husband who has a guilty wife in a difficulty and in a *prima facie* unjust position? There was a time when that observation could have been made more effectively than it can now, but if a husband, who is under an order for the payment of money for the maintenance of his wife, takes so little notice of her doings that he is not aware for 12 years whether she is living chastely or not, it may be thought that he prefers to pay rather than take care. But there is this further to be said, that at this time by means of the provisions for poor persons litigation, especially in this Division, there is abundant opportunity for a man whose wife has been guilty of adultery, and has not put himself in an impossible position as a complainant, to proceed to obtain a divorce.

When the justices made an order finding the now appellant, the wife, guilty of adultery in 1915 upon a complaint made in August of last year, they were outside their jurisdiction. My view is that the justices have power to discharge orders for payment of money to a wife if complaint of an act of adultery of the wife is brought within six months of the time when it has been committed. For those reasons, in my opinion, this appeal must succeed in this way, that the order must be discharged, but that the proceeding must be remitted to the justices in order that they may do what in their judgment justice requires either by hearing the parties upon a new complaint, or in any other mode within their jurisdiction. But upon the new complaint it must be borne in mind that, if there are reasons why the act of adultery alleged to have occurred in 1911 is not available to the complainant, the justices will hear those reasons. The appeal succeeds, and the case ought to be remitted to the justices.

Mr. Justice Hill.—I agree. I think the justices have proceeded upon the view that the case came within the last sentence of section 7 of the 1895 Act. They set aside an order on proof of adultery, however long ago that adultery took place. Application to vary or discharge on fresh evidence may be made at any time, but otherwise it seems to me that section 11 of the 1848 Act applies. In this case six months from the adultery which is the cause of complaint had elapsed, and that being so I agree that the justices were not under any compulsion under the second sentence of section 7 to set this order aside, and that it must go back to them to consider the circumstances on a rehearing and see whether they think it is a case in which they ought to set aside the order upon the evidence that will be then tendered to them.

But it is satisfactory to know that there is always open to the husband a remedy which is a much more satisfactory remedy for him to pursue, and one which he indicated he had some intention of pursuing—namely, to petition for a divorce in this Court, and

no injustice and no hardship are being inflicted upon him by the course we have pursued.

The PRESIDENT.—Then the order is set aside in the mode I have indicated.

[Solicitors—Messrs. Bower, Cotton, and Bower, for Messrs. T. W. Stuchbery and Son, Maidenhead; Mr. C. T. Lewis.]

Court of Appeal. (Scrutton and Atkin, L.JJ.) } 1927. Feb. 22.

WHITE v. SMITH.*

County Court—Practice—Action claiming relief under Moneylenders Acts—Commenced in High Court—Claim limited to £100—Transfer to County Court—"Contract"—Moneylenders Act, 1900 (63 and 64 Vict., c. 51), s. 1—County Courts Act, 1888 (51 and 52 Vict., c. 43), s. 65—County Courts Act, 1919 (9 and 10 Geo. V., c. 73), s. 1.

By s. 65 of the County Courts Act, 1888, as amended by s. 1 of the County Courts Act, 1919: "In any action commenced in the High Court, where—(1) the plaintiff's claim is founded either on contract or on tort and the amount claimed or remaining in dispute . . . does not exceed £100, whether the action could or could not have been commenced in a County Court, . . . either party may . . . apply to the Court or a Judge for an order that the claim . . . shall be transferred" to the County Court.

Where a borrower from a moneylender issues a writ in the High Court, claiming relief under the Moneylenders Acts, the claim being limited to £100, such a claim is one founded on contract within the meaning of s. 1 of the County Courts Act, 1919, and can be transferred to the County Court for trial under that section.

This was an appeal from an order of Mr. Justice Swift at Chambers, affirming an order of a District Registrar, ordering an action commenced in the High Court to be transferred to the County Court for trial.

The plaintiff, a borrower from a moneylender, commenced an action by a writ claiming under the Moneylenders Act, 1900, the reopening of a moneylending transaction between the plaintiff and the defendant. He also claimed a declaration that the interest charged therein was excessive, and that the transaction was harsh and unconscionable, accounts and inquiries, payment of the amount found due to the plaintiff, and other and necessary relief under the Moneylenders Acts.

The plaintiff applied by summons to have the action transferred to the County Court for trial, his claim being limited to £100.

The District Registrar ordered that if the plaintiff should pay the defendant his (the defendant's) costs to be agreed or taxed, the action should be transferred to the County Court, and his order was affirmed by Mr. Justice Swift at Chambers.

The defendant appealed.

Mr. H. C. Dickens appeared for the appellant; and Mr. R. F. Levy for the respondent.

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

LORD JUSTICE SCRUTTON, in giving judgment, said that the question to be decided arose in the following way:—A borrower from a moneylender desired to exercise the right given to him by the Moneylenders Act, 1900, and to have the transaction reopened, and to have it determined whether the transaction was harsh and unconscionable, and whether the interest charged was excessive, and to have an account and inquiries, and if it should be found that he had overpaid interest to have the amount found to have been overpaid repaid to him.

The borrower had applied to have the action remitted to the County Court for trial, and had restricted the amount of his claim to £100, in order to have the action tried in the County Court. The section dealing with the transfer of actions commenced in the High Court to the County Court was section 1 of the County Courts Act, 1919, which contained the words "action . . . founded . . . on contract." The question depended on whether the plaintiff's action was founded on contract.

There had been some discussion on the meaning of the words "founded on contract" (in a different section), in *Bryant and Another v. Herbert* (3 C.P.D., 389), a case that went to the Court of Appeal. In that case there was a difference of opinion between Lord Justice Bramwell and Lord Justice Brett with regard to the meaning of the words "in any action founded on contract" and "in any action founded on tort." Lord Justice Bramwell took the view that the words in question were not words of art, even as much as *ex contractu* or *ex delicto* would be. He said that they were plain English words and were to have the meaning which ordinary Englishmen would give them. But Lord Justice Brett did not agree with that view. He thought that they were technical terms having reference to the form of the action.

In *Turner v. Stallibrass and Others* ([1898] 1 Q.B., 56) the question was whether an action founded on an injury to a horse was an action founded on contract or on tort. It was said, on the one hand, that it was an action founded on tort, because the plaintiff, on proof that he delivered the horse to the defendants to be taken care of and that the horse was injured through the negligence of the defendants, showed a good cause of action for a tort, and he was not obliged to rely on any contract to maintain his action. It was said, on the other hand, that it was an action founded on contract—namely, the contract to keep the horse safely, and that without the contract of agistment no cause of action would have arisen and the plaintiff could not have launched his case. The Court of Appeal took the view that the action was founded on tort within the meaning of section 116 of the County Courts Act, 1888. Lord Justice Collins said, in giving judgment in that case, that the result of the cases appeared to be that, if the plaintiff could maintain his action by showing the breach of a duty arising at common law, he was not obliged to rely on a contract within the meaning of the rule; but if his cause of action was that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he was obliged to rely on a contract within the meaning of the rule.

Applying those observations to the present case, the question was: What was it that the plaintiff must prove in order to maintain his action? What he was seeking to do was to reopen a moneylending transaction. He could not get on at all unless he proved a contract. Therefore, in his (Lord Justice Scrutton's) opinion, the present action was an action

"founded on contract" within the meaning of section 1 of the County Courts Act, 1888, and could therefore be remitted to the County Court for trial.

LORD JUSTICE ATKIN agreed.

[Solicitors—Mr. Blacket Gill, Newcastle-upon-Tyne; Messrs. Johnson, Peacock and Co., for Mr. Victor Hadaway, Newcastle-upon-Tyne.]

Chan. Div. (Eve, J.) 1927. Mar. 1.

IN RE MADAME TUSSAUD AND SONS, LIMITED.*

Companies — Voluntary liquidation — Surplus assets—Rights of preference and ordinary shareholders.

This was a summons taken out by the voluntary liquidator to ascertain how the surplus assets were to be divided as between the Ordinary and the Preference shareholders in Madame Tussaud and Sons, Limited.

Sir T. Hughes, K.C., and Mr. Rawlence appeared for the liquidator; Mr. Jenkins, K.C., and Mr. Coumbe for the Preference shareholders; and Mr. Vaisey, K.C., and Mr. Bonner for the Ordinary shareholders.

SIR T. HUGHES said that the company had carried on business very successfully until 1925, when there was a fire. It was then determined to sell the land and what was salved out of the buildings and stock. The company was formed in 1889 with a nominal capital of £200,000, of which £75,000 was issued as Ordinary shares. In 1902 some 25,000 £1 Five per Cent. Preference shares were issued. About £71,000 was recovered from the insurance companies for loss of buildings, £81,000 for the contents, and £17,000 for profits. The surplus assets amounted to about £60,000.

MR. JENKINS said that unless one could find in the articles or documents something which defined the rights as between different classes of shareholders one was not at liberty to dissect the assets, which belonged to all the contributories. He referred to *In re Bridgewater Navigation Company* (7 *The Times* L.R., 360; [1891] 2 Ch., 317), *Bishop v. Smyrna and Cassaba Railway Company* (11 *The Times* L.R., 393; [1895] 2 Ch., 265), and *Inland Revenue Commissioners v. Burrell* (40 *The Times* L.R., 562; [1924] 2 K.B., 52). There was in the documents nothing which affected that proposition.

MR. VAISEY contended on the other hand that the fund, so far as it consisted of moneys which might have been distributed as profits, was distributable between the Ordinary shareholders only.

MR. JUSTICE EVE, in giving judgment, stated the facts, and said that *prima facie* the Preference shareholders were entitled to be placed in the same position as the Ordinary shareholders. It was said that the sum really represented profits. The question turned on the decision of the *Bridgewater* case (7 *The Times* L.R., 360; [1891] 2 Ch., 317). Could the Ordinary shareholders bring themselves within it? Having regard to the form of the articles he did not think that they could. Therefore the surplus assets were distributable among all the members of the company whether Preference or Ordinary shareholders in proportion to the amount of their shares.

[Solicitors—Messrs. E. F. and H. Landon.]

* Reported by A. W. CHASTER, Esq., Barrister-at-Law.

Judicial Committee of the Privy Council. (Viscount Cave, L.C., Viscount Haldane, Viscount Finlay, Viscount Sumner, and Lord Warrington of Clyffe.) 1927. Mar. 1.

IN RE LABRADOR BOUNDARY.*

Canada — Newfoundland—Labrador boundary.

According to the true construction of the relevant Statutes, Orders in Council, and Proclamations, the boundary between Canada and Newfoundland in the Labrador Peninsula is a line drawn due north from the eastern boundary of the bay or harbour of Ance Sablon as far as the 52nd degree of north latitude, and from thence westward along that parallel until it reaches the Romaine river, and then northward

along the left or east bank of that river and its head waters to their source and from thence due north to the crest of the watershed or height of land there, and from thence westward and northward along the crest of the watershed of the rivers flowing into the Atlantic Ocean until it reaches Cape Chidley.

The accompanying map shows the boundary.

Their Lordships delivered their considered report in favour of the Colony of Newfoundland on the Special Reference to consider the question: What is the location and definition of the boundary as between Canada and Newfoundland under the Statutes, Orders in Council, and Proclamations?

Sir John Simon, K.C., Mr. Barrington-Ward, K.C., the Hon. W. J. Higgins, K.C. (Attorney-General for Newfoundland), Mr. W. T. Monckton, and Mr. C. H. Pearson appeared for the Colony of Newfoundland; Mr. H. P. Macmillan, K.C. (of the Scottish Bar), Mr. Geoffrion, K.C. (of the Canadian Bar), Mr. Maurice Alexander, K.C. (of the Canadian Bar), Mr. H. Stuart Moore, and Mr. C. P. Plaxton (of the Canadian Bar) for the Dominion of Canada.

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

The arguments, lasting 14 days, were heard in October and November last.

The LORD CHANCELLOR, in delivering their Lordships' report, said :—

The Government of the Dominion of Canada and the Government of the Colony of Newfoundland have petitioned his Majesty to refer to the Judicial Committee of the Privy Council the following question :—

"What is the location and definition of the boundary as between Canada and Newfoundland in the Labrador Peninsula under the Statutes, Orders in Council and Proclamations ? "

That question has been referred to this Board under the Statute 3 and 4 Will. IV., c. 41, section 4, for its consideration and advice. The Board has accordingly heard evidence and arguments upon the matter, and has now arrived at a conclusion.

The Orders in Council and Proclamation upon which the decision must mainly depend were made in the year 1763, and it may seem strange that a question which affects (as it now appears) the jurisdiction over more than 100,000 square miles of territory has remained so long undecided. But an explanation is to be found in the fact that the region in dispute consists mainly of dense forests and bleak and inhospitable table-lands, of which the greater part is uninhabited (except by a few Indian families) and was until recently unexplored, being visited only occasionally by a few trappers in search of furs. The country has accordingly been regarded as having little or no value, and it is only in recent years, when the growing demand for paper has attracted attention to the vast quantity of timber suitable for pulping, that a serious controversy as to its ownership has arisen. The question of boundary was first raised in or about the year 1888, and was the subject of discussion at the Halifax Conference of 1892 ; but no solution was then reached, and it was not until the year 1903 that the Government of Canada, having been informed that the Government of Newfoundland had issued a licence for cutting timber in the neighbourhood of the Hamilton River, raised the question in a serious form. Since that time the matter has been the subject of close and skilled investigation, and it now comes before this Board for decision. The issue so raised is, as Lord Hardwicke said in another connexion, of a nature "worthy the judicature of a Roman Senate" (*Penn v. Lord Baltimore*, 1 Ves. Sen., 444) ; but the duty of the Board is not to consider where the boundary in question might wisely and conveniently be drawn, but only to determine where, under the documents of title which have been brought to their notice, that boundary is actually to be found.

The capture of Quebec in the year 1759 was followed by other British successes ; and by the Treaty of Paris, signed on February 10, 1763, the Most Christian King ceded to his Britannic Majesty in full right "Canada with all its dependencies as well as the island of Cape Breton and all the other islands and coasts (*côtes*) in the gulf and river of St. Lawrence and in general everything that depends on the said countries, lands, islands and coasts"—a description which included the whole of the great peninsula of Labrador, except such parts of it as had been already granted to the Hudson's Bay Company by their charter of 1670 and confirmed to them under the Treaty of Utrecht.

British sovereignty over the whole of the vast region which had belonged to or been claimed by France having been thus secured, it became the duty of the advisers of King George III. to consider what government or governments should be established in the territories so acquired ; and the Lords of Trade (a name then usually given to the Lords Commissioners for Trade and Plantations) first turned their attention to Labrador. On March 15, 1763, in reporting to the King upon the steps proper to be taken for the protection of the fisheries upon the coasts of Newfoundland and in the gulf and river of St. Lawrence, they observed that "upon the coast of Labrador it will be impossible to prevent the French continuing to have the full benefit of their former commerce with the Indians of that coast unless some British settlement should be made there, or sufficient cruisers stationed with instructions to the Commanders to seize all French ships coming within a certain distance of that coast." Shortly after receiving this report the Secretary of State (Lord Egremont) caused a letter to be written to the Hudson's Bay Company, whose territory extended to the entrance of Hudson Straits at the extreme northern end of the peninsula of Labrador, expressing his desire to know as soon as possible "what were the limits upon the coast between the Hudson's Bay Company and the coast of Labrador" ; and on the morning of March 24 Sir William Baker, the Governor of the Company, waited on the Secretary of State and had an interview with him. Immediately after this interview—namely, on March 24—the Secretary of State wrote a letter to the Lords of Trade informing them that the King had "judged it proper that all the coasts of Labrador from the entrance of Hudson's Straits to the River of St. John's, which discharges itself into the sea nearly opposite the west end of the island of Anticosti, including that island with any other small islands on the said coast of Labrador, and also the islands of Madelaine in the gulf of St. Lawrence, should be included in the government of Newfoundland," and requesting them to prepare for the King's approval the draft of a new commission for Captain Thomas Graves (who was then Governor of Newfoundland) to be "Governor of the island of Newfoundland and of the coast of Labrador with the several islands as above described," and revised instructions for the Governor's guidance. Drafts were accordingly prepared, and on March 30 both drafts were submitted to the King in Council and approved for issue in regular form. On April 25 the revised commission was duly sealed and the revised instructions signed by the King ; and, armed with these documents, and also with separate Admiralty instructions issued to him as Commander-in-Chief of his Majesty's ships on the Newfoundland station, Captain Graves sailed on May 2 to take up his duties.

By the commission as passed under the Great Seal on April 25, 1763, in accordance with the Order in Council of March 30, King George III. revoked the former commission (dated May 29, 1761) by which Captain Graves had been appointed Governor and Commander-in-Chief of the island of Newfoundland and constituted and appointed him to be the King's "Governor and Commander-in-Chief in and over our said island of Newfoundland and all the coasts of Labrador from the entrance of Hudson's Straits to the river St. John's, which discharges itself into the sea nearly opposite the west end of the island of Anticosti, including that island with any other small islands on the said coast of Labrador and also the islands of Madelaine in the gulf of St. Lawrence, as also of all our forts and garrisons erected and estab-

lished or that shall be erected and established in our said islands of Newfoundland, Anticosti and Madelaine, or on the coast of Labrador within the limits aforesaid," and required him to conform to the instructions given or to be given to him. By the same document power was given to the Governor to administer the oath of allegiance to all persons who should at any time "pass into our said islands or shall be resident or abiding there or upon the coasts of Labrador within the limits aforesaid"; to constitute and appoint judges and justices of the peace for the administration of justice and keeping the peace and quiet of "the said islands and coasts," with power to hold quarter sessions and adjourn the same as might be convenient "for the peace and welfare of our subjects inhabiting there"; and to erect and set apart court-houses for such justices of the peace and prisons for the keeping of offenders. The commission required all officers, civil and military, "and all other inhabitants of our said islands and the coasts and territories of Labrador and islands adjacent thereto or dependent thereupon within the limits aforesaid," to be obedient, aiding and assisting to the Governor in the execution of the commission.

By the instructions to Captain Graves, as passed under the Royal Sign Manual in accordance with the same Order in Council, the Governor was directed (among other things) to use his best endeavours to prevent aliens or strangers from fishing or drying fish "on any of the coasts or in any of the harbours of the islands and territories under your government" except as allowed by the 13th Article of the Treaty of Utrecht and the 5th Article of the Treaty of Paris; to visit all "the coasts and harbours of the said islands and territories under your government" in order to inspect and examine the state of the fisheries carried on there; to endeavour to procure accurate maps of "the several harbours, bays and coasts of Newfoundland and the other islands and territories under your government," and in particular to cause a vessel under his command to "search and explore the great inlet commonly known by the name of Davis' inlet, in order to discover whether the same has or has not any passage to Hudson's Bay, or any other enclosed sea." The instructions also required the Governor to inquire and report "whether any or what further establishment may be necessary to be made or forts erected in any part of Newfoundland or the other islands or territories under your government either for the protection of the fishery, the security of the country, or the establishing and carrying on a commerce with the Indians residing in or resorting to the said islands or inhabiting the coast of Labrador."

It is worthy of notice that in these two documents, which are of primary importance for the purposes of this inquiry, no distinction was made between the island of Newfoundland and the coast of Labrador, both being included in identical terms in the territories placed under the care of the Governor, and the powers applicable to one being equally applicable to the other.

The business relating to Captain Graves's command having been thus disposed of, Lord Egremont turned his attention to the ceded territory in general, and by a letter dated May 5, 1763, requested the Lords of Trade to consider and report upon a number of questions relating to that territory, including the question what new governments should be established and what form should be adopted for such new governments. In the same letter he called attention to the desirability of conciliating the Indians in the "Indian country" by protecting their persons and property and securing to them the rights and privileges which they had hitherto enjoyed. The Lords of Trade replied by an elaborate report dated June 8, 1763, in which, after setting out the advantages which, in consequence of the cession of French Canada, would accrue to the fishing and fur trades and the planting and settlement of North America, they recommended that three new governments should be erected under the names of Canada, East Florida, and West Florida, with certain boundaries indicated in the report, and that certain lands outside those limits—described in the report as "all the lands lying about the Great Lakes and beyond the sources of the rivers which fall into the river St. Lawrence from the north"—should be left as Indian country, open to trade, but not to grants or settlements. After some discussion as to the boundaries of the proposed new government of Canada (which it was decided to call Quebec), the King agreed to the proposals of the Lords of Trade with the addition of a provision that the "interior country" to be reserved for the use of the Indians should be placed under the control of a military commander-in-chief. A draft Proclamation for giving effect to this decision was accordingly prepared by the Lords of Trade, and was approved for issue at a meeting of the Privy Council held on October 5.

By this Proclamation, which was dated October 7, 1763, the King declared that he had, with the advice of his Privy Council, granted letters patent under the Great Seal to erect within the countries and islands ceded and confirmed to him by the Treaty of Paris, four distinct and separate governments styled and called by the names of Quebec, East Florida, West Florida, and Grenada. The limits and boundaries of these governments were defined by the Proclamation, those of the government of Quebec being described as follows:—

"Firstly.—The Government of Quebec, bounded on the Labrador Coast by the river St. John, and from thence by a line drawn from the head of that river, through the Lake St. John, to the south end of the Lake Nipissim; from whence the said line, crossing the river St. Lawrence, and the lake Champlain in forty-five degrees of north latitude, passes along the high lands which divide the rivers that empty themselves into the said river St. Lawrence from those which fall into the sea; and also along the north coast of the Baye des Chaleurs, and the coast of the gulph of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the Island of Anticosti, terminates at the aforesaid river St. John."

After defining the boundaries of the three other new governments, the Proclamation proceeded:—

"And to the end that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands, we have thought fit, with the advice of our said Privy Council, to put all that coast, from the river St. John's to Hudson's Streights, together with the islands of Anticosti and the Madelaine and all other smaller islands lying upon the said coast, under the care and inspection of our Governor of Newfoundland."

The Proclamation also contained the following further declarations:—

"And whereas it is just and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians with whom we are connected and who live under our

protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting-grounds ; we do therefore, with the advice of our Privy Council, declare it to be our Royal will and pleasure, that no Governor or Commander-in-Chief in any of our colonies of Quebec, East Florida, or West Florida, do presume upon any pretence whatever to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments as described in their commissions ; as also that no Governor or Commander-in-Chief in any of our other colonies or plantations in America do presume for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west and north-west, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

"And we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments or within the limits of the territory granted to the Hudson's Bay Company ; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our especial leave and licence for that purpose first obtained."

It is to be noted that this Proclamation, although sometimes referred to in the later documents as if it were the origin of the title of Newfoundland to its territory in Labrador, was in fact only declaratory of an annexation which had already been effected by the commission approved by the Order in Council of March 30 and issued to Captain Graves ; and it is plain that the statement in the Proclamation that the coast of Labrador had been placed "under the care and inspection" of the Governor of Newfoundland was not intended to take anything from the rights conferred upon the Governor by his commission. In the commissions issued to the Governors of Newfoundland who succeeded Captain Graves the language of the original commission was retained unaltered.

The annexation to Newfoundland of the southern coast of Labrador bordering on the gulf of St. Lawrence soon led to difficulties. It had been the policy of the British Government not to encourage planting and settling in Newfoundland or to establish a form of civil government there, but rather to treat the island as a base to which fishing vessels should proceed in each season and which they might use for drying and curing their fish and for other purposes connected with the fishing industry ; and, in pursuance of that policy, it had been the practice to appoint as Governor a naval officer who was also charged, under instructions issued by the Admiralty, with the protection of the free fishing rights of British subjects, such local administration as was required being entrusted to "Admirals of harbours," who were in fact masters of fishing vessels selected in the order of their arrival in the island harbours. Indeed, the Newfoundland of that day was sometimes spoken of as resembling a great ship provisioned and fitted out by the Mother Country, and moored off the American continent for the convenience of English fishermen, and its government as a "floating government." When the Labrador coast was added to Newfoundland, the same policy was applied to that coast ; and Hugh Palliser, who in 1764 was appointed to succeed Captain Graves as Governor of Newfoundland and the coasts of Labrador, applied that policy to the added territory, including the northern shore of the gulf of St. Lawrence. He forbade all persons from Quebec or any of the colonies to winter on the coasts of Labrador under his government ; and ultimately, by a regulation dated August 28, 1765, he went so far as to order that no person whatever should resort to Labrador to fish or trade except ship fishers annually arriving from his Majesty's Dominions in Europe and carrying men engaged to return to those Dominions after the season was over. These restrictions led to serious complaints from the "sedentary fishermen," mostly of French nationality, who had long been settled on the north shore of the gulf of St. Lawrence and had been engaged in the seal and salmon fishery there, and some of whom had received grants of land from the French Government ; and early in the year 1766 these settlers and some Quebec traders presented memorials to the Lords of Trade praying to be reinstated in their rights and possessions. These memorials were taken into consideration, and after a considerable correspondence with Governor Palliser (against whom some of the complainants brought an action at law in London) the Lords of Trade, by reports dated June 24, 1772, and March 2, 1773, recommended that the part of the coast of Labrador between the river St. John and the Ance des Espagnols or Baie Phillippeaux, near the straits of Belle Isle—being the part of Labrador with which the settlers and traders were concerned—should be taken from the Government of Newfoundland and restored to its dependence on the Government of Quebec. This proposal was apparently approved by the King's advisers, and on April 22, 1773, an Order in Council was passed for the preparation of the instruments necessary for carrying it into effect ; but it was ultimately determined that the matter should be dealt with by a provision to be inserted in the Bill for the Quebec Act of 1774, which was then under consideration. In the course of the preparation of that Bill the proposal made by the Lords of Trade was enlarged so as to provide for the transfer to the province of Quebec not only of the coast of Labrador from the river St. John to the Ance des Espagnols, but of the whole of the territory in Labrador which had been annexed to Newfoundland. The clauses of the Bill relating to Newfoundland were strenuously opposed by Mr. Edmund Burke, Admiral Saunders, and others, but were ultimately carried into law. Accordingly, by the British North America (Quebec) Act, 1774, after reciting (among other things) that by the arrangement made by the Proclamation of 1763 "certain parts of the territory of Canada where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said Province of Canada, under grants and concessions from the Government thereof were annexed to the Government of Newfoundland and thereby subjected to regulations inconsistent with the nature of such fisheries," it was enacted that the territories therein described and also "all such territories, islands and countries which have since the 10th February, 1763, been made part of the Government of Newfoundland" be annexed to and made part of the province of

Quebec as created and established by the Proclamation of October 7, 1763.

Soon after the passing of this Act it became apparent that, in transferring to the Government of Quebec not only the parts of Labrador where the "sedentary fishery" for seal, seal-cow, and salmon had been carried on, but also those parts facing towards the Atlantic where the great cod and whale fisheries had flourished, a serious blunder had been committed. Complaints were made that the Government of Quebec paid no attention whatever to the cod fisheries on the Atlantic coast, and that "in truth there was no government whatsoever on that coast"; and, ultimately, by the Newfoundland Act, 1809, section 14, it was enacted:—

"That such parts of the coast of Labrador from the river St. John to Hudson's Streights, and the said Island of Anticosti and all other smaller islands so annexed to the Government of Newfoundland by the said Proclamation of the seventh day of October One thousand seven hundred and sixty-three (except the said islands of Madelaine), shall be separated from the said Government of Lower Canada and be again re-annexed to the Government of Newfoundland; any thing in the said Act passed in the Thirty-first Year of His present Majesty's Reign, or any other Act, to the contrary notwithstanding."

It would seem that, in so restoring to Newfoundland the whole of the coast of Labrador originally annexed to that government, Parliament omitted to have regard to the position of the sedentary fishermen in the gulf of St. Lawrence which had given rise to so many complaints before the passing of the Act of 1774; and, as might have been expected, these complaints were soon renewed, with the result that in the year 1825 effect was at last given to the counsel tendered by the Lords of Trade in 1773. By the British North America (Seignorial Rights) Act, 1825, section 9, after reciting that under and by virtue of the Acts of 1774 and 1809 the coast of Labrador from the river St. John to Hudson's Strait and the islands above referred to were "annexed to and form part of the Government of Newfoundland," and that it was expedient that "certain parts of the said coast of Labrador should be re-annexed to and form part of the province of Lower Canada," it was enacted:—

"That so much of the said coast as lies to the westward of a line to be drawn due north and south from the bay or harbour of Ance Sablon, inclusive, as far as the fifty-second degree of north latitude, with the island of Anticosti and all other islands adjacent to such part as last aforesaid of the coast of Labrador, shall be and the same are hereby re-annexed to and made a part of the said province of Lower Canada, and shall henceforward be subject to the laws of the said province and to none other." The bay or harbour of Ance Sablon referred to in this section lies a little to the east of the Ance des Espagnols or Phillippeaux Bay.

The statute of 1825 is the last of the documents directly affecting the annexation to Newfoundland of a part of Labrador; but it may be here mentioned that by an Act passed in the year 1840 the provinces of Upper and Lower Canada, into which Quebec had been divided in the year 1791, were united to form one province of Canada; that in the year 1854 Newfoundland, in which a representative Government had been established in 1832, became a responsible self-governing colony; that by the British North America Act, 1867, the Dominion of Canada was set up, Lower Canada becoming the province of Quebec; and that by an Order in Council made in 1880 it was ordered and declared that:—

"From and after the first day of September, 1880, all British territories and possessions in North America not already included within the Dominion of Canada, and all islands adjacent to any of such territories or possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada, and become and be subject to the laws for the time being in force in the said Dominion in so far as such laws may be applicable thereto."

Thus either by the statutes already cited or by the last-mentioned Order in Council, the Dominion of Canada, and particularly its province of Quebec, has become the next neighbour to the dependencies in Labrador of the colony of Newfoundland, and the question of boundary falls to be determined as between the Dominion and the colony.

At this point it is desirable to set out the contentions of the two parties. The contention of the Dominion is that the "coast" which by the commission and Proclamation of 1763, as modified by the subsequent statutes, was annexed to Newfoundland, is

"a strip of maritime territory, extending from Cape Chidley at the entrance to Hudson Strait, to the eastern headland of the bay or harbour of Blanc Sablon on the Strait of Belle Isle, and comprising, in its depth inland, only so much of the land immediately abutting on the sea, above low-water mark, as was accessible and useful to the British fishermen annually resorting to that coast in the ordinary conduct of their fishing operations, for the purposes of 'the open and free fishery' extended to that coast by the Royal Proclamation and carried on there and for those purposes only";

but, recognizing that it may be found impracticable to lay down such a line upon the land, Canada suggests "that the boundary be located as a line to be drawn from the eastern headland of the bay or harbour of Blanc Sablon on the south to Cape Chidley on the north at a distance from high-water mark on the seacoast of the peninsula of Labrador of one mile."

On the other hand, the contention of the colony of Newfoundland is that the boundary should be "a line drawn due north from Ance Sablon as far as the fifty-second degree of north latitude, and should be traced from thence northwards to Cape Chidley along the crest of the watershed of the rivers flowing into the Atlantic Ocean."

In order to make the matter clear, a sketch-map illustrating the two claims is annexed. On this map the territory proposed by the Dominion as the land to be allotted to Newfoundland is indicated by a thick black line following the line of the seashore, while the boundary claimed by the colony is marked by a broken line with a hatching over it.

It may be added that the colony contends that, in the event of the Dominion establishing its main contention, the littoral strip of land which would then represent the territory annexed to Newfoundland should not cross the mouth of the great Hamilton Inlet as shown on the sketch-map, but should be carried along the northern shore of that inlet and round the head of Goose Bay and so back along the southern shore of the inlet to the seacoast.

Before examining these claims in detail, their Lordships think it desirable to formulate two pro-

positions which appear to be common to both sides, and which indeed are beyond dispute.

First, the word "coast" or "coasts" (for both are used in the documents) is a word of undefined meaning; and while it is usually to be understood in the sense which is given to it in Dr. Johnson's and other dictionaries, that is to say, as meaning "the edge or margin of the land next the sea" or "shore," there are many examples of its being used to denote a considerable tract of land bounded by and looking towards the sea. In Murray's Oxford Dictionary (1891) it is stated that the term "is familiarly applied in different regions to specific littoral districts, in India especially to the Coromandel coast"; and in the "Encyclopædia Britannica" (12th edition, 1922) that "the word is sometimes applied to the bank of a river or lake and sometimes to a region (*cf.*, Gold Coast, Coromandel Coast), which may include the hinterland." In the appendix of documents used in this inquiry a number of extracts are given from the Old and New Testaments and from well-known authors, in which the word "coast" is used as signifying a whole country, sometimes extending from the sea to the sources of the rivers running into it; and it is plain that the word is susceptible of more constructions than one, and that its precise meaning must depend on the subject and context.

The second proposition which appears to be beyond dispute in this case is that the effect of the Orders in Council, Proclamation, and statutes which have to be construed was to give to the Government of Newfoundland not mere rights of inspection and regulation exercisable upon a line of shore, but territory which became as much a part of the colony as the island of Newfoundland itself, and which was capable of being defined by metes and bounds. This is evident from the form of the commissions issued to Captain Graves and his successors, by which they were appointed Governors of the island of Newfoundland and of the coast of Labrador in identical terms, and, indeed, in one and the same sentence, and in which reference is again and again made to the "territory" of Labrador comprised in the commission. If there remained any doubt upon this point, it would be set at rest by the language of the statutes of 1774, 1809, and 1825, which refer to the territory in Labrador as being "annexed" first to the Government of Newfoundland and then to the Government of Quebec, and afterwards as being "re-annexed" to Newfoundland and partly "re-annexed" to Lower Canada. Stress was laid by counsel for Canada on the declaration in the Proclamation of 1763 that the Labrador coast had been put under the "care and inspection" of the Government of Newfoundland; but this ambiguous expression cannot affect the plain inference to be drawn from the other documents cited that what was added to Newfoundland was a tract of land, having a boundary which can be located and defined. Indeed, this is assumed by the terms of reference to this Board, to which the parties have agreed.

In these circumstances the question to be determined is, not whether Newfoundland possesses territory upon the peninsula of Labrador, but what is the inland boundary of that territory. Is it to be defined by a line following the sinuosities of the shore at a distance of one mile or thereabouts from high-water mark, or is it to be found at the watershed of the rivers falling into the sea on that shore? No third alternative has been suggested by any person.

When the material documents are considered from this point of view, it is evident that they contain much which supports the contention that the word "coast" is to be construed as including a considerable area of land. The commissions issued to Captain Graves and his successors until 1774 refer to the "territories" of Labrador and to the planters or inhabitants resident there, and they authorize the Governor to appoint judges and justices of the peace for keeping the peace of the coasts and for holding quarter sessions at places convenient to the inhabitants. The instructions issued during the same period direct the Governor to erect upon the "coast" court houses for the trial of offenders and prisons for their detention; and it is plain that a criminal jurisdiction limited to a narrow coastal strip, so that offences committed beyond that limit would not be justiciable and offenders escaping from it could not be apprehended, would be very difficult to exercise. Further, the same instructions require the Governor to report, not only as to the protection of the fishery, but also as to the security of the country and the establishing and carrying on of commerce with the Indians inhabiting the coasts of Labrador; and the directions for protecting the timber from waste and for reporting as to the number of the inhabitants and of the furs taken by them and the improvement of the land, which apply to Labrador as well as to the Island, are appropriate to a government extending into the interior.

With regard to the limit in depth of the country which may be described as "coast," where that term is used in the wider sense, it is argued that the natural limit is to be found (in the absence of special circumstances) in the watershed which is the source of the rivers falling into the sea at that place; and there is much to be said in favour of that view. It is consistent with the doctrine of international law by which the occupation of a sea-coast carries with it a right to the whole territory drained by the rivers which empty their water into its line (see Hall's International Law, 5th edition, page 104; Westlake's International Law, Part 1, page 112; and Lawrence's Principles of International Law, 3rd edition, page 151), and it is certainly difficult, in the absence of any specified boundary or of any special feature (such as a political frontier), which could be taken as a boundary, to suggest any point between the seashore and the watershed at which a line could be drawn.

Further, the use of the watershed or "height of land" as a boundary was undoubtedly familiar in British North America at the period in question, and it is shown as a boundary in many of the maps of that time. Thus, in some of the pre-annexation maps of French Canada which have been produced (Sanson 1656, Coronelli 1689, and Mortier 1693), the watershed running westward from Cape Charles is shown as the boundary between Labrador (or Nouvelle Bretagne) and Nouvelle France. In Bowen's map of 1763 the southern boundary of Labrador appears to run along the fifty-second north parellel of latitude, roughly corresponding with the same line of watershed; and the same feature is reproduced in Rocque's map of about the same date. In Bellin's map of 1755 the "hauteur des terres" is indicated as the boundary between the possessions of the Hudson's Bay Company and the territory (then in French ownership) of Labrador or Nouvelle Bretagne; and the same observation applies to Gibson's map of 1763. In the Proclamation of 1763 the province of Quebec thereby constituted was defined as bounded on the south by "the high lands which divide the rivers that empty themselves into the said river St. Lawrence from those which flow into the sea." It may well be, there-

fore, that in allotting to Newfoundland the "coast" of Labrador the framers of the documents of 1763 had in mind as a boundary the "height of land" from which the rivers ran down to that shore—though without any accurate conception of the distance of that boundary from the sea.

The contention that the territory annexed to Newfoundland was intended to run back to the watershed is supported by the fact that in the Proclamation of 1763 the province of Quebec is described as bounded on the north by a line drawn from the head of the river St. John to the westward—a description which leads to the inference that the land on the east or left bank of the river St. John from its head to the sea had been already allotted to the Government of Newfoundland. It has been ascertained by recent surveys that the river St. John here mentioned does not in fact rise near the watershed, but at some point between the height of land and the sea; but it is plain from contemporary maps that the sources of the river Romaine, which rises at the watershed and runs parallel with the St. John, had been taken for the sources of the latter river, and that the eastern boundary of the new province of Quebec at this point was intended to follow the course of the river Romaine from the watershed to the sea.

A further argument for the adoption of the watershed as the boundary of Newfoundland-Labrador is based on the position at that time of the Hudson's Bay Company. That company had always claimed to be entitled under its charter to the land reaching to the watersheds from which the rivers ran into Ungava Bay, James Bay, and Hudson's Bay, and this claim was ultimately conceded by the British Government. Upon this footing the line of the watershed running from Cape Chidley southward was for a considerable distance the eastern boundary of the Hudson's Bay territory, and so that watershed might for that distance form a political as well as a natural boundary for the "coast" of Labrador.

But perhaps the strongest argument in favour of an extended construction of the grant to Newfoundland is to be found in the terms of the Act of 1825 above quoted. By that statute, after a recital that it was expedient that "certain parts of the said coasts of Labrador should be re-annexed to and form part of the province of Lower Canada," it was enacted that "so much of the said coast as lies to the westward of a line to be drawn due north and south from the bay or harbour of Ance Sablon inclusive as far as the fifty-second degree of north latitude" should be re-annexed to and made part of that province. Now a line drawn due north and south from the bay of Ance Sablon to the fifty-second degree of north latitude would penetrate the interior of the country for a distance of about 40 miles, and the land to the westward of such a line would in some of its parts cover a distance of over 100 miles from the sea; and this being so, it would seem that the language of this enactment, construed in its plain and natural meaning, points directly to the inference that the expression "coasts of Labrador" as used in 1763 and 1809 was understood by Parliament in 1825 to have comprised the interior of the country back to those limits. It is suggested in the case for the Dominion that the line to be drawn north and south as far as the fifty-second degree was merely the draftsman's device for effecting the division of the coastal strip of one mile at Ance Sablon, and was probably intended to serve as a "boundary monument, as it were," for that purpose; but, having regard to the terms of the statute, their Lordships find great difficulty in accepting that construction.

While these arguments make a formidable case in favour of the contention of Newfoundland, it is obvious that the Canadian claim presents great difficulties. A grant of "so much of the land immediately abutting on the sea above low-water mark as was accessible and useful to the British fishermen annually resorting to the coast," even if expressly made in those terms, would have been so vague and indefinite as to be hardly capable of taking effect without some further and clearer definition. Under a grant in those or similar terms, would regard be had only to the needs of the fishermen resorting to the coast at the date of the grant, or would it be necessary to take into account the possibly greater needs of future generations of fishermen? And in case of doubt, upon whom would the duty fall of determining what extent of land was "accessible and useful" to the fishermen? The case for Canada admits that it may be found impracticable to lay down such a line upon the land, and suggests that, in order that neither party may suffer by reason of this difficulty, the boundary should be drawn along the coast at a distance of one mile from high-water mark; but their Lordships cannot think that in adopting such a proposal they would be performing the duty cast upon them by the terms of reference to determine the boundary "under the Statutes, Orders in Council and Proclamations." In any case they could not regard the line proposed as accurately defining the territory accessible and useful for the fishery. Of the ribbon of land along the coast which it is proposed to concede to Newfoundland, a great part lies at the summit of high cliffs not accessible from the sea, and this part of the area proposed would be of no use to fishermen. On the other hand, in places where, owing to the existence of a sea beach or of an inlet, opportunities for landing are available, a limit of one mile would often be found insufficient. Dr. Wilfred T. Grenfell, who has an unequalled knowledge of the country to which he has rendered such devoted service, states that he knows of no building in Labrador which is more than 250 yards above high-water mark, and that all nets are spread and fish dried within that distance from the sea; but his report makes it clear that, for the purpose of obtaining wood for repairs, an allowance of three miles on the average or five miles as a maximum would not be excessive. This view is confirmed by Minutes of the Executive Council of Newfoundland, from which it appears that it has been the practice in leasing the right to cut timber in the island to reserve a margin of three (or sometimes five) miles from the sea in the interest of the fishermen. Further, there are places where a broad peninsula is joined to the mainland by a neck not more than two miles in width, and in each of these instances the one-mile strip would meet in the neck of the peninsula and cut off by an interposed barrier of Newfoundland soil all access to the Canadian *enclave* on the broader part of the promontory. These considerations seem to show that on any view of the construction of the grant an allowance of one mile from high-water mark would be inadequate, and that any allowance of that kind which might be made would certainly be arbitrary and would probably be insufficient. Indeed, it may be doubted whether any person, noting upon the sketch-map the configuration of the coast as proposed by Canada to be defined, would conceive that the Crown can have intended to annex to Newfoundland an area of that shape and character, to refer to it as a "territory," and to establish a form

of government there ; and if, as the Colony forcibly contends, the shores of the Great Hamilton Inlet must be treated as a part of the sea coast, so that the one-mile strip would pass up the northern shore of that inlet and round the head of Goose Bay and would then return along its southern shores, the fantastic character of the boundary proposed would become even more apparent. It is also to be observed that the effect of allotting to Newfoundland a continuous one-mile strip along the shore would be to seal off the hinterland up to the watershed from all contact with the shore, from which access to it would naturally be sought ; and it cannot be supposed that the statesmen of 1763 intended, while setting up a new form of government in the interior, to put that government entirely at the mercy as regards customs duties and otherwise of the Government of Newfoundland.

The principal arguments urged on behalf of the Dominion were based on the terms of the Proclamation of 1763, and particularly (1) on the declared purpose for which the government of the coast of Labrador was entrusted to Newfoundland ; and (2) on the provision made in the Proclamation for the Indians residing in the hinterland. It is true that the actual annexation of part of Labrador to Newfoundland was effected by the commission issued to Graves under the Order in Council of March 30, 1763, which was prior in date to the Proclamation of October 7 ; but the Proclamation is referred to in some of the statutes as a document of great importance, and no doubt regard must be had to its terms so far as they bear on the construction of the commission of the same year.

As to the purpose of the grant, great stress was laid on the declaration in the Proclamation that "to the end that the open and free fishery of [the King's] subjects might be extended to and be carried on upon the coast of Labrador and the adjacent islands," that coast with the islands has been put under the "care and inspection" of the Governor of Newfoundland. Attention was also called to a number of passages in letters and reports of about the same date, in which the control of the fishermen and the prevention of encroachments by the French were referred to as the principal objects to be attained. Having regard to these expressions, it was said the grant of the "coast" must be held to include only so much of the land as was accessible and useful to the fishermen resorting to that coast in the ordinary conduct of their fishing operations.

There is no doubt that the fisheries supplied the principal, if not the only, motive for the annexation of the coast of Labrador to Newfoundland. Labrador, like Newfoundland, was to be a base for fishing and a nursery of British seamen. But although this was the principal motive of the annexation, it does not follow that it was the measure of the grant. The free right to fish off the shores of Labrador, and the right of British fishermen to land there for the purpose of curing and drying their fish and repairing their ships and tackle, was already secured by statute or Order in Council ; and the instructions regularly given to the Admiral in command of the fleet provided for the protection of British subjects and the prevention of foreign intruders. What King George III. and his advisers desired was that there should be a government on the coast, with power to administer justice, to imprison offenders, to encourage trade, and to erect forts for the purpose of defence ; and it was for these purposes, which went beyond the regulation of the fisheries, that the coast of Labrador was subjected to the Government of Newfoundland on the same terms as the island of Newfoundland itself.

Further, the fishing industry would not have been fully provided for by the grant of jurisdiction over a narrow strip of land near the shore. In addition to the cod and the whale which were caught off the Atlantic coast, and to the seal and sea-cow which were found mainly in the gulf of St. Lawrence, the salmon and salmon-trout had to be considered. The salmon fisheries are mentioned in the instructions given to Captain Graves, and the special importance of those fisheries in the gulf of St. Lawrence, and in the rivers running into the gulf, is apparent from many references in the documents produced in evidence. The salmon fishery could only be fully protected by the grant of jurisdiction over the rivers and inland lakes as well as over the seashore ; and from this point of view the reference to the fisheries tends rather to extend than to limit the grant.

But it was pointed out that the Proclamation of 1763 contained a declaration (quoted above) reserving under the sovereignty, protection, and dominion of the King for the use of the Indians the lands and territories not included within the limits of the three new governments of Quebec, East Florida, and West Florida, or within the limits of the territory granted to the Hudson's Bay Company ; and it was argued that this reservation applied to the territory occupied by the Indian tribes who were settled between the Atlantic seaboard of Labrador and the watershed, and was evidence that this territory was not intended to be included in the "coast" granted to Newfoundland. The Indians living in this territory consisted of Nascopies, who lived north of the Hamilton River, and Montagnais, who ranged to the south of that river ; and if it were established that those tribes were intended to be included among the Indians in whose favour the reservation was made, the argument would undoubtedly have much force. But it does not appear to their Lordships to be made out that the declaration in question referred to the lands occupied by these two tribes. The reservation is confined to lands occupied by "the said Indians"—that is to say, those who are referred to in the next preceding paragraph of the Proclamation as nations or tribes of Indians with whom the King was connected and who lived under his protection ; and it appears from the report of the Lords of Trade, dated June 8, 1763, on which the Proclamation was based, that the Indians so described consisted of those tribes of the six nations who were settled round the Great Lakes or beyond the sources of the rivers which fell into the river St. Lawrence from the north. This description would not include Indians residing beyond the sources of the rivers which flow into the gulf of St. Lawrence or into the Atlantic. It is true that the exception of lands and territories included in the three new governments or the Hudson's Bay territory does not apply to lands in the "coast" annexed to Newfoundland ; but if the Indians in the "coast" territory were not included in "the said Indians," it was unnecessary to except them. Nor would the lands occupied by these Indians fall within the general description contained in the Proclamation as "lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west." Further, the Nascopies and Montagnais, so far as they had taken any part in the Anglo-French conflict, had sided with France, and they were not connected with or under the protection of the King before the cession of the French

territory to him. The instructions given to Governor Graves in the earlier part of the same year had required him to report as to the establishing or carrying-on of a commerce with the Indians "inhabiting the coast of Labrador"—a direction which was repeated in the instructions to the Governors appointed immediately after the Proclamation, but which was omitted in those given after 1774, when Labrador was withdrawn from the government of Newfoundland; and such a direction would have been out of place if the Indians settled in Labrador had been altogether excluded from the Governor's jurisdiction. Upon the whole, their Lordships are of opinion that this argument, although well deserving of consideration, is not well founded.

It is said that the territory claimed by Newfoundland is of great extent, being about twice the size of Newfoundland itself; and no doubt this is the case. But the territory in question, when compared with the vast regions with which the British Government was dealing at the time, was relatively small in area and infinitesimal in value.

The colony of Newfoundland claimed to support its case founded on the documents by a reference to evidence showing that the annexation of the "coast" had from the year 1763 onwards been understood and treated by everyone as including the whole area lying between the sea and the watershed or "height of land"; and there is no doubt that, where a document is ambiguous, evidence of a course of conduct which is sufficiently early and continuous may be taken into account as bearing upon the construction of the document. In this case the events of the 60 years next after the year 1763 have a special relevance, as the statute of 1809 (under which the present title of Newfoundland directly arises) and the statute of 1825 may be assumed to have been passed with knowledge of the public events which had occurred before their passing. It may be added that it was a term of the agreement between the two governments that in the discussion before this Board reference might be made to any evidence which (having regard to the nature of the case and the parties to it) the Board might think material and proper to be considered; and that throughout the discussion, which was conducted in the most friendly spirit, both parties were desirous that no available material which might possibly bear upon the question to be decided should be excluded from consideration.

In this connexion the following facts, which were proved, appear to their Lordships to be material and proper to be considered:—

(1) In the year 1765 the Unitas Fratrum, a society of Moravian missionaries, petitioned the Lords of Trade for the allotment to them of four tracts of land on the coast of Labrador containing together about 400,000 acres, with a view to the settlement there of missions to the Eskimos; and with the approval of the Lords of Trade missionaries were sent out by the society and received the support and protection of Governor Palliser. At a meeting of the Privy Council held on May 3, 1769, upon a report of the Lords of Trade recommending that a grant of land should be made to the society, the King in Council authorized certain British subjects as trustees for the Unitas Fratrum to occupy and possess during his Majesty's pleasure 100,000 acres of land in such part of Eskimo Bay on the coast of Labrador as they should find most suitable to that purpose, and directed the Governor of Newfoundland to give them all reasonable assistance and support in forming their establishment. This grant was duly made, and early in the year 1774 two other similar grants to or in trust for the society of 100,000 acres each were sanctioned by the Privy Council and committed to the Governor of Newfoundland to be carried out. In the year 1821, after the retransfer of Labrador to Newfoundland, a fourth grant of a like nature was made to the same society. The lands so granted to the society of Unitas Fratrum penetrated into the country far beyond the suggested limit of one mile from high-water mark, and in the case of the most northerly of them to a distance of about 30 miles from the shore. It would appear that these grants, connected as they were with the Government of Newfoundland, were consistent only with the existence of a Newfoundland jurisdiction extending beyond the littoral strip; and it is hard to believe that when, in the year 1809, Parliament restored to Newfoundland the coast of Labrador, it intended to divide the Moravian settlements then in existence, placing a small fraction of them (one mile in width) under the jurisdiction of the colony and leaving the remainder to Canada.

(2) In the year 1774 John Agnew and others having petitioned for a grant of mines and minerals to be discovered on the "coast or country of Labrador" between the river St. Lawrence and Hudson's Straits, the King in Council approved of the grant to them of all such mines and minerals "upon such parts of the sea coasts of Labrador as lie within 60 miles of low-water mark of the open sea" between the river St. John and the southern limits of the territories granted to the Hudson's Bay Company. This grant appears to treat the "coasts" as extending far inland from the shore.

(3) The administration of justice in Labrador has throughout been under the direction of the Government of Newfoundland. In the early years after the annexation it was found sufficient, as in the case of Newfoundland itself, to administer justice by the agency of naval surrogates exercising their functions on board their vessels or from some place close to the seashore. But by the Act of 1809 (section 15) it was enacted that the Supreme Court of Judicature of Newfoundland might hold sittings for criminal and civil cases in the parts of the coast of Labrador by that Act re-annexed to Newfoundland; and by an Act of 1811 the institution of surrogate Courts for that purpose was authorized. By an Act of 1824 the Government of Newfoundland was empowered to institute a Court of civil jurisdiction on the "coast" itself, and to appoint a Judge of such Court; and Judge Patterson, the Judge so appointed, exercised his functions at various places in the Labrador territory, including Rigolet, Kimmamish, and North West Brook, places which would have been far outside his jurisdiction if it had been limited as suggested by the Dominion in this inquiry. In 1834 the Legislature of Newfoundland, which had then been established, abolished the Court in Labrador on the ground of expense; but by an Act of the same Legislature passed in 1863 the Governor was empowered to institute "at the Labrador" a Court of civil and criminal jurisdiction to be presided over by one Judge to be appointed by the Governor in Council, and with an appeal to the Supreme Court of Newfoundland, and to appoint such Judge to be a collector of revenue on the Labrador. This Court was duly set up and was presided over by Judges Sweetland, Pinsent, and McNeil successively; and it continued to function until 1874, when it was discontinued. Each of these Judges, in addition to performing his judicial duties, made reports from

time to time to the Governor on a number of questions relating to the territory of Labrador, including roads, schools, churches, and the fur trade. Among other incidents may be mentioned a visit of Judge Pinsent in 1873 to the North West River (about 100 miles from the open sea), when a Government official vaccinated a number of Montagnais Indians coming there for trade.

(4) Customs duties have been levied on behalf of the Government of Newfoundland on goods disembarked in Labrador from about the year 1826 until the present time, and the right of the government to collect such duties has from time to time been affirmed by the Secretary of State. In the year 1864 Mr. Donald Smith (afterwards Lord Strathcona), who was in control of the Hudson's Bay Company's trading station at North West River, agreed after some demur to pay the duties on goods landed at that place; and such duties have since been regularly paid.

It may be added that a considerable trade in fur was carried on by traders settled at or near the seashore or on the shores of the Hamilton inlet with the Indians in the interior, and was fostered by the Governor of Newfoundland; but a trade of this character would easily reach beyond the territory of the traders themselves, and it has little bearing on the question of boundary. A similar observation applies to the trade carried on by the Indians with the King's Posts in the province of Quebec, on which counsel for Canada relied. No evidence was given of any exercise of a Canadian jurisdiction in any part of the territory in dispute.

It seems desirable to add some observations on the maps, of which a large number (some of great antiquity and interest) were produced by the parties. [The maps contained in the collection put in by the Dominion are referred to by their numbers following a C, and those contained in the atlas put in by Newfoundland by their numbers following an N.] Maps published by private persons must, of course, be received with caution, as such persons depend to a large extent upon information obtained from general and unauthoritative sources; but from a map issued or accepted by a public authority, and especially by an authority connected with one of the governments concerned, an inference may not improperly be drawn.

The maps issued before 1763 have no direct bearing on this case, although some of them have been already referred to as instances of the use of a watershed or "height of land" as the boundary of a territory; and the later maps down to the year 1842 are of little use, except that they clearly indicate the whole course of the river St. John as the eastern boundary between Quebec and Labrador. Arrowsmith's map of British North America (N 24), published in 1842, is interesting as showing a line drawn from Ance Sablon northward to the fifty-second degree of north latitude and then along that parallel to the head of the St. John River as being at that point the boundary between Lower Canada and Labrador, thus indicating that the construction of section 9 of the Act of 1825 now put forward by Newfoundland was then adopted by the cartographer. The same indication of boundary appears, with greater authority, in the map (N 25) prepared in 1855 by T. C. Keeper, C.E., on the instructions of the Government of Canada for the use of the Canadian Commissioners at the Paris Exhibition. Arrowsmith's map of 1857 (N 26) has some authority as having been ordered to be printed by the House of Commons for the purposes of the Hudson's Bay Committee of that year, and as having been selected as an exhibit in the Alaska Boundary case; and that map not only has a similar indication as to the southern boundary of Labrador, but assigns to that territory the exact boundaries now claimed for it on behalf of Newfoundland. The same observation applies to a map (N 31) prepared in 1871 by two Canadian officials (Russell and Mare) on the order of the Canadian Minister of Agriculture, and to a map (N 32a) compiled by Desbarats in 1873 and sent by Lord Dufferin, as Governor-General of Canada, to the British Ambassador in Washington as showing "the exact boundary on the coast and the assumed boundary in the interior." The dispatch of the Governor-General transmitting this map enclosed a copy of the report of a Committee of the Privy Council approved by the Governor-General in Council on November 12, 1874, which was in the following terms:—

"In a despatch dated 20th June, 1874, from Sir Edward Thornton to Your Excellency, inclosing a communication from the Hon. Hamilton Fish, Secretary of State at Washington, desiring to be informed whether any part of Labrador is separated from the jurisdiction of either the Dominion of Canada or that of Newfoundland.

"The Honourable the Secretary of State to whom this despatch, with enclosures, has been referred, reports that the boundary-line between the Dominion of Canada and Labrador is a line drawn due north and south from the Bay or Harbour of Ance au Blanc Sablon, near the Straits of Belle Isle, as far as the 52nd degree of north latitude; that Labrador extends eastward and northward from that point to Hudson's Straits.

"That the division-line in the interior separating Labrador from the Dominion of Canada has only been defined as far north as the 52nd degree of north latitude, but it has been assumed that the boundary-line in the interior would have taken the direction laid down on the accompanying map, which follows the height of land.

"That Labrador, with the islands adjacent thereto, is annexed to Newfoundland, and under the Government of that Island.

"Attached to the Report of the Secretary of State are extracts from the Imperial Statute bearing on the question, and a map showing the exact boundary on the coast and the assumed boundary in the interior.

"The Committee recommend that a copy of this Minute with the map and extracts from the Imperial Statute, above alluded to, be transmitted to Sir Edward Thornton for the information of the United States Government."

The terms of this report appear to their Lordships to be significant.

The maps subsequent to 1874 are not less interesting. The boundary now claimed by Newfoundland is assigned to Labrador by a map (N 35) prepared by Johnston in 1878, signed by the Surveyor-General of Canada and published by order of the Ministry of the Interior; in a map (C 36 and N 36) prepared by Johnston and Edmunds in 1882 and issued by the Canadian Department of Railways; and in a map (N 38) compiled by two French-Canadians (Tache and Genest) and issued by the Department of Railways of Quebec in 1883. In a map (C 37 and N 39) prepared by J. Johnston by authority of the Minister of the Interior and issued by the Department of the Interior at Ottawa in July, 1890, the height of land now claimed by Newfoundland as a boundary is shown by a red line; and though it is not clear on that map whether it is intended to be taken as

the boundary between Canada and the Dependency of Newfoundland, no other boundary is indicated. This observation does not apply to a map (N 41) issued by the Department of Railways and Canals of Canada in 1891 and signed by the Chief Engineer of Government Railways, for in that map Labrador is clearly shown as bounded by the height of land; nor to a map (N 43) published by the Map and School Supply Company of Canada, Limited, and registered with the Department of Agriculture, in which "Labrador (Dependency of Newfoundland)" is depicted in bold colours as containing (subject to a slight difference to be mentioned hereafter) the precise area for which Newfoundland is contending. In the important map (N 42) prepared by Mr. A. P. Low, an official of the Canadian Geographical Survey, as the result of a careful survey of the country and issued by that department in 1896, the approximate height of land is shown, though not as a boundary; but the line drawn due north from Ance Sablon to the fifty-second parallel is shown and marked "boundary line." No other boundary of Labrador is indicated in that map. It is not until the year 1900 that the boundary now claimed by Canada is found upon any map; but it then appears upon a map (C 39) issued by the Department of the Interior, where a dotted line is drawn along the line of the shore and is marked "boundary undefined." It is also found in later maps; but as these were published after the dispute had arisen, no importance attaches to them.

The maps here referred to, even when issued or accepted by departments of the Canadian Government, cannot be treated as admissions binding on that Government; for even if such an admission could be effectively made, the departments concerned are not shown to have had any authority to make it. But the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion.

Upon the whole, their Lordships, having considered the facts and arguments put before them with the care which is necessary in a matter of such grave importance, have come to the conclusion that the claim of the colony of Newfoundland is in substance made out; but there are two points of detail to be mentioned.

First, in many of the maps issued after the year 1882, and particularly in the official maps above mentioned and numbered N 38, 41, and 43, and in maps issued by W. and A. K. Johnston (N 37) and by Stanford (N 40), the southern boundary of Labrador is shown as running, not from the point where the north and south line drawn from Ance Sablon meets the fifty-second parallel, and in a straight line along that parallel, but from a point where that north and south line would reach the watershed north of the fifty-second parallel and along that watershed as far as the head of the Romaine River. A boundary so drawn along the watershed would no doubt be more convenient than one which follows the arbitrary line of the fifty-second parallel, and would have the advantage of throwing into Canada the whole course of the rivers which run into the gulf of St. Lawrence. But their Lordships would not feel justified in adopting a boundary which, however convenient in itself, is not warranted by the terms of the statute of 1825; and they are of opinion that the line must be drawn along the parallel as far as the supposed river of St. John—namely, the Romaine River. According to the claim of the colony as illustrated by the sketch-map, the line would be continued westward across the river until it met the height of land; but there is no warrant in the statute of 1825 for such a continuation of the line, the effect of which would be to give to Newfoundland a part of the original province of Quebec as constituted under the Proclamation of 1763. The line should follow the parallel only until it meets the river, and should then turn north to the watershed.

Secondly, a small island called Woody Island, lying opposite to the bay of Ance Sablon, is claimed both by Canada and by Newfoundland. In their Lordships' opinion the transfer to Canada by the Act of 1825 of so much of the coast as lies to the westward of a line drawn due north and south from the bay or harbour of Ance Sablon "inclusive," with the islands adjacent to that part of the coast, carries with it Woody Island, which accordingly belongs to the Dominion.

For the above reasons their Lordships are of opinion that, according to the true construction of the statutes, Orders in Council, and Proclamations referred to in the Order of Reference, the boundary between Canada and Newfoundland in the Labrador Peninsula is a line drawn due north from the eastern boundary of the bay or harbour of Ance Sablon as far as the fifty-second degree of north latitude, and from thence westward along that parallel until it reaches the Romaine River, and then northward along the left or east bank of that river and its head waters to their source, and from thence due north to the crest of the watershed or height of land there, and from thence westward and northward along the crest of the watershed of the rivers flowing into the Atlantic Ocean until it reaches cape Chidley; and they will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Burn and Berridge; Messrs. Charles Russell and Co.]

K.B. Div. (Sankey, J.) 1927. Mar. 1.

BRITISH AND NORTH EUROPEAN BANK, LIMITED v. ZALZTEIN.*

Bankers—Overdraft—Fraudulent book-entries by manager for own advantage—Notional credit and debit—Rights of customer.

The account of a customer with the plaintiff bank was overdrawn. The manager, for the purpose of concealing the overdraft from the auditors, fraudulently credited the account with a sum sufficient to put it in credit, and subsequently debited it with a similar sum. In an action by the bank against the customer,

Held, that the customer could not rely upon the credit as payment and repudiate the debit as being unauthorized.

This was an action tried in the Short Cause List before Mr. Justice Sankey. The plaintiff bank claimed from the defendant £2,392 8s. 6d. upon the balance of an overdrawn account. The defendant denied liability by reason of circumstances which he alleged to amount in law to payment. The facts appear fully from the judgment.

Mr. Pritt appeared for the plaintiff bank; the Hon. S. O. Henn Collins for the defendant.

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* Reported by J. W. Hall, Esq., Barrister at-Law.

MR. JUSTICE SANKEY read the following considered judgment :—The plaintiff bank claim the sum, subject to adjustment, of £2,392 8s. 6d., being a balance alleged to be due by the defendant to them in respect of the defendant's account with them for money lent, bank charges and interest ; in other words, for a sum due in respect of an overdrawn account. In fact the sum in question is the amount of the overdrawn account.

The defendant himself has not paid anything in respect of it and the plaintiffs are entitled to recover unless, as the defendant alleges, the circumstances of the case permit him to say that in law the overdraft has been paid off. Those circumstances are as follows : Towards the end of 1923 the defendant had two accounts with the plaintiff bank, being overdrawn on No. 1 to the extent of £600 and in respect of No. 2 to the extent of £2,300. A Mr. Wizotzky had guaranteed the defendant's overdraft up to £2,000, and so the defendant's accounts were in debit to the extent of £900 in excess of his allowed overdraft.

The bank manager, a man of the name of Kiaer, who gave evidence before me which I accept, was anxious about the accounts but could not get Wizotzky to put them in credit. Kiaer did not want his company or the auditors to see that the accounts were overdrawn ; no doubt he would have been reprimanded if it had come to their notice. He therefore set about to think how he could get the accounts put in apparent credit. He had at that time a power of attorney from a Mr. Rist, his brother-in-law, and so in September, 1923, he put £2,000 from Rist's account to the apparent credit of the defendant's No. 1 account. The result of his so doing was to put that account into apparent credit, while No. 2 account showed a debit of £2,260 19s. 6d. Subsequently on October 3, 1923, he caused the defendant to be apparently debited in his No. 2 account for that sum, and on October 11 transferred the £2,000 apparent credit from No. 1 account to No. 2 account.

Kiaer in giving evidence before me very frankly admitted that he carried out this manœuvre in order, in his own interest, to deceive the auditors of the bank. He never told anybody about it for some time. The defendant never knew about it for weeks afterwards, but in a letter to him dated November 14, 1924, his account was enclosed showing the book entries above referred to and showing a debit of £300 0s. 7d. in respect of No. 1 account and a debit of £2,375 13s. 6d. in respect of No. 2 account.

Subsequently Rist's account was altered by transferring a credit of £2,000 to him. The net effect of these transactions was to leave the position of the defendant exactly as it had been. The credit and debit were, without begging the question, mere notional book entries. The defendant was repeatedly pressed for payment of the overdraft and copies of the account were sent to him ; in fact, as above stated, he himself did nothing to liquidate the overdraft and at last a writ was issued.

In the proceedings under Order XIV. the defendant filed an affidavit in which he had alleged that his guarantor Wizotzky had paid the sum of £2,000 on his behalf, and the case was remitted for trial. Subsequently, as I was informed, the defendant obtained an adjournment in order that he might prove these facts. The adjournment was granted, but he would never have been able to prove such facts, for Wizotzky had never paid it at all. All that had taken place had been, as above stated, that certain book entries had been made.

When the matter came before me the defendant was unable to prove that Mr. Wizotzky had in fact paid the money, nor was he able himself to go into the witness-box, but then for the first time the point was taken for him that he was entitled in law to rely upon the above facts as constituting payment. The way in which the case was put for him was as follows : (1) That when the £2,000 was placed to his credit in the way above mentioned that £2,000 was a payment to him and became his and his overdraft was liquidated to that extent. (2) That the bank had no right or authority to make the subsequent debit, and therefore their act in doing so was void and he was entitled to rely upon the £2,000 as a payment to him and to his credit and to disregard the debit.

The question for decision is whether he is so entitled. I was referred on the defendant's behalf to the cases collected under the case of *Marriot v. Hampton* (2 Smith, L.C. 403) with regard to money paid under mistake and also to the case of *Eyles v. Ellis* (4 Bing., 112).

Before discussing the matter it is necessary to find or to emphasize certain facts. (1) The defendant never knew anything about these transactions at the time when they took place, and the first time when he knew anything about the book entries was after both the credit and the debit had been made, and when the account showed the sum (subject to adjustment) now sued for. (2) The defendant never objected to the accounts as delivered to him and never took this point till the hearing of the case. (3) The manager of the bank made the book entries for his own purpose to deceive the auditors. (4) The bank itself knew nothing about these transactions.

Dealing with the law, I am of opinion that the cases which have been decided on mistakes of fact have very little to do with the present case. Indeed, the defendant contended that there was no mistake here, for the bank manager did what he intended to do and did not do it in consequence of any mistake or misapprehension, the main argument for him being that he was entitled to treat the entry as payment, and he cited the case of *Eyles v. Ellis* (*supra*) as being in his favour.

In my view that case is wholly distinguishable. There the plaintiff and the defendant each kept an account with the same banker. The plaintiff desired the defendant to pay in to his account a sum due to him for rent. The defendant wrote stating that he had caused the amount to be transferred to his account, and the banker wrote to the plaintiff to the same effect. At the time when the transfer was made in the books of the banker the defendant's account was overdrawn. The bank having stopped payment, it was held that the transfer was equivalent to payment by the defendant to the plaintiff. Chief Justice Best said that, though no money was actually transferred, yet as the bankers gave the plaintiff credit for the amount, that was equivalent to an acknowledgment by them that they had received the rent from the defendant on account of the plaintiff, and the plaintiff might then have drawn for the sum thus transferred. See Hart on Banking, 3rd Edition, page 214.

It is true that the entries were made by clerks in that case, but it was not suggested that the clerks had no authority to make them or that they were making them for their own purposes only. In the present case the manager was making the entries in fraud of his employers and for his own purposes.

The law applicable to the subject is, in my view, rather to be found in that branch which deals with the effect of entries in passbooks, and the real question is, has there been payment in this case ?

The present position of the law is said to be most unsatisfactory. See Paget on Banking, 3rd Edition, page 344. I do not think that it can be dogmatically asserted that an entry made in a passbook is in all cases conclusive and binding on the bank, or conclusive or binding upon the customer, but each case must be judged on its own particular facts, although the customer in whose favour the entry stands starts with the advantage that *prima facie* it is an admission by the bank in his favour which cannot in some cases be rebutted. Mr. Justice Bigham has said that statements in a passbook are statements on which a customer is entitled to act. See *Akrokerri (Atlantic) Mines, Limited v. Economic Bank* (20 *The Times* L.R., 564; [1904] 2 K.B., 465). That may be so in certain events, but, if a customer after some months examines his passbook and sees a credit of £2,000 and a debit of a similar amount immediately after and knows nothing about either entry, is he entitled to say: I will act on the credit and disregard the debit? Is he entitled to regard and accept the credit as a payment and to disregard and repudiate the debit? In my opinion he is not.

I think, too, that in every case where it is sought to treat a mere book entry as a payment, some other circumstance must be present and relied upon to enable the customer in whose favour it is made to succeed, either some express previous authority to pay, some communication of the circumstance to the defendant and some action on it by him (see *Eyles v. Ellis* (*supra*), and *Skyring v. Greenwood*, 4 B. and C., 281), so that there may be something in the nature both of a payment by one party and of a receipt by the other, or some alteration by the customer, in whose favour the book entry was made, in his position to induce the Court to say that the entry was payment and that the money cannot be recovered from him.

In this case the defendant never knew of the entry or alleged payment till after a debit of a similar amount had been made, and never altered his position because of it, and although it cannot be said that mere acquiescence in the debit entry binds him (see *Kepitigalla Rubber Estates, Limited v. National Bank of India*, 25 *The Times* L.R., 402; [1909] 2 K.B., 1010), there is ground for saying that there was no payment at all in this case. See *Holt v. Markham* ([1923] 1 K.B., 504, *per* Lord Justice Scrutton, at p. 514).

I find (1) that the bank manager never meant the entry to be a payment or to appropriate it as such; (2) that the defendant himself eventually knew of it and never regarded the entry as a payment. In these circumstances I am of opinion that the entry was not a payment and cannot be relied upon as such.

In the result the plaintiffs are entitled to judgment, the exact figures of which I was told would be adjusted by the parties.

[Solicitors—Messrs. Guedalla, Jacobson and Spyer; Messrs. Stephenson, Harwood and Tatham.]

Court of Appeal. } 1927.
(Bankes, Scrutton, and Atkin, L.JJ.) } Feb. 21.

IN RE THE RAILWAYS ACT, 1921—EX PARTE MANCHESTER SHIP CANAL COMPANY AND DOCK AND HARBOUR AUTHORITIES ASSOCIATION.*

Railways — Standard charges — Ancillary business — Dock undertaking — Consideration of amount of dock charges—Railways Act, 1921 (11 and 12 Geo. V., c. 55), s. 58 (4).

By s. 58 (4) of the Railways Act, 1921, "When fixing the charges necessary to produce the standard revenue, the Tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal, and if in the opinion of the Tribunal the company is not making, or has not taken reasonable steps to enable it to make, adequate charges in respect of any such business, the Tribunal shall, in fixing the charges under this part of this Act, take into account the revenue which would be produced by any such business if adequate charges were in operation."

Held, that under this provision, where a railway company is carrying on a dock undertaking as an ancillary business, the conclusive test as to what is railway service and what is dock service is not whether the service has been performed within the territorial ambit of the dock undertaking, but the Railway Rates Tribunal has to take into consideration the different operations which make up the business of a dock undertaking and for which separate charges are made, and the Tribunal may come to the conclusion that some of the charges are subject, and some are not subject, to its jurisdiction.

These were appeals from an order of the Railway Rates Tribunal in reference to the principles on which standard railway charges should be fixed under the Railways Act, 1921.

The main question in dispute was with regard to the extent of the railway-owned dock undertakings whose rates were outside the jurisdiction of the Tribunal. The Tribunal decided that the docks consisted of the water spaces, quays, pontoons, &c., but did not include the dock lines. The appellants, the Manchester Ship Canal Company and the Dock and Harbour Authorities Association, contended that the Tribunal's definition of the limits of the railway docks enabled the railways to put what were really dock charges on to other rates and thus exposed the independent docks to unfair competition.

Under the Railways Act, 1921, the net annual or standard revenue of the respective amalgamated companies was to be obtained from two sources—namely (*a*) railway charges, and (*b*) other sources of revenue. What the other sources of revenue did not supply, the railway charges had to make up. The Tribunal was engaged in estimating what "other sources of revenue" would contribute to the revenue of the "A" year. Each of the amalgamated companies had deposited "estimates of revenue from other sources for the 'A' year."

In connexion with those "estimates" of revenue from "ancillary and subsidiary businesses," the statute imposed a duty on the Tribunal by section 58 (4), which was as follows:—

"When fixing the charges necessary to produce the standard revenue, the Tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal, and if in the opinion of the Tribunal the company is not making, or has not taken reasonable steps to enable it to

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

make, adequate charges in respect of any such business, the Tribunal shall, in fixing the charges under this part of this Act, take into account the revenue which would be produced by any such business if adequate charges were in operation."

The Tribunal, having taken all the evidence into consideration, was not prepared to find that, in respect of the business of "docks, harbours, and wharves," of the respective companies, the companies were not making, or had not taken reasonable steps to enable them respectively to make, adequate charges. In their opinion the intention of the subsection was to prevent an available source of additional revenue from being disregarded and neglected on the part of the railways, and imposed the penalties prescribed by the section in cases where it was found that the railways were not making charges commensurate with, or equal to, the highest effective charges that they could make to secure more revenue. The Tribunal did not consider that the charges in force could be held to be inadequate, because they were the highest that could legally be made, and, in addition, higher charges would be ineffective to produce a greater revenue.

The Manchester Ship Canal Company and the Dock and Harbour Authorities Association appealed.

Sir John Simon, K.C., and the Hon. Stafford Cripps appeared for the Manchester Ship Canal Company; Mr. Craig Henderson, K.C., and Mr. J. Forster for the Dock and Harbour Authorities Association; Mr. Tyldesley Jones, K.C., Mr. Bruce Thomas, and Mr. Tylor for the Railway Companies; and Mr. Bowstead for the Ministry of Transport.

Lord Justice Bankes, in delivering his considered judgment, said:—These appeals are from a decision of the Railway Rates Tribunal, a statutory body set up by the Railways Act, 1921, for the purpose, among other things, of settling the schedule of standard charges which the railways as from the appointed day may make for all services rendered in respect of which the charges are fixed. By section 26 of the Act the same right of appeal is given as was conferred in the case of the Railway and Canal Commission by section 17 of the Railway and Canal Traffic Act, 1888, which right includes the right to appeal upon any question of law. The Railways Act, 1921, lays down a number of principles and rules which the Tribunal is to follow in settling the schedules of charges. It is obvious that in the course of deciding how far the schedules submitted by the railway companies do, or do not, comply with the statutory requirements of the Act, and in deciding from what point of view the Tribunal is to approach the consideration of those schedules, questions of law must continually crop up.

The Tribunal appears to be under no obligation to give any intimation what decision it may have arrived at on any question of law, or to give any reasons for its decision. It is, however, manifestly to the interest of all parties concerned that when an important question is raised upon which either the Tribunal, or the parties interested, desire the decision of this Court, the Tribunal should state what its decision is, and the reasons for it, so as not only to give a right of appeal, but also to inform this Court what the grounds of the decision were.

In the present case this has been done. A formal judgment in the form of an order and declaration was drawn up and issued on May 28, 1926. It is from this decision that the present appeals are brought.

The appellants are the Manchester Ship Canal Company and a body representing dock interests who appeared before the Railway Rates Tribunal as interested parties. Their present complaint is that the Rates Tribunal put a wrong construction upon certain directory provisions of the Railways Act, 1921, with the result that they, as independent dock companies competing with railway-owned dock undertakings, are placed in a much less favourable position than, under the Act, they are entitled to be put.

The whole question turns upon the proper construction to be placed upon section 58 (4) of the Act.

His Lordship read the subsection and proceeded:—

The construction of this subsection was considered by the Tribunal in a judgment delivered on December 1, 1925. The question then before it had reference to the charges made by railway companies for collection and delivery and for warehousing. It had there been contended, as it was contended in the present appeal, that section 58 (4) was a protective section inserted by Parliament in the interest of the independent dock companies. The Tribunal refused to accept that view. The President said:—

"This subsection seems to be in aid of the person called upon to pay the standard charges and to be designed to prevent him from being called upon to pay charges which contain an element of subsidy of certain other businesses which the railway companies may be carrying on. It assumes that he will be doing so if the charges in these businesses are inadequate."

I agree that this is the primary object of the statute, the terms of which, taken as a whole, plainly indicate in my opinion that Parliament had in mind in framing its provisions two parties—namely, the railways which perform the services, and the public who pay for them. It seems unnecessary to decide whether Parliament also had in view the position of the independent dock companies, because their interest in questions such as are raised in the inquiry before the Tribunal is such as clearly to entitle them to the *locus* which was granted them to appear as opponents of the railway companies' proposals and to claim that the true construction must be placed upon the subsection, whether it was inserted in the statute with the object of protecting their interests or not.

In order to follow the subsequent proceedings before the Tribunal reference must be made to the decision of December 1, 1925. It was in the following terms:—

"(1) That for the purpose of fixing standard charges under the Railways Act, 1921, (*a*) collection and delivery is a business carried on by the said railway companies, as ancillary or subsidiary to their respective railways; (*b*) warehousing as now undertaken by the said railway companies in connexion with their respective railways (including the provision of accommodation for storage under fixed space agreements) is a part of railway working and is not a business carried on by them ancillary or subsidiary to their respective railways. (2) That the charges in respect of the aforementioned business of collection and delivery are not charges which are not subject to the jurisdiction of the Tribunal within the meaning of section 58 (4) of the Railways Act, 1921, the adequacy of which the Tribunal can, under the said subsection, take into consideration in fixing standard charges. And the Court doth further order:—

"1. That the expenses of collection and delivery be omitted from the respective companies' estimates

lodged with the Court and marked respectively—" then the marks are given—

"and be transferred to their respective estimates—" then the marks of those are given.

"2. That to enable the Tribunal to fix the standard charges the said railway companies do from time to time as required furnish to the Tribunal accounts showing the properly ascertained receipts and expenditure from and on the services of collection and/or delivery as performed by them."

Although warehousing was dealt with as appears in the Order, the question then before the Tribunal was warehousing in general. At a later stage the question of warehousing on dock premises was raised, and argued before the Tribunal. On this question the Tribunal came to the decision of March 30, 1926, which is the subject of the present appeals. The decision of December 1, 1925, has not been appealed from. In order to follow the form of the Order of March 30, 1926, it is necessary to refer to the case presented to the Tribunal and to the arguments put forward in support of it. This very clearly appears from the speech of Mr. Cripps, appearing for the Manchester Ship Canal. He began by setting out the points to which he desired to call attention, and said :—

"There are two points which, in my submission, arise here on the consideration of other sources of revenue. The first is the definition of 'ancillary business,' and the second is the adequacy of the charges, and that second point divides itself into two : first, the meaning of 'inadequate,' and secondly, whether, on the proper interpretation of the word 'inadequate,' the charges are in fact inadequate. So far as my clients are concerned, they are particularly concerned to get the proper legal interpretation on the first two points. They submit on the facts shown that the charges are not adequate ; but that is not a point which so vitally concerns them ; the point which vitally concerns them is what they consider the final determination now of the Tribunal as to 'ancillary business,' because when the Tribunal comes to consider section 59 (6) they feel that the Tribunal will be bound by the decision which they now give as to the ambit of those ancillary businesses. I do not suggest that at this stage it would be profitable for the Tribunal to go into the details of each dock and settle the exact ambit of it, but on the other hand, knowing as we do that at the present time the form of this account is under revision by the Minister and the railway companies, it is obviously a very opportune moment for the Tribunal to give their decision on the point as to what an ancillary business is, so that the railway companies and the Minister may have the assistance of that decision when they come to re-cast their accounts under the Act."

He then proceeded to contend that, in construing the subsection in reference to docks, the entire business of the dock must be considered as the business carried on by the company referred to in the subsection, and that it is not legitimate to split up that business into warehousing, cooperage, &c., and treat each branch of the business as a business for the purposes of the subsection ; and further that, in determining what the business of the dock is, the ambit of that business must be determined by a consideration of the statutes creating the dock undertaking.

It followed from that contention, and it was freely admitted by Mr. Cripps, that no general rule could be framed applicable to all docks, because the case of each dock must depend upon its own particular statutes. His proposal to the Tribunal was :—

"What I propose to do is to examine one series of Acts, and if this Tribunal should lay down some such principle as that an ancillary business is a business defined by statute in which the charges are not subject to the jurisdiction of the Tribunal, I should suggest that then the whole matter might easily be referred to some person, perhaps the Minister of Transport, to decide in the case of each dock what was the ambit of the dock undertaking, with power to Parliament perhaps to refer it for reply to this Tribunal in case there is any insuperable difficulty : but as I anticipate, once the legal position is ascertained by this Tribunal the parties will probably have no great difficulty in themselves agreeing the actual ambit of the various docks."

He proceeded with the question of law arising upon what is the meaning in the subsection of the expression "adequate charges," which he construed as meaning charges sufficient in amount to defray the cost of the services and to give some reward upon capital, and he dealt with the contention that the railways were relying upon their charges being maximum charges. He completed his case with a contention that the railway companies had not complied with the Order of the Tribunal of December 1, 1925, directing them to furnish accounts of collection and delivery services.

The Order appealed from is in the following terms :—

"The Court doth order and declare as follows :—(1) That for the purpose of fixing standard charges under the Railways Act, 1921, (*a*) the estimates of other sources of revenue for the respective companies aforesaid as set forth in the tables R.T.2.c., R.T.3.c., R.T.4.c., and R.T.5.c. conform to and satisfy the requirements of the Railways Act, 1921, and be accepted. (*b*) That the ancillary or subsidiary businesses of docks, harbours and wharves carried on by the several companies aforesaid, are not businesses in which the several companies are not making or have not taken reasonable steps to enable them to make adequate charges in respect of such businesses. (*c*) That that position of the said estimates relating to joint lines and to collection and delivery be accepted."

I understand the last clause to have reference, in part at any rate, to Mr. Cripps's complaints that the accounts rendered by the railway companies were not in order, and this is confirmed by paragraph 4 of the notice of appeal of the Manchester Ship Canal Company. Nothing has been said in reference to this part of the appeal, and I pass from it to consider heads (*a*) and (*b*) of the Order and paragraphs 1, 2 and 3 of the notice of appeal.

The way in which the Tribunal dealt with the arguments addressed to it appears from its written judgment, to which I must refer. It sets out the capital expenditure of the four railways upon their dock undertakings, and goes on to say that except in the case of the Southampton Docks the figures do not include any expenditure on railway sidings and warehouses. It then goes on to explain that the railway companies have adopted a division of railway receipts and dock receipts by which all receipts and expenses in respect of railway sidings and warehouses, whether they are within the area of a dock or not, are included as railway receipts. The Tribunal treats this division as a satisfactory compliance with the requirements of the Railway Companies (Accounts and Returns) Act, 1911.

The Tribunal then proceeds to set out the objections

of the present appellants to the course adopted by the railway companies, and gives its decision in the following words :—

"In our opinion Parliament, when passing the Railways Act, 1921, must be assumed to have had knowledge of the Railway Companies (Accounts and Returns) Act, 1911, and the statutory form of accounts thereunder, and of the established practice in connexion with it, and in providing the methods which the Act contains for ascertaining railway charges must be deemed to have kept these statutory provisions as to accounts, and the practice which had been established under them, in view, and to have utilized the division of receipts and expenses which it contained as the basis upon which the provisions of the Act as to fixing charges should proceed. This, we think, appears upon a consideration of the terms of the Act of 1921."

It is not disputed that this decision is based upon a misapprehension. There was not at the time of the passing of the Railways Act, 1921, any settled practice ; only one set of accounts under the Act of 1911 had been delivered before the war, and with regard to that one set the practice was not uniform. No accounts were rendered during the war, or until after the passing of the Act of 1921. It follows that the Tribunal has, for a reason which cannot in law be supported, declined to take into consideration the matters submitted for their consideration by the appellants. Unless their decision can be supported on other grounds the appeal must be allowed.

Mr. Tyldesley Jones attempted to support the decision upon the ground that all the charges to which reference could be made were subject to the jurisdiction of the Tribunal. In support of this contention reference was made to section 28 (1) (*f*), section 59 (6), and Schedule V., para. ii. It was further contended that section 58 (4) was confined to the first fixing of standard charges, and, that being so, no meaning could be given to the part of the subsection referring to jurisdiction unless it was read as including the jurisdiction conferred by section 28 (1) (*f*) and Schedule V., para. ii. I do not agree with this contention.

In my opinion the jurisdiction conferred by section 28 (1) (*f*), not being exercisable until the appointed day, and then only for the purpose of determining questions brought before the Tribunal, is not the jurisdiction which is referred to in section 58 (4). Whether the draftsman had in his mind any particular form of exercise of jurisdiction when he drafted the subsection, or whether it was introduced merely as a matter of drafting because subsections 1 (*a*), (*g*), (*h*), and (*i*) of section 28 were not subject to the same restriction as subsections (*b*) to (*f*), I do not know. It seems to me, however, clear that when the statute expressly provides that certain powers of the Tribunal shall not be exercisable until the appointed day, it cannot mean that before that time the jurisdiction, though not exercisable, shall be deemed to be existing.

Mr. Tyldesley Jones made a further appeal to the Court not to send the matter back to the Tribunal, on grounds which it is unnecessary to go into, but which amounted to an appeal to us to exercise a discretion in the matter. Sir John Simon relieved us of any necessity to consider this question, as he stated quite early in his argument that his clients had no wish to compel the Tribunal to reconsider at the present juncture the decision to which it had come, the object of the appeal being to make it quite clear that on any further consideration of the questions involved the Tribunal must not follow its present decision, but must deal with the questions afresh and on entirely different lines.

How far the considerations which are material when section 58 (4) controls the situation will continue to be material when section 59 (6) is the controlling section I express no opinion. The question has not been argued. I merely call attention to the difference between the language of the proviso to section 59 (6) and that of section 58 (4).

It remains now to consider how far, if at all, it is possible to lay down any rule of construction which will guide the Tribunal in the future. This at least is clear, that the Tribunal must reconsider its decision. The appellants ask us to accept their test of what are railway and what are dock charges, and to decide as a matter of law that it is the correct test. I take the appellants' contention from their notice of appeal as supplemented by the draft form of order which Sir John Simon asked this Court to make.

In substance it amounts to this, that in the case of a dock undertaking, taken over, or acquired, by a railway company, the deciding and conclusive test of what is railway service and what is dock service is whether the service has been performed within the territorial ambit of the dock undertaking. If this principle were adopted it would no doubt apply to all docks and every kind of service in every dock. The difficulty of then deciding where the dividing line between railway undertaking and dock undertaking is to be drawn is attempted to be got over by asking for a direction of this Court to the Minister of Transport to find out and report to this Court where, in the case of every dock undertaking of the respective railway companies, the line is to be drawn. What jurisdiction this Court has to give any direction to the Minister of Transport I do not know, and in the view which I take of the appellants' contention it is immaterial to inquire.

I do not agree with the construction put upon the subsection that what the Tribunal has to do is to consider the business of the dock undertaking as one entire whole, and that it may not take into consideration the separate services which go to make up the entire business. I think that what the Tribunal is directed to take into consideration is not the business carried on by the company, but the charges in respect of any business carried on by the company. Under this direction the Tribunal is, in my opinion, entitled, and, under the last part of the subsection, specially directed, to take into consideration the different operations which go to make up the business of a dock undertaking, for which operations separate and distinct charges are made. If this construction of the subsection is correct it follows that the Tribunal may come to the conclusion that some of the charges are subject to and some are not subject to its jurisdiction. This conclusion of itself disposes of the appellants' main contention.

In addition to the difficulty in the appellants' way created by this construction of the subsection, there is also the decision of the Tribunal, upon a construction of the statute as a whole, that the charges for collection and delivery services within the dock area are subject to its jurisdiction. This decision has not been appealed from. There is the further difficulty, which, in my opinion, is insuperable, and that is that, in view of the number of dock undertakings, the diversity of provisions under which they were created or are operated and the different kinds of services which may be performed within the territorial ambit of a dock undertaking, it is quite impossible to lay

down any general rule which would cover every dock undertaking and every kind of service performed within the limits of the dock undertaking.

It may be that when the question of revision of charges arises the Tribunal may consider that, the appointed day having passed, its jurisdiction and powers under section 59 (6) are very different from what they are under section 58 (4), and that questions which are now material for consideration will be no longer material. But, assuming that this is not so, and that it will still have to consider what charges are or are not within its jurisdiction, it is impossible to frame an exhaustive list of all the matters which should be taken into consideration. Until all the facts relating to any particular service are known, no one can say what it is necessary to consider in relation to that service. This decision may seem to impose a grievous burthen upon the Tribunal, but it will not be greater than those which they have already borne, and which they have been materially aided in bearing by the good sense and assistance of the parties interested, which good will and assistance will no doubt be forthcoming in the future as in the past.

As the appellants have succeeded in displacing the decision of the Tribunal, the appeals will be allowed, but the only order made will be that the respondents pay the appellants' costs.

Lord Justice Scrutton.—This is an appeal from the Railway Rates Tribunal established under the Railways Act, 1921, to the Court of Appeal. This appeal is on questions of law only; there is no appeal as to questions of fact, or as to the *locus standi* of persons appearing before the Tribunal. Under this power of appeal the Dock and Harbour Authorities Association (which includes the Port of London Authority, the Mersey Docks and Harbour Board and the Clyde Navigation Trust, as well as numerous other Docks and Harbour Authorities), and the Manchester Ship Canal Company appeal to this Court against what they allege to be an erroneous decision in point of law of the Railway Rates Tribunal.

The question arises in this way. The Railways Act, 1921, which amalgamated the railways of Great Britain into four groups, proposed also to regulate their income and the charges from which it was partly derived. They were by section 58 (1) to be given a standard revenue which was to be equal to their net revenue in 1913 with additions to represent interest on capital since expended. This standard revenue was to be derived from "standard charges" for certain matters, with the addition of "other sources of revenue." The standard charges were to be fixed by the Tribunal at such a rate as would, with the other sources of revenue, yield, in the opinion of the Tribunal, the standard revenue; and there was to be a yearly revision to adjust charges to revenue required. But some of the "other sources of revenue" were businesses subsidiary and ancillary to the railways, in which the Tribunal could not fix the charges, and Parliament appears to have thought that it might be that the railways, by making insufficient charges in their subsidiary businesses, might require too much revenue to be raised from standard charges. To prevent this, Parliament, by section 58, subsection 4, required the Tribunal, if it considered that the charges of the companies in these subsidiary businesses were inadequate, but had not power directly to fix these charges at an adequate level, to attempt indirectly to make those charges adequate by only allowing so much standard revenue from "standard charges" as would be necessary if the subsidiary charges were adequate. In other words, inadequacy in subsidiary charges was, if possible, to be corrected by disallowing the amount of the inadequacy in estimating the revenue which should be raised from standard charges. This it was hoped would induce the railway companies to supply the amount which otherwise might be disallowed from standard charges, by raising their subsidiary charges to an adequate level. This provision certainly might protect the payer of standard charges on the railways from paying more in standard charges because the railways were making inadequate subsidiary charges. It also would tend to protect independent undertakings which competed with the subsidiary businesses of the railways from competition by means of charges inadequate for the subsidiary work done, which the railways were able to keep inadequate because they made up the loss out of standard charges on the user of railways. To carry out this object harbour authorities appeared before the Tribunal to say that the charges in docks subsidiary to the railways, or "railway docks," were inadequate to the capital involved and work done. They were given a *locus standi* by the Tribunal, and this decision is unappealable. Working out section 58, subsection 4, the Tribunal had to "take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal." The reason for the latter provision appears to be this. The Tribunal was fixing standard charges before "the appointed day" at which those charges were to come into operation. If at that time there were any subsidiary charges which it could at that time fix, in respect of such charges there was no need to attempt to correct their inadequacy by cutting down standard revenue and charges. It was only with regard to subsidiary charges which the Tribunal could not at that time fix, that it was necessary to use the indirect method of correcting their inadequacy, by giving the railway companies notice to make them adequate. This consideration, in my opinion, shows that the fact that after the appointed day (see section 28 (2) and section 55 of the Act) the Tribunal could, under section 28, and Schedule V., Clause ii., determine, on application by a trader, the reasonable charges which he should pay, does not make such charges, before the appointed day, charges subject to the jurisdiction of the Tribunal and therefore excluded from consideration under section 58 (4) of the Act. They cannot be fixed, where the consideration of standard charges is to take place.

The next question is, what are the subsidiary and ancillary businesses, the charges of which the Tribunal cannot fix but is to consider. We were told that one of the few things on which the parties before us were agreed was that railway docks and harbours were businesses ancillary and subsidiary to the railways. These might be of two classes: they might be docks originally constructed by the railways, or docks originally constructed as independent undertakings under Dock Act powers and then purchased or absorbed by railway companies under Amalgamation Acts; and in this latter case subsequent additions might have been made to them either under dock powers or railway powers. There were more than a hundred of these railway docks, differing widely in situation and statutory powers. For instance, the position at the Southampton Docks was completely different from that at the Hull Docks, and the individual docks at Hull differed considerably from each

other in the statutes applicable. It would seem an almost impossible task to lay down any general principle which would apply to all these various docks. The railway companies, however, proceeded to endeavour to do it, and persuaded the Tribunal that their attempted solution was right. It is a melancholy fact that their counsel now admit that the conclusion which they persuaded the Tribunal to come to was erroneous in law.

In considering the adequacy of charges in an ancillary dock business, a line had to be drawn to indicate where the dock ended and the railway began. The eminent accountant for the railway companies prepared a careful statement of what was included in the "dock," which he read to the Tribunal at answer 15,181, page 1166 :

"Water spaces, jetties, piers, pontoons, stathes, floating and graving docks, lock entrances, bridge plant, floating craft, cranes, coal hoists and shoots, bridges across docks—provided they are not for railway purposes—paths or roads for access to the area, workshops, stores and offices solely used by the company's staff engaged in the upkeep and working of the area, and any other appliances in connexion with the working of that area." This answer he shortened later in his answers to questions 15,520 and 15,521 : ". . . the properties and spaces dealt with as 'dock' you may take roughly as water spaces, quay walls and wharves." The last word is, of course, ambiguous, for it depends on how much of the "wharf" on the landward side you are considering.

Mr. Quirey does not seem to have been aware that on many quays the goods discharged from a ship go straight into a "transit shed" at the ship's side, where they are sorted, and some taken delivery of by consignees and carted away, and some taken away on trucks. He did not intend to exclude all dock warehouses from docks and include them in railways (A. 15,184), though the warehouses may have been part of the original dock undertaking and used largely or even entirely for goods which do not go on the railways at all. He did intend to exclude all dock railways, *i.e.*, lines of rail in the dock undertaking, and dock bridges, if they had lines of rail on them. He apparently did exclude (though whether he knew about their existence or not does not appear), all charges made for work done on land of the dock undertaking, or storage on that land, as, for instance, charges for storing timber in the open at Hull on land belonging to the dock undertaking, charges for "coopering" or mending casks or packages of goods discharged on the dock land, and there dealt with, and charges for rent or transit sheds, where goods discharged from a ship remained there for more than a certain length of time. Mr. Quirey said quite truly, "This is the division we are now making between dock and railway in our accounts." The Tribunal adopted the division as satisfactory, in its judgment of March 30, 1926, the judgment appealed against, and apparently the Tribunal adopted it because it took the view that it was an existing practice at the time of the passing of the Act of 1921 : "something which is already known does not require to be re-settled" ; and that the Act continues and utilizes a division which already exists. (Page 1318). This view appears to rest on a complete misunderstanding of the evidence, which it was admitted by counsel for the railway companies did not justify it. It appears that after the Railway Companies (Accounts and Returns) Act, 1911, which required a separate item of revenue and expenditure on "Docks, Harbours and Wharves," only one set of accounts had been presented by the various railway companies concerned, namely, in 1913, and the practice of the various companies in allocating revenue and expenditure "to docks" varied. (A. 15,202.) It further appeared that it was only after the passing of the Act of 1921, when it first became of importance to the companies to limit the items included in docks, that the companies more or less agreed on the division put forward by Mr. Quirey. I say "more or less," for it was clear that the Southampton Docks were treated in a different way. A division which did not come into existence till after the Act was passed cannot possibly have been recognized and continued by the Act. But acting on its view, the Tribunal excluded from its consideration all charges relating to dock undertakings except those specified by Mr. Quirey, and did not consider whether they were adequate. Whether this exclusion was right in law was the first question raised by the appeal.

I am of opinion that there is in the Act nothing which justifies the division stated by Mr. Quirey, and the exclusion from consideration of all charges on the landward side of it, and indeed counsel for the railway companies did not contend that there was. Docks, historically, are much older than railways. The statutes relating to the docks of London and Hull begin in the 18th century, when railways were not thought of ; and many of the present railway docks had their origin quite independently of railways, under Dock Acts. In 1847 the common clauses in Dock Acts were included in the Harbours, Docks and Piers Clauses Act, 1847, which in most Dock Acts since that date is incorporated in whole or in part. The scheme of the Act was that there was a dock undertaking, the harbour, dock, and pier, and the works connected therewith, including lands authorized to be used in connexion therewith, and section 33 of the Act of 1847 read as follows :—

"Upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

Section 83 gave power to the dock company to make by-laws for regulating the use of the harbour, dock, or pier, which had to be confirmed by a Judge of one of the superior Courts, and one of the subject-matters of by-laws was "for regulating the duties and conduct of the porters and carriers employed on the premises of the undertakers and fixing the rates to be paid to them for carrying any goods . . . from or to the same." The scheme of dues or tolls contained in the Acts was (1) a tonnage rate on vessels using the dock ; (2) a tonnage rate on goods using the dock undertaking. Questions, of course, arose as to the period for which these rates franked the vessel or goods, and this was dealt with by fixing, sometimes by by-law, sometimes by rate-book, a period after which "rent" began, whether the goods were stored in warehouses, transit sheds, or in the open on land of the dock undertaking. Further, the dock companies, from the first, performed services to the goods, of which cooperage or repairing breakages is a very good example, and from the middle of the last century it was common to find in Dock Acts a kind of omnibus clause authorizing reasonable charges for all services rendered to goods, a long list of special kinds of services being enumerated. Further, for a long time no railway engines were found in docks at all. Goods were brought and removed by various kinds of carts, and though the dock companies laid

down rails on docks, there were statutory provisions, as in the Hull Acts, that no locomotives were to be used on them ; trucks were to be moved on them by horse or man power. This, however, in each dock would vary with its history, its statutory authorities, and the extent to which, if a railway company which had not constructed it or absorbed it, railway powers were given by the relevant Acts, whether with or without the extension of dock powers. In fact the Act of 1921 contains in Schedule V., clause 9, a provision preserving to railway companies all their dock powers, a provision repeated from the rates and charges orders made before the passing of the Act. Clause 19 of the same schedule appears to prevent docks or shipping places, the charges for the use of which are regulated by Act of Parliament, from being treated by the railway companies as "terminal stations." Clause 11 (vii.) as to "dock charges" is also worthy of attention.

In view of this state of the law and facts, it appears quite impossible to extract from the Act of 1921 and the evidence the division between railways and ancillary businesses of docks which the Tribunal has adopted, and in acting on which it has excluded from consideration charges at dock warehouses or storage spaces, though none of the goods stored in them use railways, and all charges in respect of conveyance on railways in the dock, in whatever circumstances those rails were laid or charges were made for their use.

It follows that a point of law was wrongly decided by the Tribunal. The question is what is to be done. Counsel for the railway companies, while admitting after a time the error in law, urged that it would occasion excessive delay without any real benefit, if the Tribunal which had now fixed a scale of standard charges was required to withdraw it and reverse the whole schedule if a protracted investigation of individual railway docks should show that some charges therein were inadequate. Counsel for the harbour authorities were clearly afraid not so much of this prospect as of the effect on the Court of the prospect, and they said they did not want the schedule sent back and reconsidered, but would be content with a declaration which could be used by them at the next revision of standard charges. Sir John Simon, in the course of the argument before us, submitted a suggested form of declaration which, it is fair to the Tribunal to say, he had not submitted to it. It declares in effect that if accommodation has been provided under Acts authorizing the construction or maintenance of docks, all use of or services rendered in connexion with such accommodation are to be taken as part of the ancillary business of docks. I suppose it involves that if a railway company stores goods which have come by rail in a warehouse on land originally acquired for a dock undertaking, though those goods are never going to be shipped at all, the rent is to fall into dock business. In my view, it is quite impossible to make such a wide declaration which may affect some hundred docks, about whose statutory conditions and working history we know nothing. If a particular dock comes before us, with relevant findings of fact by the Tribunal, we can deal with any questions of law decided by the Tribunal in settling the sphere of the ancillary business ; but in making a general declaration affecting docks, of whose working conditions and statutory conditions we are ignorant, we may easily fall into the most hopeless errors.

I agree with both sides that the Tribunal was wrong in law when, accepting the demarcation between docks and railways submitted by the companies, it declined to take into consideration any matters on the railway side of that line. I agree with both sides that, although this is so, it is not desirable to reopen the whole of the present consideration of inadequacy of charge, with its possible result on the schedule of standard charges. The dock authorities, treating the matter generally, and with very slight reference to particular docks, got some such result as this. The capital invested in railway docks, they said, should have produced £700,000 revenue, and did produce £300,000 ; the amount of inadequacy was £400,000, which should be deducted from standard revenue. But the gross revenue to be raised by standard charges was about 200 millions ; the inadequacy was less than one-quarter per cent. of this, or less than 5s. in the £100, or a little over a halfpenny in the pound. If this inadequacy was spread over a hundred docks, it was minute in each, and there was no attempt to differentiate between particular docks.

It may be said that to decide nothing but that the Tribunal adopted a wrong line of demarcation in its construction of the statute, and to abstain from fixing the right line, does not help the Tribunal, and indeed the Tribunal is disposed to say that it will be impossible to work the Act, if it cannot adopt the line of demarcation in the railway accounts. I sympathise with its difficulties, but I think the answer is that Parliament has, probably without appreciating it, set it a very difficult task, which cannot be performed by treating all the docks of all the companies as one ancillary business to which one rate can be applied without considering the particular facts and statutes and charges of such docks. If when in future they consider, under section 58 (4), the adequacy of charges in ancillary businesses, no one and make a case that those particular charges are inadequate, its task is easy. If such an objector does come, it seems to me that he may be required, in the first instance, to take a particular dock with its particular circumstances and statutory history and make a case that those particular charges are inadequate, the line of dock business being drawn by the particular circumstances of that dock. Generally, without finally committing myself, it seems to me that warehousing, or storing exported or imported goods in the open on dock lands, the use of transit sheds, and services such as coopering, are dock and not railway charges. Charges for conveyance on rails on dock lands raise more difficult questions, and I should want to know how and under what powers the rails were laid down, and what statutes or by-laws are applicable to the rates charged, whether anything is charged for (*a*) use of the land on which the rails are laid, (*b*) use of rails so laid, (*c*) any and what kind of terminal charges, or whether the charge is merely for haulage, also how the expenses of maintenance are provided. I gather that the railway companies agree that such an inquiry would produce quite a different result in the case, for instance, of Southamption, from that in the case of some other docks. The result is that the appeal against the refusal of the Tribunal, by reason of its construction of the Act of 1921, to consider under section 58 (4) of the Act the adequacy of any charges of dock ancillary business other than those covered by Mr. Quirey's definition in answer 15,181, must be allowed because the Tribunal arrived at an erroneous construction of the Act for the reasons stated in its judgment. But the Court does not give any further directions as to reconsideration of adequacy of charges for ancillary business, or revision of the standard charges, which,

on the view taken by both sides before us, is undesirable at this stage. When the next revision of charges comes, the Tribunal, if called upon to act under section 58 (4), will have regard to the views expressed in the judgments of the Court as to the legal position.

The appeal must be allowed with costs.

Lord Justice Atkin.—In view of the admissions made by both parties and the judgments already delivered, I find it unnecessary to give a detailed judgment of my own. I agree with the reasons given by the other members of the Court for allowing the appeal.

There is one matter, however, which I think it desirable to mention. By reason of the wrong construction adopted by the Tribunal as to the extent of the subsidiary business in question it has been unnecessary to consider the precise meaning of the word "adequate" in "adequate charges" in section 58 (4). If ever it has to be considered it will probably be found to entail some consideration of the expenses of the business in respect of which the adequacy of the charges is being investigated. And, if this is so, it may be found that the problem of the delimitation of the dock undertaking will not be solved by merely ascertaining whether charges are dock or railway charges. The expenses of maintaining the dock structure on or in which railway charges are earned may be found to be dock expenses.

[Solicitors—Messrs. Grundy, Kershaw, Samson and Co.; Messrs. Chamberlayne, Keene and Co.; Sir R. F. Dunnell; Mr. H. L. Thornhill; Mr. A. G. Hubbard; Mr. W. Bishop; the Treasury Solicitor.]

Prob., Divorce, and Adm. Div. (Bateson, J.) } 1927. Feb. 4.

THE GOULANDRIS.*

Ship — Salvage — Lloyd's salvage agreement, "No cure no pay"—Maritime lien—Arrest under foreign jurisdiction—*Saisie conservatoire*—No maritime lien under foreign jurisdiction—Sale of ship by syndic (trustee) in bankruptcy of owner in Egypt—Arrest of ship, after sale, in this country.

The plaintiffs, a firm of salvage contractors, by a writ *in rem* claimed salvage for services rendered by them to the defendants' steamship under the terms of a salvage agreement in Lloyd's Standard Form, known as "No cure no pay," signed by the master. The agreement expressly provided that in the event of security not being given by the owners of the ship and cargo the salvors should be entitled to take steps to enforce their maritime lien. After the salvage services the ship was arrested in Constantinople, but she was released upon her owner undertaking that she would proceed forthwith to Alexandria and there submit to re-arrest until such time as security was provided. The vessel duly sailed from Constantinople, but before her arrival at Alexandria her owner had become bankrupt in Egypt, and the ship, on reaching the Egyptian port, was seized by his syndic or trustee in bankruptcy, and by that official sold, in the bankruptcy proceedings, to the defendants, free from encumbrances. An order obtained by the plaintiffs for a *saisie conservatoire* of the ship, in accordance with Egyptian law, was therefore ineffective. The plaintiffs proceeded to arbitration in accordance with the terms of Lloyd's agreement, and having obtained an award in the absence of the shipowners, entered a claim in the bankruptcy in Egypt for the amount of the award. The syndic, however, opposed the claim on the ground that the master had no authority to sign the salvage agreement, and that matter was now pending in the Egyptian Courts. No maritime lien or right *in rem* is recognized by Egyptian law, or conferred by a *saisie conservatoire*. After being sold by the syndic the ship came within the jurisdiction of the English Courts, and she was thereupon arrested by the plaintiffs in an action *in rem*. On a motion by the defendants to set aside the writ in that action,

Held, that the sale by the syndic was not a sale of the *res*, as a sale on a judgment in an action *in rem*, which would confer a title free from encumbrances, but was merely a sale of the interest of the bankrupt owner, and therefore a sale *cum onere*, and could not discharge the maritime lien of the salvors; that the salvors' maritime lien had not been discharged by the signing of the salvage agreement, because although Lloyd's salvage agreement was a bargain to arbitrate, the contract itself was based on the owner of the salved property providing security in the terms of the contract, and the salvors' lien could only be defeated if the whole of the salvage agreement was carried out; and that, in fact, security never had been provided in the terms of the agreement, and the plaintiffs were therefore entitled to maintain an action and assert their maritime lien.

This was a motion by the defendants to set aside the writ and stay proceedings in an action for salvage brought by the Ocean Salvage and Towage Co., Ltd., against the owners of the steamship Goulandris.

Mr. R. H. Balloch appeared for the defendants in support of the motion; Mr. C. R. Dunlop, K.C., and Mr. Harold Stranger for the plaintiffs.

In 1925 the Egyptian steamship Carston stranded near the Black Sea entrance of the Bosphorus, and the plaintiffs, the Ocean Salvage and Towage Company, entered into an agreement with the master, on Lloyd's standard form of salvage agreement—"No cure no pay"—to salve her. After the Carston had been refloated the plaintiffs demanded bail in the terms of the salvage agreement, and when security was not forthcoming they arrested the ship at Constantinople. The vessel was, however, released on an undertaking being given that she would proceed forthwith to Alexandria, and there submit to arrest until such time as security had been provided. On

* Reported by A. W. Grant, Esq., Barrister-at-Law.

behalf of the plaintiffs an order was obtained in Egypt for a *saisie conservatoire* of the ship, in accordance with Egyptian law, but before the arrival of the ship within Egyptian jurisdiction her then owner had become bankrupt, and when the Carston reached Alexandria she was at once seized by his syndic (or trustee) in bankruptcy, and sold by that official, in the bankruptcy proceedings, to Greek purchasers, the present defendants. The plaintiffs proceeded to arbitration under the terms of the Lloyd's salvage agreement, and in the absence of the shipowner the arbitrator appointed by the committee of Lloyd's (Mr. H. C. S. Dumas) awarded the plaintiffs £1,200 against the Carston and £500 against her cargo. The award against the ship being unsatisfied, the plaintiffs entered a claim in the bankruptcy in Egypt for the amount awarded, but the syndic recommended that the claim should be disallowed, on the ground that the master of the Carston had no authority to sign the salvage agreement. That matter was therefore pending in the Egyptian Courts. The evidence of a French lawyer who was called as a witness was to the effect that no maritime lien or right *in rem* is recognized by Egyptian law or conferred by a *saisie conservatoire*.

Upon the Carston—the name of which had been changed by her Greek purchasers to Goulandris—coming within the jurisdiction of the British Courts the plaintiffs, as unsatisfied salvors, issued a writ *in rem* and sought to arrest her. A solicitor's undertaking to put in bail was, however, given on behalf of the defendants, who now moved to set aside the writ and stay all subsequent proceedings.

Mr. Justice Bateson.—I cannot assent to this motion. The facts of the case seem to be that on November 26, 1925, a vessel, then called the Carston and now called the Goulandris, left Galatz on a voyage with cargo. On November 29 she grounded at a place called Sil Burnu, when services of a salvage character were rendered to her by a vessel belonging to the plaintiffs, the Cleopatra III., a well-known salvage vessel in those waters.

The services were rendered on the well-known Lloyd's form. That form is a "No cure no pay" agreement; that is to say, it is a salvage contract, and provides for security being given by the owners of the ship and cargo. Clause 5 says: "In the event of the security not being provided as aforesaid"—that is, as arranged in the contract—"or in the event of any attempt being made to remove the property salved contrary to this agreement, the contractor may take steps to enforce his aforesaid lien." That is, the maritime lien which he has, of course, on performing the salvage services.

That contract was signed by the master of the Carston on behalf of the owner of the ship and of the cargo, and by the master of the Cleopatra on behalf of the plaintiffs, and under that contract salvage services were rendered, and those services gave the plaintiffs who rendered them a maritime lien on the ship. They were salvage services rendered under a salvage contract.

On November 30 the vessel was refloated and taken to Constantinople. Negotiations then took place with regard to security, but that could not be satisfactorily arranged, and on December 7 the vessel was arrested in the Turkish Courts. Further negotiations followed. The owners of the cargo were very anxious to get the cargo to Alexandria, and the owner of the ship no doubt was also very anxious to get her away from Constantinople, because he was on the verge of bankruptcy. What happened was that the solicitors for the plaintiffs, the well-known firm of Catzeflis and Lattey, managed to arrange, as appears on page 8 (*b*) of bundle Z, for the arrest at Constantinople to be taken off, and for the ship to proceed with her cargo to Alexandria. The owners of the cargo were going to give security, and the owner of the ship was going to allow the vessel to be seized in Alexandria on what is known as a *saisie conservatoire*.

The terms are set out on page 8 (*b*) in this form:—"After a number of long discussions with the shipowner and cargo owners and their underwriters we succeeded in finding the solution to the problem, which we telegraphed to you forthwith in our cablegram of the 12th inst., *i.e.*, to obtain an order for the seizure of the vessel here upon her arrival with the consent of the shipowner, and at the same time to consent to the release of the vessel at Constantinople."

That is amplified in a letter from Mr. Paschalis, who was then the owner of the Carston, which letter is to be found on page 12 of bundle Z. He there says: "With the object solely of permitting the immediate departure of the Carston from Constantinople, and its arrival at Alexandria, as well as the immediate lifting of the embargo placed at present on the said vessel at Constantinople, and under formal reservation of all my rights, and notably of contesting later both the existence, the nature, the necessity and the extent of the services alleged to have been rendered by the Ocean Salvage Company, and the amount of the remuneration claimed by it, I agree to allow that the embargo placed by this latter on the s.s. Carston at Constantinople may be renewed on the arrival of the Carston at Alexandria in the form of a new conservative seizure, in guarantee of my contributive share of the average in question, in the event of its being eventually recognized as founded by the Mixed Tribunal, and that up to the maximum sum of £E2,500. In consequence, I authorize formally and irrevocably by these presents the Ocean Salvage Company to proceed immediately to obtain an order authorizing it to seize conservatively the s.s. Carston on its arrival at the port of Alexandria, whither I undertake to bring it immediately and directly from Constantinople, and I debar myself either from taking my ship from the said port of Alexandria, before I have furnished an equivalent guarantee, or from demanding the lifting of the above-mentioned conservative seizure under any pretext, and notably under the pretext that I may myself be domiciled at Alexandria, the home port of the Carston, and this until the full settlement of the dispute before the Mixed Tribunal of Alexandria."

So the owner was saying that he gave the plaintiffs an equivalent to the arrest in Constantinople by this conservative seizure in Alexandria.

That was assented to, and on December 24 the order so attaching the vessel was obtained from the Court, although the vessel had not then arrived.

On January 12—all this was done by cable—the Ocean Salvage and Towage Company, Limited, wrote to Lloyd's saying: "We beg to inform you that in respect of the salvage services rendered by us to the s.s. Carston we have now accepted the following arrangement with regard to the guarantee:—

"1. Messrs. P. Wigham Richardson and Co., Limited, open guarantee.

"2. Shippers at Alexandria on behalf of Hamburg interests, £3,000.

"3. Mr. C. D. Paschalis, attachment of ship at Alexandria.

"We have, therefore, wired to Constantinople to-day as follows: 'Carston. Satisfactory arrangements guarantee settled. Give captain our written consent to proceed Alexandria subject to immediate arrest of ship at that port.'"

It is pretty clear from those documents that the arrangement was that the arrest in Constantinople should be lifted on the terms that a similar arrest should be provided at Alexandria and give the same results at Alexandria, so as to protect the plaintiffs for the amount of their maritime lien. Thus the vessel escaped from Constantinople and got to Alexandria.

She was released on January 14 or 16, 1926, as appears by a judgment of the Constantinople Court. But subsequently she was arrested by other creditors, and did not in fact get away till February.

In the meantime, on January 27, the plaintiffs' solicitors in Alexandria wired to the plaintiffs: "Carston shipowner declared bankrupt and order to seize vessel here ineffective, as she passes into Receiver's hands. If possible detain vessel Constantinople as question of privilege not certain here."

I think I am justified in assuming that that is an accurate statement of the facts; that at that date Mr. Paschalis, the owner, was declared bankrupt, and his offer, which had been accepted, to give a similar security by arrest of the ship at Alexandria became quite ineffective. The result was that the arrangement which the plaintiffs had made to release the ship in Constantinople in exchange for a similar arrest in Alexandria came to nothing.

The ship, in fact, did not leave Constantinople till about February 16. From that cable it appears that the Carston had left before it was possible to re-arrest her. It is dated February 16, and that is why I say she left by February 16. It says: "Carston left before re-arrest. Endeavour arrest Alexandria." That, of course, was hopeless, when once the owner had gone bankrupt.

On February 18 the solicitors for the plaintiffs in England, Messrs. Downing, Middleton and Lewis, wrote to Messrs. Catzeflis and Lattey, in Alexandria, the letter of that date on page 22:—"Our clients were not able to re-arrest the ship before she left Constantinople. There is no doubt our clients have a maritime lien on the ship for salvage services, and they propose to exercise that lien irrespective of whatever hands the steamer may get into, unless in the meantime we are able to get security for the ship's proportion of the salvage. And it may be desirable to warn any buyer that that is the position, and you might also let the Receiver know."

So as early as February, 1926, the position which the plaintiffs took and take up was made plain to the gentleman in charge of the bankruptcy. If those orders were carried out—and I have not the least doubt they would be—the position which the plaintiffs were going to take up had been definitely decided.

Then on February 21 the steamer arrived in Alexandria. It is quite true that in Mr. Mathias's affidavit, paragraph 5, he says that Mr. Paschalis was only declared bankrupt on March 22. There it says "declared bankrupt by definitive judgment." Whether that was some formula that was finally concluded on March 22, though in fact he had gone bankrupt early in January, I do not know, but I do not think there is the least doubt that the bankruptcy began in January.

On April 8 Mr. Mathias, who was the syndic, or as we should call him, I suppose, the Trustee in Bankruptcy, appointed to carry out the bankruptcy, made an application to the Juge Commissaire—(what exactly his position is I am not sure; in some of the documents he is called "Registrar")—asking for an order authorizing him to object to the above-mentioned dispute being settled by arbitration. That was the dispute as to the salvage, under the agreement that had been made by the master of the ship when he was in trouble in November, 1925.

The attitude of the Trustee in Bankruptcy representing the bankrupt from that time forward has always been that any arbitration under that "No cure no pay" agreement was null and void. On May 5 he wrote to Messrs. Philippides and Co., Alexandria, who were the representatives of the owners of the cargo, sending them certain documents in connexion with the negotiations which were going on with regard to the arbitration, and he said: "Please note that the above mentioned information is furnished to you for your own defence, for, as I have already intimated to you, I have advised the Ocean Salvage Association that I consider that the arbitration now pending is null and void as far as I am concerned." And he repeats that in substance in document "Z" at pages 24, 26 and 27. So it is quite clear that the attitude which the syndic was taking up with regard to settling the dispute by any arbitration was null and void so far as he was concerned.

An arbitration was, in fact, held on August 26 before Mr. Dumas, a well-known practitioner of great experience, and he made his award on that date. The award does not recite who was represented—whether the owners of the ship as well as the owners of the cargo were represented—but I am told by Mr. Dunlop—and I do not think there is any doubt about it, because his client, I understand, has informed him, and he was present at the arbitration—that nobody appeared on behalf of the ship in that arbitration, and only the owners of the cargo and the plaintiffs were present, and discussed the case there. The award is made by Mr. Dumas in these terms: "I find that salvage services were rendered by the contractors to the steamship Carston and her cargo, and I assess the amount payable to the contractors by the owners of the Carston at the sum of £1,250 (One thousand two hundred and fifty pounds) and the amount payable to the contractors by the owners of the cargo of the Carston at the sum of £500 (Five hundred pounds); and I further award and direct that the owners of the cargo of the Carston do pay their own and the contractors' costs of the hearing before me," &c. So the costs of the arbitration were confined to the only persons before the arbitrator, which bears out the statement that there was nobody there on behalf of the ship. But the amount payable to the contractors was stated to be £1,250 as far as the ship was concerned.

Then on August 31, five days afterwards, there was a creditors' meeting, at which was discussed the sale of this vessel by the syndic, who had on August 24 asked the Court for permission to sell the ship. That appears in document "E." It does not say whether the plaintiffs were at that meeting or not. It does not appear anywhere in the proceedings that they were there. The creditors present agreed to a sale in accordance with the deed and formalities put before them. That sale was completed by documents on September 3, and finally allowed by the Court on September 13. I say

allowed by the Court, because that is the date on which the confirmation of the sale by the Court took place.

Now the sale was a sale by the syndic, and was no doubt approved by the Court, but it was certainly not a sale after a judgment *in rem*. The Trustee in Bankruptcy had applied to the Court for permission to sell, and he got permission to sell, and it was sold in accordance with the practice of the Court, and it was approved by the Court ; but it was not a sale by the Court in the sense that it was a sale on a judgment *in rem*, which would be a sale of the thing as it stood, and not merely a sale of such interests as the parties to whom it belonged had in it. I cannot think there is any doubt about that. It was a sale such as any other Trustee in Bankruptcy would make, namely, a sale of the interest of the debtor, such as it was. In other words, it was a sale *cum onere*. When you look at the terms of the contract I think that is made clear.

First of all it begins in Article 1 with these words : "Mr. Ferdinand Mathias, acting with the express consent of Mr. Ch. D. Paschalis, sells, cedes and makes over to Messrs. Leonidas Dambassis and Antoine Diapoulis, who accept it subject to the reservations in the following article." So the Trustee in Bankruptcy sold the ship to the present defendants upon the terms of the articles in this document with the approval of the Court. Article 2 is : "Mr. Ferdinand Mathias in his capacity as above, guarantees that the vessel is at present and will be handed over to the buyers in the condition as shown in the two certificates from the English Lloyd's at Alexandria." Article 5 says :—"The vendor,"—that is, Mr. Mathias —"acting in his capacity as above, takes upon himself the exclusive liability for, and agrees to pay to the brokers," &c. Article 6 is :—"Mr. F. Mathias, in his capacity as above, declares that the bankrupt, Ch. D. Paschalis, is the owner of the vessel Carston, he having acquired the vessel by his own moneys according to a contract dated the twenty-second of June One thousand nine hundred and twenty-one from the Bathampton Steam Navigation Company, Limited, of Cardiff. In addition, he declares that as concerns the buyers the said vessel is free of all charges in general of whatever kind. The vendor, acting in his capacity as above, guarantees the buyers that they will not have to submit to any proceedings on the part of Mr. Paschalis's creditors, undertaking, under penalty of the cancellation of the contract, to obtain the withdrawal of any seizure of the vessel." Then Article 7 is :—"Mr. F. Mathias, acting in his capacity as above, declares that the present sale is authorized by the Juge Commissaire (Registrar) in the bankruptcy of Mr. Charalambo D. Paschalis, in accordance with a decree dated the twenty-fifth of August, One thousand nine hundred and twenty-six. . . . He states that the present sale is subject to the definite confirmation of the Mixed Tribunal of Commerce of Alexandria."

As I understand it, that is a sale by the Trustee in Bankruptcy, guaranteeing that the buyers will not have to submit to any proceedings on the part of Mr. Paschalis's creditors, and if he fails to make that good no doubt he will be liable to the buyers for breach of his guarantee.

I ought perhaps just to draw attention to the letter of September 3 attached to Mr. Hadoulis's affidavit, in which it is made quite clear that the negotiation of the sale was an ordinary negotiation of the sale of a ship, brokers acting on one side and on the other—Messrs. Embiricos acting for the present defendants, and Messrs. Griffiths, Tate and Co. acting apparently for the syndic. Mr. Hadoulis says in terms in his affidavit : "The sale was made with the approval of the liquidator in the Egyptian bankruptcy proceedings, and I was given to understand that the sale gave to my clients a title to the vessel free of all charges and incumbrances." And if one looks at the document itself one sees at once that the terms are that the syndic guarantees freedom from claims by creditors.

When you look at Mr. Mathias's affidavit with regard to this, he says, in paragraph 6 : "The s.s. Carston was properly sold to Messrs. L. Dambassis and A. Diapoulis, according to a notarial act executed before the Greffier-Notaire of the Mixed Tribunal of Alexandria, September 13, 1926, for the sum of £10,250. The said sale was homologated by judgment of September 15, 1926. The proceeds of sale after deduction of certain expenses were deposited with the cash department of the Mixed Tribunal for subsequent distribution among creditors."

Then on October 18 the plaintiffs, being unable to enforce their rights except by action in the Courts of Alexandria, or get any security at all—they could put forward their claim, no doubt, in the bankruptcy and be met by the syndic saying that the arbitration contract was null and void—caught the ship in Hull and issued their writ, and claimed, as I think they were entitled to claim, a maritime lien on the property. They caught the *res* and issued their writ, and it is that writ that the defendants are trying to set aside on the ground that they have bought the ship free of all incumbrances. They say that for that and other reasons the writ ought to be set aside.

On the following day, October 19, it is said by Mr. Mathias that the Ocean Salvage Company, the plaintiffs, put in a claim in the bankruptcy for the salvage, and, as he states, that had been referred to the Court.

On October 26 Messrs. Catzeflis and Lattey wired to the plaintiffs saying : "Carston receiver disposed settle five hundred pounds stop If you succeed seizing vessel and purchasers disposed furnish you banks guarantee we recommend you insist payment subject decision English Court as arbitration submission attackable Egyptian Courts." If that is right, it seems that not only can the syndic say the arbitration is null and void, but he can say the whole agreement to arbitrate may be set aside, and there was some suggestion before me that a point could be taken, and would be taken, in the Egyptian Court that the master of the ship had no authority to bind the owner, and that the whole foundation of the "No cure no pay" agreement had gone. What the position may be in the Alexandrian Courts I really do not know ; I am not sufficiently informed about the matter ; but at any rate it seems quite clear that the plaintiffs have no security of any sort or kind in Alexandria. They have only the claim, which may or may not turn out to be good, against the proceeds of the bankrupt's estate in the hands of Mr. Mathias.

There is only one other telegram that I think I need refer to, and that is one on January 13, 1927. The warning which the plaintiffs had given to their solicitors in Alexandria to tell anybody that they were going to insist upon their maritime lien on this vessel was conveyed by them to these very defendants. Apparently the same solicitors acted for these defendants in Alexandria in connexion with the sale. The telegram is this : "Carston Goulandris

on thirteenth September Dambassis and Diapoulis personally consulted us upon draft purchase contract and after informing them of possible seizures by creditors including Ocean Salvage they instructed us to attempt insert clause for indemnification by vendors in event of seizure stop We drafted necessary clauses but same refused by vendors and purchasers accepted vendors terms and contract duly executed and registered same day stop Can send affidavit giving full facts if necessary."

So it appears that when the present defendants bought the ship they had full warning of the possible claim by the Ocean Salvage Company for their salvage services. They did not get the clauses which their advisers had drawn up for them inserted in the contract, but it looks as if they had something towards that in the terms of the guarantee which I read out some time ago.

That—so far as I think it is necessary to go into it—is the order of events in this case.

Mr. Balloch, for the defendants, takes, as I understand, four, or possibly five points, which he says entitle him to have this writ set aside.

The first point that he takes is this : Lloyd's form of salvage contract (" No cure no pay ") prevents the plaintiffs from bringing an action for salvage. He says that it is just the same as in *The Solway Prince* (12 *The Times* L.R., 184 ; [1896] P., 120), where the contract by the salving vessel to salve a ship made with the insurers of the vessel excluded them from any right to sue the ship herself when the insurers became bankrupt and failed to pay. I think the two cases are totally different. In *The Solway Prince* (*supra*) there was a contract between the salvors and the insurers to do a particular work at a particular price. It meant, therefore, that the salvors were not volunteers. It was not a " No cure no pay " contract, and inasmuch as they were not volunteers there could not be any salvage. In the present case the contract was a contract to salve " No cure no pay," with all the attending consequences if salving services are performed of there being a maritime lien on the property in favour of the salvors ; and that maritime lien on the property has never been put an end to by any action of a competent Court or by any bargain which has been fulfilled between the parties.

Then Mr. Balloch also says that it is a contract by the owner of the ship, and no one else, for remuneration in a mode specified. It is perfectly true that the bargain of " No cure no pay " in Lloyd's form is a bargain to go to arbitration and have the thing settled by an arbitrator out of court, but it seems to me that the contract itself, by clause 1 and clause 5 together, is based on the owner of the salved property providing security in the terms of the contract, and if he does not provide security then the contractor may take steps to enforce his lien, namely by the Court. There is no other way of enforcing his lien. He cannot enforce his lien except through the Court. In the very terms of the contract it is provided that if no security is furnished by the owner of the salved property the plaintiffs may resort to the Court to enforce their maritime lien. The truth is that the salvors have a right against the ship which can only be defeated if the whole of the salvage agreement, " No cure no pay," is carried out. I think the real answer to Mr. Balloch's point here is that the owners of the salved property as far as the ship is concerned never put up any security at all in accordance with the terms of the contract. They did not implement the bargain.

It is also said by Mr. Balloch that the plaintiffs did get the security for which they bargained, because they only bargained for a *saisie conservatoire,* and that they got. I think perhaps they got an order for a *saisie conservatoire,* though they never actually got seizure. Certainly, in my view, what they bargained for was not a mere paper *saisie conservatoire,* but an effective arrest of the property equal in value to the arrest in Constantinople, which would ensure their obtaining payment from any award that was made. I think the terms of their letter show that they only released her in Constantinople on terms of arrest in Alexandria. I think " arrest " there means arrest as we understand it—an effective arrest which will produce security .

Then Mr. Balloch says that the security which they got was good security, because by means of the sale by the syndic the proceeds of the ship were put into Court and made available for any claim which they might have. I do not think that is the meaning of what was done or a carrying out of the intention of the parties. No doubt the property of the bankrupt went into a common fund and the plaintiffs would have some rights against it as distinct from their maritime lien. That language itself seems to me to be only giving them a partial remedy instead of a complete one.

Then his next point was that the award by Mr. Dumas was a binding award against the owners, or an award which could be made binding on them, and which could be made a rule of Court, and that in effect the rights of the salvors were merged in what is equivalent to a judgment. He cited the cases of *The Sylph* (L.R. 2 A. and E., 24) and *The Charles Amelia* (L.R. 2 A. and E., 330). He admitted that *The Sylph* (*supra*) and *The Charles Amelia* (*supra*) were dead against him, but he sought to distinguish them—on, as I thought, slight grounds. He tried to distinguish them on the ground that there was some reservation in each case. But I think Mr. Dunlop was right in saying that really they were on all-fours with this case, and conclude the matter.

In the case of *The Charles Amelia* (*supra*) the defendants had given a bill of exchange, and had been allowed to go away with the ship. The ship came to England, and although the bill of exchange had been given it had not been paid, and it was held that the plaintiffs had not lost their lien for damage, either by *laches* or by the subsequent sale of the vessel. The case of *The Sylph* (*supra*) was an action for personal injuries. The plaintiff went to arbitration and was awarded compensation. He, however, never was paid, and he sued in Admiralty, and it was held that he was entitled to do so. The reservations in both cases I do not think amount to any more than would be implied in law if, on a bargain, one side failed to carry out or make good its part of the bargain. I think in this case the owner of the ship distinctly failed to make good his part of the bargain to give security for the plaintiffs' claim.

Mr. Balloch further contended that the award in itself was a good defence ; but if the award is not performed, and so far from being performed it is contested in every possible way, as far as one can see, it is no defence at all to an action *in rem.*

His next contention was that the sale by the syndic under the authority of the Court in Egypt was as good as a sale in an action *in rem.* Now my first observation with regard to that is this. It was not a sale in an action *in rem* because the action of the

syndic had nothing whatever to do with an action *in rem*. Secondly, the sale does not purport to be by the Court; it is a sale by the syndic with the approval of the Court. Nor does it purport to be any decision as to the property in the ship. It transfers property no doubt; that is to say, such interests in the property as the debtor may have had, but it does not purport to decide the rights in the property.

Then Mr. Balloch said that according to *Castrique v. Imrie* (L.R., 4 H.L., 414), a sale by the Court in France is just the same as a sale *in rem*. I do not think that is the proper result of *Castrique v. Imrie* (*supra*). I think *Castrique v. Imrie* (*supra*) was a decision that what had happened in that case was the same as a sale in an action *in rem*. I think here the facts are quite different, and I do not think the sale in this case has any resemblance to a sale in an action *in rem*.

Mr. Dunlop cited on the other side Abbott, 14th Edition, pages 1012 and 1013, and quoted this passage:—"In the case of a judgment *in personam*"—and at most that is what this is, if it is anything at all, because according to the evidence there is no proceeding *in rem* in the Egyptian Court—"the Court does nothing more than issue process against the property of the defendant, and if the officer of the Court should sell a particular chattel as being the defendant's property, there is nothing to prevent a third person impeaching such sale and setting up a claim to the chattel. All the Court does in such circumstances is to sell the defendant's interest, if any, in the particular chattel. In the case of a judgment *in rem* the Court directs that the *res*, and not the defendant's interest in the *res*, be sold. In other words, it determines on the disposition and status of the *res*. To this extent a judgment *in rem* binds third parties." And so far as I know it is only a judgment *in rem* that does bind third parties.

Then Mr. Dunlop followed that up by quoting Parson's Law of Shipping, Vol. II., chapter X., page 332; *The Nestor* (1 Sumner's Rep. (Amer.), 73), and *The Bold Buccleugh* (7 Moore P.C., 267), and Daniell's Chancery Practice, 8th edition, page 939—all much to the same effect.

He further said that he relied on the origin of a maritime lien as shown in *The Bold Buccleugh* (*supra*), *The Ripon City* (14 *The Times* L.R., 219; [1897] P., 226), and in *The Tervaete* (38 *The Times* L.R., 460, 825; [1922] P., 259), showing that a maritime lien is something more than a mere right *in rem*. It is described in *The Bold Buccleugh* (*supra*) as a kind of property; it is described in *The Ripon City* (*supra*) as a *jus in re aliena*; and it is described in *The Tervaete* (*supra*) as a subtraction from the interests of the owner. But whatever form of words is used, there is no question that it is something more than a mere right *in rem*, and I think Mr. Dunlop was right in saying that in order to get rid of it you must have a decision in an action *in rem* or something equivalent to it. The only other ways in which you can get rid of it are by saying that you are impleading the Sovereign State or the Sovereign of this country is being impleaded, or by showing *laches*. He says those are the only ways in which you can get rid of a maritime lien, and as far as I know he is right. *Castrique v. Imrie* (*supra*) itself draws this distinction between a sale *in rem* and a judgment *in personam*.

In this connexion the law of Egypt was referred to, and I had before me Mr. Duhamel, who gave me a great deal of assistance with regard to the law in France, and helped in the discussion of the Egyptian Code. I think that if a ship is sold by the Egyptian Court it must be sold in accordance with the Code de Commerce Maritime. As Mr. Dunlop said, there are only certain privileged claims, salvage not being amongst them, which are dealt with in the sales by the Court, and certain formalities must be carried out before they extinguish the privileged claims.

Article 5 sets out what are privileged claims. Article 7 says how the privileges of creditors are extinguished by a sale, but as that only refers to those privileged claims in Article 5 it has no relation to the extinction of a claim which does not come under Article 5. And salvage certainly does not come under Article 5. As he says, it is only privileged claims of the classes set out in Article 5 which are extinguished. Salvage is not one of those, and therefore a salvage claim is not extinguished by such a sale. Therefore, under Article 4 the salvor has the right to follow the property notwithstanding that there has been a sale.

Furthermore, if you have to find some right of salvage in the Egyptian Code, it must be under section 729 of the Code Civil Mixte; but, as he says, that is only a common law right—for work and labour done. It is quite a different right from salvage as we understand it. And there is nowhere to be found in any of these codes any right *in rem*, or any maritime lien for salvage at all. Therefore his points are that this is not a sale by the Court at all, and if it is a sale at all it does not extinguish the salvor's lien.

Lastly, Mr. Balloch says that under the circumstances in this case, where the plaintiffs have the power of putting forward a claim against the proceeds of this bankrupt's estate in Alexandria, and where they have done what they have in regard to releasing the vessel in Constantinople and arranging for her re-arrest, so to speak, in Alexandria, it would be inequitable after the sale to his clients that the plaintiffs should be allowed to follow the ship again here. I do not agree. As the plaintiffs have a maritime lien on the ship and find her here when they have been kept out—I will not use any other expression—of their security, and when they have not any means of getting their claim secured elsewhere, and find the ship in the hands of somebody else who must have known the danger and risk which he ran in purchasing such a vessel, I do not think there is much want of equity in saying that he should take the consequences.

That really is not a plea to jurisdiction. It is a plea to the exercise of it. The remedy here, it seems to me, would be quite different from the remedy available in Egypt, if any, and therefore it does not come within cases, like *The Christiansborg* (1 *The Times* L.R., 634; 10 P.D., 141), of *lis alibi pendens*, or double vexation of the defendant. Of course, it cannot be double vexation in a case of this sort, because it is really a different defendant, if and when the defendant appears.

I have tried to deal with all the arguments as well as I could without reserving my judgment.

There is one other matter to which I ought perhaps to refer, and that is this. The award of Mr. Dumas is unsatisfied. It is just like a judgment that is unsatisfied. That is at the highest. It could not be put higher than to say it is just like a judgment that is unsatisfied. If a judgment at common law *in personam* were unsatisfied with regard to the claim for salvage, there would be no question but that the plaintiffs could issue a writ and sue in this Court to enforce their maritime lien. I think that is clear from *The John and Mary* (Swabey, 471) and *The Bengal* (Swabey, 468), and also *The Sylph* (*supra*).

I think I have covered all the arguments for the defendants.

In my judgment the motion fails, and should be dismissed, with costs.

[Solicitors—Messrs. Wm. A. Crump and Son, for the defendants; Messrs. Downing, Middleton and Lewis, for the plaintiffs.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1927. Feb. 23.

GLASKIE v. WATKINS.*

Practice — Short Cause list — Moneylender's action—Disputed claim—Rules of the Supreme Court, Order XIV., Rule 8.

In a moneylender's action properly brought before the Judge or Master at Chambers on a specially indorsed writ supported by an affidavit in proper form the Judge or Master still retains the full jurisdiction, under Order XIV. of the Rules of Court, to direct a disputed claim for interest, alleged to be excessive, to be sent to the Short Cause list for trial, but that jurisdiction ought to be exercised very sparingly and only in simple and plain cases.

Bennett v. Stubbs ([1926] 1 K.B., 272) not followed.

This was an appeal by the plaintiff, a moneylender, from an order of Mr. Justice Swift at Chambers affirming an order of Master Ball refusing to direct an action to be tried in the Short Cause list.

The plaintiff had issued a writ against the defendant claiming to recover £325, the balance of the amount of a promissory note for £750 dated July 28, 1926, made by the defendant and payable to the plaintiff by equal consecutive monthly instalments of £125 each, commencing August 28, 1926.

The defendant, by his affidavit, said that he had repaid the plaintiff the sum of £425, leaving a balance in respect of principal of £75. He further said that the transaction was harsh and unconscionable, and was such that a Court of Equity would grant relief. He asked for leave to defend the action on its merits; for relief under the Moneylenders Act, 1900; and to have the matter reopened and to be relieved from payment of any sum in excess of the amount fairly due to the plaintiff.

On the hearing of the summons under Order XIV. the Master gave judgment for £75, the balance of the principal owing, and gave leave to defend as to the balance. He refused an application by the plaintiff to send the case to the Short Cause list for trial, holding that he was precluded from doing so by the decision of the Court of Appeal in *Bennett v. Stubbs* ([1926] 1 K.B., 272).

On appeal, the Judge at Chambers, also considering himself bound by *Bennett v. Stubbs* (*supra*), dismissed the appeal.

The plaintiff appealed.

Mr. J. B. Matthews, K.C., and Mr. R. F. Levy appeared for the appellant; and Mr. Woodgate for the respondent.

Lord Justice Bankes.—This is an appeal from an order of Mr. Justice Swift in Chambers affirming an order of a Master. The appeal, which has been very fully argued on both sides, raises an important point of practice. The question is whether there is any decision of the Court of Appeal which renders it impossible for a Master or a Judge in Chambers to order a disputed claim in a moneylender's action—where the claim for interest is disputed on the ground that it is excessive—to be tried in the Short Cause list.

It is very important to bear in mind what the contention put forward on behalf of the respondent in this case involves, because if that contention is to prevail, it will deprive the plaintiff of a statutory right, and the Judge in Chambers and the Master of a statutory jurisdiction which is conferred on them by the Rules of the Supreme Court.

To make that point plain I will refer quite shortly to a few of the rules. First of all there is Order III., Rule 6, which provides that if a case comes within those provisions a plaintiff may specially indorse his writ, and if a writ is specially indorsed, and the plaintiff has followed the directions of the rules by making a sufficient affidavit, two consequences follow, as it seems to me: one is that the plaintiff has the statutory right under the rules to take proceedings for summary judgment under Order XIV. That arises from the fact that he has got a specially indorsed writ, and he has made a sufficient affidavit. The next consequence is that, the plaintiff having that right and having exercised it, the rules confer a statutory jurisdiction upon the Master or Judge, as the case may be, to deal with the application which comes before him in certain specified ways. He may, if he has jurisdiction, give judgment for the full amount. In a proper case he has jurisdiction to give judgment for a part of the amount, and to give leave to defend as to another part of the amount. Then Rule 4 of Order XIV. directs: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms . . . as the Judge may think fit." Therefore the matter is not discretionary in such a case, subject to the terms that the Judge may enforce, but the rule directs that if there is no defence to a part of the claim the plaintiff shall have judgment for that part. Then the Judge also has jurisdiction given him where a matter comes before him on a summary application, among other things under Rule 8, to give directions as to how the case shall be tried and where it shall be tried, and, in a proper case, to order it to be put into the Short Cause list to be tried. There is another rule giving the Judge jurisdiction, Rule 9 (*b*), where the plaintiff makes an application: "Where the case is not within the Order, or where the plaintiff, in the opinion of the Judge, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff."

It seems to me that those rules give the Judge or Master a certain statutory jurisdiction in every case which is brought before him, because the writ is a specially indorsed writ, and the plaintiff has made a proper and sufficient affidavit. The contention, therefore, that the Master or Judge has no jurisdiction to order the contested part of a moneylender's claim, the part in reference to interest, to be tried in the Short Cause list is in substance saying that something has happened which has deprived the Judge and the Master of that jurisdiction. Now

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

where do you find anything that can have deprived them? The only possible contention—I do not in the least agree with it—as it seems to me, is the one advanced by counsel in *Wells v. Allott* (20 *The Times* L.R., 799; [1904] 2 K.B., 842), that the effect of the Moneylenders Act, 1900, to put it in his language, was to oust Order XIV. The only way in which it could oust Order XIV. would be by construing the Moneylenders Act, 1900, as altering a claim of a moneylender upon a bill from a claim for a liquidated amount into a claim for an unliquidated amount. That, in substance, was the contention of counsel in *Wells v. Allott* (*supra*). It was not accepted, and, in my opinion, as a contention going to the jurisdiction it is an impossible contention. So far, therefore, as there is anything in the Moneylenders Act, 1900, which deprives the Judge or the Master of the jurisdiction which the rules confer upon him, in my opinion there is nothing in that Act which can possibly support such a contention. That being so, the question we have to consider is, Is there any decision of this Court which binds us to say—whether we agree with it or whether we do not agree with it—that the Judge or Master has been deprived of that portion of his jurisdiction which would have enabled him to make an order that the case should be dealt with in the Short Cause list? That drives one to consider not only what the real effect of the decision in *Bennett v. Stubbs* ([1926] 1 K.B., 272) is, but whether *Bennett v. Stubbs* (*supra*) is itself in conflict with other decisions of this Court, and, if so, which of the two sets of decisions we think that we ought to accept as being the law.

In *Bennett v. Stubbs* (*supra*) the judgment of the Master of the Rolls is founded upon his view of the judgment of the former Master of the Rolls, Lord Collins, in *Wells v. Allott* (*supra*). Speaking with all respect, it seems to me that the language of Lord Collins in that case has been considered without reference to the facts of the case about which the learned Master of the Rolls was expressing his view. In *Wells v. Allott* (*supra*) the case was one where there was a specially indorsed writ. It was one in which when the defendant put in his affidavit under Order XIV. he admitted that a portion of the principal was still due, and he contested the claim for the interest on the ground that the transaction was harsh and unconscionable. Mr. Matthews has sought to draw a distinction between *Bennett v. Stubbs* (*supra*) and the other cases upon the ground that there is a difference where a defendant in his affidavit admits that some of the principal is due. With submission, I do not think that that is a real distinction, since, if the Judge has jurisdiction to deal with the case because the writ is a specially indorsed writ, it seems to me to be immaterial whether, when the defendant comes to split up the claim into principal and interest, he is not in a position to dispute that some of the principal still remains unpaid; however, those were the facts in *Wells v. Allott* (*supra*), and the Master had given leave to sign judgment for the admitted amount of the principal and a certain amount of interest. I need not trouble about that, but he gave the defendant leave to defend as to the general claim for interest. On an appeal from that order the moneylender swore an affidavit which set out his grounds for contending that there was no foundation for suggesting that the bargain was harsh and unconscionable, and thereupon Mr. Justice Phillimore discharged the order of the Master and gave the plaintiff leave to sign final judgment for the full amount claimed. The question before the Court of Appeal was whether that was a right order, and what the Master of the Rolls and the other members of the Court had to deal with was whether in a case where the defendant admitted part of the claim but swore an affidavit which disclosed a *prima facie* defence as to the rest of the claim an order ought to be made under Order XIV., either for judgment or in any other form except giving the defendant unconditional leave to defend. It was in reference to that view, and that state of facts, that the Master of the Rolls used the language which he did use. He says at page 846 of the report in [1904] 2 K.B.: "It is clear in the present case that there is *prima facie* a debt due from the defendant to the plaintiff," and that was the reason why he allowed that part of the Master's order which had given judgment to stand; but how could that be if the contention is right that there is something in the Moneylenders' Act, 1900, which would deprive the Master or the Judge of his jurisdiction to deal with the claim at all under Order XIV. proceedings? Then he goes on and uses the expression to which the Master of the Rolls in *Bennett v. Stubbs* (*supra*) has referred, and which is really the foundation of the Master of the Rolls' judgment. He says this: "The procedure under Order XIV. is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence. But where in a particular class of case a special jurisdiction is given to the Court by the Moneylenders Act, 1900, to determine whether the plaintiff is entitled in the circumstances to recover what is a *prima facie* debt"—he is there obviously only referring to the claim in that particular case for the interest—"it seems to me to be clear that that class of case is taken out of Order XIV." One seldom criticizes the language of so accurate a Judge as Lord Collins, but when he speaks of a case being taken out of Order XIV. it does require some explanation as to what exactly he means. The Master of the Rolls, I think, in *Bennett v. Stubbs* (*supra*) has interpreted that as meaning that the Judge or the Master has no longer any jurisdiction to deal with it. It cannot be that Lord Collins used the expression in that sense because in this very case he restored the order of the Master which had given the plaintiff judgment for part of his claim, the admitted part; and when this language of Lord Collins is read in reference to the facts of the case it seems to me really not possible to place the interpretation upon his language which Mr. Woodgate asks us to place upon it, or which the Master of the Rolls in *Bennett v. Stubbs* (*supra*) did place upon it. So much for *Wells v. Allott* (*supra*).

I need not really refer to *Dott v. Bonnard* (21 *The Times* L.R., 166) or *Tumin v. Levi* (28 *The Times* L.R., 125) because in neither of those cases is there anything of real assistance upon the point that we have to decide. In one case the question was whether any order should be made under Order XIV., the defendant having in fact alleged in his affidavit that he had paid or more than paid the whole claim of the plaintiff moneylender for principal and interest. Of course it is perfectly obvious that in face of that affidavit no order under Order XIV. in the sense of an order giving judgment could be made. In the other case there was the battle of the two Divisions. The borrower there brought an action in Chancery to set aside the whole bargain upon the ground that it was harsh and unconscionable. After that proceeding had commenced the plaintiff took out a specially indorsed writ and took

proceedings under Order XIV., and the question really turned upon what was the right procedure to follow in those circumstances. It is quite true that there was some difference of opinion between the Chancery members of the Court and Lord Justice Kennedy. The former were very strongly inclined to the view that such a case as that particular one could not possibly be dealt with satisfactorily in the Short Cause list, though Lord Justice Kennedy was not at all convinced upon that point, but, as it seems to me, in that case nothing was said which bears directly upon the question that we have to consider or is if any real assistance. There are three other cases, all of them decisions of this Court, which are very material. I think the problem which is presented to us is whether we should accept the decisions in those cases in preference to the decision in *Bennett v. Stubbs* (*supra*) if it goes as far as Mr. Woodgate contends.

The first of those cases was *Lazarus v. Smith* (24 *The Times* L.R., 592; [1908] 2 K.B., 266). There it is material, as Lord Justice Scrutton has pointed out, that Lord Cozens-Hardy was a party to the decision, and he had also been a party to the decision of *Wells v. Allott* (*supra*). There the facts were that there was a claim by a moneylender and a specially indorsed writ. The defendant by his affidavit set up the defence under the Moneylenders Act, 1900. The Master gave leave to the plaintiff to sign judgment for the sum of £40, being the amount admittedly due from the defendant in respect of the sum actually advanced, and gave leave to the defendant to defend for the residue of the claim, and ordered the action to be placed in the Short Cause list for trial, and this order was confirmed by Mr. Justice Ridley in Chambers. Mr. Chaytor was for the defendant in the appeal, and his contention (at p. 267) was: "In a moneylender's action, where the borrower sets up a defence under the Moneylenders Act, 1900, Order XIV. has no application: *Wells v. Allott* (*supra*)." That means to say that it has no application for any purpose either for giving judgment for a portion of the principal, or for giving directions, or for ordering the case to be put in the Short Cause list, or for any other purpose. That was his main contention. Then he went on: "It is true that the only question there was as to the claim for interest, but the principle of that decision extends to the whole claim." Upon that the then Master of the Rolls, Lord Cozens-Hardy, says at page 268: "I have no desire or intention to depart from one word that I uttered in *Wells v. Allott* (*supra*), and in what I then said I was merely following and adopting the language of the then Master of the Rolls. I desire to make it quite clear that my view is that in any case in which an issue has to be decided under the Moneylenders Act that is a matter which ought to be dealt with at the trial of the action, and not by summary judgment under Order XIV." Now, is he there saying anything more than this: You ought not to give a summary judgment under Order XIV., and a summary judgment is an order for judgment; you ought not to do that where the defendant raises an issue under the Moneylenders Act, 1900? In other words, he is saying that the defendant took it upon himself to swear that the interest charged was excessive and exorbitant. That must be accepted as establishing a *prima facie* case, a *prima facie* case which entitles him to defend, and entitles him, therefore, to have his case tried, but it says nothing as to the tribunal which shall try it or the directions as to the mode of trial, or anything which suggests that a short cause is not a proper way of trying a very simple case. Lord Justice Kennedy uses language to exactly the same effect. He says at page 269: "It seems to me that, while it is our duty to maintain in all proceedings in which the Moneylenders Act comes into operation everything necessary to make the Act effective, it would be going beyond anything which that Act either demands or authorizes to say that Order XIV. does not apply to an admitted debt—a debt which is admitted quite irrespective of any matter with which that Act has to deal. Here the defendant is in a position in which he must admit that, even if this loan had been given without any terms as to interest, it has not been repaid to the extent of £40. It cannot be right, if Order XIV. is to be used at all, to hold that, where there is an admitted debt as to part of the claim, Rule 4 is not to apply, whether it is a moneylender's claim or the claim of any other creditor. The Moneylenders Act only relates to transactions which can be reopened and modified under its provisions, and what would be reopened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus or interest, or of bonus or interest consolidated with principal." The result of that decision, which was a decision of the Court of Appeal, was that the order of the Master and the Judge ordering the claim for interest to be placed in the Short Cause list was affirmed. It is impossible, in my opinion, having regard to the argument, and having regard to the language used, to say that it was not present to the minds of the Lords Justices whether or not the Short Cause list was not only in that case within their discretion a proper tribunal in which to try the dispute, but that they also had jurisdiction to affirm the order which had been made in Chambers by the Judge and Master.

In addition that case, which seems to be a clear authority in the Court of Appeal, that this contention in this particular case is not well founded, is really supported by the two unreported decisions which Mr. Matthews has cited. One is *City and County Finance Company v. Dolphin* (unreported), February 12, 1920, in this Court, in which I and, I think, Lord Justice Scrutton were members of the Court. I forget whether we affirmed an order directing a trial in the Short Cause list or whether we made the order in the first instance, but, at any rate, it was quite present to our minds that we had the jurisdiction to do it, and we in fact did it, because we thought that that was a proper case. A similar order was made in the other case to which attention was called, of *Rothfield v. Leighton* (unreported), December 5, 1918, where, I think, Lord Justice Scrutton and Mr. Justice Eve, sitting together as a Court of Appeal to deal with interlocutory matters, made a similar order.

If one assumes that *Bennett v. Stubbs* (*supra*) does decide the question of jurisdiction, and does decide that the Master had no jurisdiction, and that the Judge had no jurisdiction, to make an order directing the trial of a moneylender's claim of disputed interest in the Short Cause list, with all respect to those who gave the decision it seems to me in conflict with the three other decisions of this Court to which I have referred, and which personally I prefer, because I cannot see anything anywhere which deprives the Judge of the jurisdiction which the rules give him in a case which is properly brought before him, because the writ is specially indorsed and the affidavit is in proper form. If that is the correct view it follows that the head-note in *Bennett v. Stubbs* (*supra*) does not correctly state the decision of this Court upon this particular matter,

and for myself I should say, and I do say, that in this particular case, or in any case where the facts are the same, that is to say, where a moneylender properly indorses a writ for a liquidated amount, and the liquidated amount is represented by a promissory note or a bill of exchange, and where the defendant in his affidavit raises a case under the Moneylenders Act, 1900, in my opinion the Judge or the Master still retains the full jurisdiction given him under Order XIV. to deal with such a case, and he does retain and has jurisdiction, among other things, to order any disputed part of that claim to be placed in the Short Cause list; but I desire to say this also, and to say it very emphatically, that I think that jurisdiction ought to be exercised very sparingly, and it ought to be exercised in cases which are simple and clear cases. It is impossible to lay down any rule which shall define what constitutes a simple and a plain case. I think I can go to this extent, and say that in a case where a defendant is seeking to rip up not only the particular transaction in respect of which the claim is made but previous transactions with a moneylender, that would certainly not be a proper case in which to send the trial of such a dispute to the Short Cause list. Indeed, I think that probably it is true to say that in the majority of cases, in the exercise of a wise discretion, it would be better not to send the disputes under the Moneylenders Act, 1900, into the Short Cause list, but in every case the Master or the Judge has a discretion, and it is for him to exercise it. Speaking for myself, with all respect I should say that they would be wise to exercise that discretion with considerable caution and only to make orders sending this class of case into the Short Cause List where it is reasonably plain that the dispute is a short one.

In these circumstances I think that this appeal should be allowed with costs in any event, and that there being in this case really nothing tangible to suggest that this is not a proper case for the Short Cause list, we ought to make an order to remit this case to the Short Cause list, treating it as an exceptional case rather than as an application of a general rule.

Lord Justice Scrutton.—This case raises a question of some practical importance in regard to what undoubtedly forms a considerable branch of the business of the King's Bench, known as moneylenders' cases, and as the decisions of the Court of Appeal are not at present consistent I express my reasons for allowing the appeal in my own language.

In this particular case a moneylender sues on a promissory note, giving credit for certain instalments paid. The defendant says, "Yes, that promissory note is for money that you lent me. As to the principal that you lent me I have paid all but £75. I have not paid £75 of the principal. As to the interest it is at least 100 per cent., and I desire to raise the point that the interest is excessive and the transaction harsh and unconscionable." Thereupon the Master made an order in effect giving judgment for the £75, the balance of principal unpaid, and gave leave to defend as to the interest, and he was then asked to put the case in the Short Cause list. The Master took the view that the decision of two members of the Court of Appeal in *Bennett v. Stubbs* ([1926] 1 K.B., 272) prevented him from putting the case into the Short Cause list because it related to the adequacy and amount of interest. On appeal to the Judge the Judge took the same view, that he was precluded by *Bennett v. Stubbs* (*supra*) from putting the case into the Short Cause list. We have asked the learned Judge whether he exercised any discretion in the matter, and he tells us that he did not; he thought he was bound by *Bennett v. Stubbs* (*supra*). On looking at *Bennett v. Stubbs* (*supra*), from the statement of Mr. Levy, who was counsel in it, the point that there was no jurisdiction to put the case into the Short Cause list was not raised before the Master or the Judge in that case but appeared for the first time in the Court of Appeal, with the consequence that all the authorities in the Court of Appeal bearing upon the point were not cited to the two learned Judges who decided *Bennett v. Stubbs* (*supra*), and, in particular, the reported case of *Lazarus v. Smith* (24 *The Times* L.R., 592; [1908] 2 K.B., 266) was not cited to the Court, and is not referred to by the Court in its judgment, and it is extremely difficult to reconcile the judgment in *Lazarus v. Smith* (*supra*) with the judgment in *Bennett v. Stubbs* (*supra*). Two unreported cases were also cited to us, unreported decisions of the Court of Appeal which also were wrongly decided if *Bennett v. Stubbs* (*supra*) is right. The result is that, considering the question as one of judicial comity, this Court, a Court of three, has before it a series of judgments of the Court of Appeal which do not appear to be consistent with each other. It is not that the later judgment has considered the earlier ones and decided that they mean so-and-so; it is that the later judgment was given when the Judges were not aware of three of the previous decisions. In those circumstances, in my view, as a matter of judicial comity, it is open to this Court to consider all the decisions of the Court of Appeal, and to form its own views as to which are the more accurate and which it shall follow in this case. It is quite true that it is possible to make a distinction between *Bennett v. Stubbs* (*supra*) and this case, and the distinction is this: that in *Bennett v. Stubbs* (*supra*) it appeared from the defendant's evidence that all the principal had been repaid, and in this case it appeared from the defendant's evidence that there was still a balance of principal left unpaid, but when one considers the matter from the point of view of principle I cannot see that that fact makes any legal difference.

Approaching the matter from the point of view of principle, if one can use such a word about the White Book, before one comes to any authorities, the Rules of Court, which have the authority of a statute, give power to the Masters and Judges in certain specified cases mentioned in Order III., Rule 6, to give summary judgment without the cases going through the form of trial in Court. You require, to get that jurisdiction, that the claim on the writ of the plaintiff shall comply with certain specified rules mentioned in Order III., Rule 6. It is undoubted that if on the writ you find something that comes within Order III., Rule 6, and something which does not, the writ does not comply with the statutory requirements, and the plaintiff cannot go on and get summary judgment unless he has struck off the writ that which does not come within the matters described in Order III., Rule 6; but in moneylenders' cases there is almost always this to start with, that the moneylender sues on a promissory note or bill of exchange which exactly complies with the requirements of Order III., Rule 6, and unless the defendant raises some defence which entitles him to object to summary judgment, Order XIV. will be complied with. Judgment can be given if the defendant does not appear. Usually in moneylenders' cases the defen-

dant does appear and he says : "True it is that I have signed this bill, but it is for money lent. The principal lent was" so much. Sometimes he says that and sometimes he says he does not know what the principal was. He says, "The interest is at such a rate, and I say, as I am entitled to say under the Moneylenders Act, that that interest is excessive and the transaction is harsh and unconscionable." He then raises a *prima facie* defence to a writ which comes within Order XIV., and in my view, the writ coming within Order XIV., as to such part of the claim represented on the writ as does not come within Order XIV., or does not entitle the plaintiff to summary judgment under Order XIV., the powers given to a Judge who gives leave to defend as to a part of the claim remain unaltered because there is a writ properly indorsed under Order III., Rule 6, which gives the Judge power to exercise the jurisdiction contained in Order XIV. I do not know that it is necessary to decide it, but it seems to me that the Judge, reading the defendant's affidavit under Order XIV., may say, "There is no evidence on which any one can say that this interest is excessive or harsh and unconscionable," but may not say, "I decide on the evidence before me on each side that it is or is not harsh and unconscionable." That was what Mr. Justice Phillimore did in *Wells v. Allott* (20 *The Times* L.R., 799 ; [1904] 2 K.B., 842), and he was held to have done that wrongly. To take a possible case—I say "a possible case"—supposing that all that the defendant says is : "You lent me £100 at 1 per cent. interest, and I was in the retreat from Mons," I should have thought that in a case like that it was open to a Judge to say : "Nobody can reasonably say that you have raised a contention of excessive interest or of a harsh and unconscionable transaction ; nobody can say that 1 per cent. is an excessive rate of interest" ; but as soon as the affidavit gets to a point where it is a doubtful question what the decision will be, then it is quite clear in principle, it seems to me, that a Master or a Judge cannot deal with the matter under the summary procedure of Order XIV. by giving judgment. He can deal with so much of the principal as is unpaid, because there the defendant admits the principal lent, and he admits that he has not repaid all of it, and judgment may be given for part of the principal which the defendant has not repaid. It seems to me on principle and on the rules that the Master is in this position : There is a properly indorsed writ under Order III., Rule 6. The defendant shows no defence to part of the claim when that claim is analysed. He shows a possible defence to part of the claim. Then there is leave to sign judgment for the part for which he shows no defence, the balance of principal, and as to the part for which he shows a possible defence you deal with it under Order XIV., Rule 4 ; under Order XIV., Rule 8 (*a*), by giving directions as to the further conduct of the action ; under Order XIV., Rule 8 (*b*), by, if you think it right and it is a proper case, putting it into the Short Cause list. That is how it seems to me the case would stand on principle if there had been no decisions of the Court at all.

When we come to decisions of the Court there is no doubt that the practice of Masters and Judges has changed from time to time. For instance, in the first case to which we were referred, *Wells v. Allott* (*supra*), the Court allowed summary judgment to stand for 5 per cent. interest on the principal, and there is no doubt that in *Lazarus v. Smith* (*supra*), the later decision of the Court, the Court of Appeal said that that was wrong and that it should not be done. In *Wells v. Allott* (*supra*) part of the principal was still unpaid when the case came for summary judgment. The Master having given judgment for part of the principal, with interest at 5 per cent., and leave to defend as to the rest of the interest, Mr. Justice Phillimore took the view that he could decide on the affidavits whether the transaction was or was not harsh and unconscionable. He decided that it was not harsh and unconscionable, and gave judgment for the whole amount claimed. That was the substantial point raised in *Wells v. Allott* (*supra*), and that was the point that the Court decided when they set aside Mr. Justice Phillimore's judgment and restored the judgment of the Master. There were two members sitting in the Court, Lord Collins, who was then Master of the Rolls, and Lord Cozens-Hardy, who was afterwards Master of the Rolls. I think the source of misunderstanding as to *Wells v. Allott* (*supra*) has been this : there is a passage in Lord Collins's judgment at page 846 : "It is impossible now to say that the procedure of Order XIV. can be made applicable to an action by a moneylender to recover interest on money lent, where the loan appears *prima facie* to carry an excessive rate of interest." That has been read, and I think it was read in *Bennett v. Stubbs* (*supra*) as if it meant the whole procedure of Order XIV., whereas I am fairly clear on reading the judgment that all that Lord Collins meant was the procedure of summary judgment so far as interest was concerned, which was the particular matter which they were deciding because they were considering whether Mr. Justice Phillimore could give summary judgment for principal and interest, there being the conflict on the affidavit. That appears to me to be the point decided in *Wells v. Allott* (*supra*), where judgment was given in fact for the balance of principal due, and in fact also where judgment was given for some interest on that principal. One is confirmed in that view when one sees that Lord Cozens-Hardy was a party to the case of *Lazarus v. Smith* (*supra*) later, in which he did give judgment for principal and said that the judgment should not be given for interest on the principal, not even 5 per cent., and ordered the case to be placed in the Short Cause list for trial.

Dott v. Bonnard (21 *The Times* L.R., 166) does not seem to me to have very much to do with it. In *Dott v. Bonnard* (*supra*), a claim being made on a bill of exchange and a promissory note, the defendant's answer was : "I have paid the whole principal and interest, not in money, but I have given you shares which are worth far more than the amount of principal and interest that you claim" ; and the Court said there what I should have thought was fairly obvious, "This is not Order XIV. at all. You cannot possibly use Order XIV. when this is the answer made on the affidavit."

Next in date comes the case to which I have referred of *Lazarus v. Smith* (*supra*), where the point that was argued was the point that had also been argued unsuccessfully in *Wells v. Allott* (*supra*), that if the defendant shows that there is excessive interest judgment cannot be given against him for any principal that he owes, and the Court said that certainly it can. In a case where you have a properly indorsed writ, and where the defendant shows a defence as to part but no defence as to the other part, you can give judgment for the part for which he shows no defence. You must give leave to defend as to the part for which a possible defence is shown, and may put the case into the Short Cause

list. In that case it was left in the Short Cause list where it had been put by the Court below.

Tumin v. Levi (28 *The Times* L.R., 125), it seems to me, would be better described as Chancery v. King's Bench. *Tumin v. Levi* (*supra*) was decided at a stage when the procedure was constantly being adopted, of which we have not heard so much lately, that the borrower rushed to the Chancery Division with a writ to reopen all the transactions, and the moneylender rushed to the King's Bench Division with an application under Order XIV. At that time—I do not know whether it had anything to do with the procedure adopted by the various parties—it took very much longer for a case to come on in Chancery than it did in the King's Bench, and also the Chancery idea of a short cause was one which took only ten minutes, and the King's Bench idea of a short cause was one which was said to take an hour and which frequently took a day. In those circumstances one can conceive that there was likely to be a difference of opinion in the Court of Appeal which had in it a Chancery Lord Justice and a King's Bench Lord Justice. In *Tumin v. Levi* (*supra*) you had, and this was really the point of the case, two actions. The first action was by the borrower in the Chancery Division to reopen all the transaction, and the second action by the moneylender in the King's Bench Division was to take advantage of the procedure under Order XIV. The majority of the Court—and with great respect to my Lord I do not think he was quite right in saying that they were both Chancery men ; Lord Justice Vaughan Williams was one of the majority—acted on the rule which I think has been acted on largely with regard to those cases since, that the person who issues his writ first will be the person who will be allowed to proceed, and they allowed the Chancery action to proceed where the writ was issued first, Lord Justice Kennedy dissenting ; but undoubtedly in that case Lord Justice Buckley did say, and he repeated it five days afterwards in a case where the question did not arise but where he used it as an illustration of principle, that he did not think that questions of interest were ever intended to come into the Short Cause list.

Two unreported cases, in one of which Mr. Matthews has furnished us with a contemporary note, and in the other with the papers, also came before, in each case, two Judges of the Court of Appeal. I happened to be a member of both Courts. My Lord was a member of one Court with me, and Mr. Justice Eve was a member of the other Court. In each of those cases we put the question of interest in the Short Cause list. In the second case the only question argued was whether it should or should not go into the Short Cause list, although, as far as I remember, the question was argued as one of discretion and not one of jurisdiction. It was not argued to us, as far as I remember, that there was no jurisdiction to put the case into the Short Cause list.

In that state of the authorities in 1925 *Bennett v. Stubbs* (*supra*) came before two other Judges of the Court of Appeal, and, as I have said, Mr. Levy tells us that the point not having been taken before the Master and the Judge he had not that command of all the authorities that he would have had if he had known what point was coming. *Lazarus v. Smith* (*supra*) was not cited to the Court in *Bennett v. Stubbs* (*supra*), and the two unreported cases, of course, were not cited to the Court, so that the two Lords Justices who sat in *Bennett v. Stubbs* (*supra*) were not aware that in three cases, in one of which short cause was the only point argued, their brothers, in each case two other members of the Court, had done what they were saying in *Bennett v. Stubbs* (*supra*) there was no power to do. In my view, *Bennett v. Stubbs* (*supra*) proceeded upon a misreading of the decision in *Wells v. Allott* (*supra*) in thinking that the Court had said that Order XIV. did not apply to all the procedure instead of, as I think, to the power to give summary judgment on the question.

Having considered all the authorities in the Court of Appeal, I come to the conclusion that the view taken in *Lazarus v. Smith* (*supra*), and the two unreported cases, is right. I understand it to be this, that if you have a writ properly indorsed under Order III., Rule 6, but the defendant is able to raise a defence to part of it, namely, as to the interest by making a *prima facie* case of excessive interest, the powers given to the Master or a Judge when the Master or a Judge gives leave to defend as to part, the powers of giving directions for the action under Rule 8 (*a*) and putting it into the Short Cause list, under Rule 8 (*b*), apply, although you cannot give summary judgment for the amount of interest, a *prima facie* case being raised that there is a defence.

Next, of course, comes the question in this case ; there being jurisdiction in the Court to do it, and the Master and the Judge having declined to exercise jurisdiction because they thought they were bound by the decision of *Bennett v. Stubbs* (*supra*), and this Court having held that they were not in view of the other decisions in the Court of Appeal, what should this Court do as to the Short Cause list. I quite agree with what my Lord has said, that this power of putting moneylenders' cases into the Short Cause list should be exercised with considerable caution. It is certainly not to be taken as a rule that whenever the only dispute is as to the adequacy of interest in a moneylender's case, the case should go into the Short Cause list. Moneylenders' cases are very complicated, particularly cases where the defendant desires to reopen a previous transaction, and I think that the Master would be safe, although I do not lay down any final rule, in never putting any cases into the Short Cause list where there is a claim to reopen previous transactions as well as a dispute as to the particular transaction put on the writ. Where only one transaction appears to be concerned the Masters must use their judgment as to whether it is likely to be a short cause, and I think they may require the defendant to show them some reason why it is likely not to be a short cause. The questions what the financial position of the borrower was at the time of the loan, and how much the moneylender knew about him, are sometimes quite simple. Sometimes the borrower knows exactly what he has had, and there are undoubtedly some cases which are properly dealt with in the Short Cause list, but I think the Masters would be wise to approach the question rather with a prejudice against the Short Cause list in moneylenders' cases. They are not always short, and I do not know of any reason of public policy which requires that moneylenders whose claims are being investigated because a *prima facie* case of extortionate interest is shown should have any special precedence over other litigants who are not in the position of having a *prima facie* case of extortion made against them, but I do not think it is possible to say more to help the Masters as to whether or not cases should be put in the Short Cause list. A case should not be put in the Short Cause list unless the Master has strong reason to believe that it will

be short; perhaps that is as simple a rule as one can give him.

Lord Justice Atkin.—If it were not for the decision in *Bennett v. Stubbs* ([1926] 1 K.B., 272) I should have found this case a reasonably simple one, and I should not have given a judgment of my own except to concur in the judgments that have been delivered, but the judgment in *Bennett v. Stubbs* (*supra*) stands and presents a difficulty. It is because of that case that I feel bound to express my own reason for concurring in this appeal being allowed. If the case of *Bennett v. Stubbs* (*supra*) had stood alone it appears to me that it would govern this case. I think that it is an expression of opinion by the Court of Appeal that in a case where a moneylender has sued upon a bill of exchange and a defence under the Moneylenders Act, 1900, is raised which the Court ought to give effect to and treat as raising a defence to be tried, in such a case the Court has got no jurisdiction under the provisions of Order XIV. to allow the case to be put in the Short Cause list. It is true that in the case in question the only matter that was in dispute was the question how much interest should be paid in addition to the principal which had already been paid, but I can see nothing in principle which would make any difference to any degree, although there was still some undoubted balance of the principal sum due. I could not say that, taking that view of the case if it stood alone, it would make any difference, and I should feel, and indeed I am quite sure that we should all feel, bound by it. It is obvious that a Court of Appeal consisting of three Judges is not entitled to overrule a decision of a Court of Appeal expressed by two Judges, but the case does not stand alone, because now it is quite apparent that there were at least three previous decisions of the Court of Appeal which have been mentioned, and to which I need not refer, which are inconsistent with the decision in *Bennett v. Stubbs* (*supra*), and in each of which the Court of Appeal, to my mind quite obviously, considered and gave effect to their opinion that it was within the jurisdiction of the Court to order a trial as a short cause in a moneylender's case where the defendant had raised a *prima facie* defence under the Moneylenders Act, 1900, and it also is the case that none of those three cases were in fact cited to the Court in *Bennett v. Stubbs* (*supra*). It is not a case, therefore, where there is an authoritative decision of the Court of Appeal distinguishing the two previous cases.

There being this state of the authorities, it appears to me obvious on authority and on principle that this Court now is not bound by the decision in *Bennett v. Stubbs* (*supra*), but has to express its own view of what the law is. I do not decide whether or not the Court is bound by the previous decision in those cases, but I think it is open to us to deal with the matter on principle, which is the way in which I propose to deal with it. Dealing with the matter on principle, it appears to me that the provisions of Order XIV. depend in the first place upon observing whether or not a writ has been specially indorsed under Order III., Rule 6. If the plaintiff has in fact indorsed his writ with a specially indorsed claim under Order III., Rule 6, and has made a sufficient affidavit following the rules in Order XIV. it appears to me that the case is then within Order XIV., and he is entitled to make an application for summary judgment. It also appears to me quite plain that in the case where a moneylender sues, at any rate upon a bill of exchange, including in that term a promissory note or cheque, and claims an amount for interest which is either due as being part of a fixed sum mentioned in the bill or is a rate of interest expressed to be in the bill of exchange at a fixed rate, then the amount of the claim is a liquidated claim as far as the interest is concerned, by reason of the provisions of the Bills of Exchange Act, 1882. It is quite true that by reason of the Moneylenders Act, 1900, the party liable on such a bill may, in a moneylender's transaction, raise a defence under the Moneylenders Act, 1900—namely, that the interest was excessive, and that the transaction was harsh and unconscionable. If he makes a *prima facie* case to that effect then he is precisely, in my opinion, in the same position as any other defendant against whom a summons is taken out under Order XIV.—that is to say, he has raised a case of a *prima facie* defence which has to be tried. It is in no way different from the case of a man sued on a liquidated claim for goods sold and delivered who raises a *prima facie* defence, either that he has not had the goods or that they have not been delivered, or that the goods are not of the quality, and so on, or that they did not comply with some condition. There is a case to be tried, and in that case, where he has raised a defence at the time, it appears to me that the Judge is equipped with all the powers which are expressly provided in Order XIV. in such a case where he desires to give leave to defend. He may give leave to defend conditionally or unconditionally. He may give directions as to the mode of trial, and among the directions that he may give it appears to me by the express rule that he may think the case is a simple one and order the case to be tried in the Short Cause list. I see no reason at all for supposing that there is some magic in the defence under the Moneylenders Act, 1900, which makes the defence to a bill of exchange anything other than a defence and a defence which has to be tried. It has to be remembered that the mere fact that the defendant raises a case that the interest is excessive, and that the transaction is harsh and unconscionable, is one which on authority, and by the plain words of the Rule, cannot be determined by the Master or the Judge. It is a question for trial, and it still remains an issue. It may be that the moneylender will prove either that the interest was not excessive or that the transaction was not harsh and unconscionable, and in that case his bill of exchange remains as he sued upon it, and he is entitled to judgment for a liquidated sum. It is obvious to my mind that it is quite illogical for the Court, before the matter is determined whether the transaction was a transaction in which the interest was excessive and was harsh and unconscionable, to presume the fact against the plaintiff, and on that assumption decide that the claim is not a liquidated claim.

That is how the matter seems to me to stand, apart from authority, and I think that the decision to the contrary, apart from the fact that the three previous cases were not brought to the attention of the Court, rests upon what I venture to think is not an uncommon misuse or misunderstanding of language as to a case not being within Order XIV. I have known the expression commonly used at the Bar, and I have often heard it used on the Bench in this particular connexion, as a compendious way of stating that it is not a case where the Court ought to give summary judgment on an application made on the summons taken out under the provisions of Order XIV. Merely used in that way all that it means is that the Court

will not give summary judgment. One has often known the case where a plaintiff claims on a specially indorsed writ. The defendant makes an affidavit which seems to suggest a trial defence, and at once everybody thinks "This is not a case for Order XIV.," and so I suppose the expression might be used "This is a case which is outside Order XIV.," but in all those cases all that is meant is that it is not a case in which the ordinary right of a defendant to have the case determined by trial should be taken away from him and summary judgment should be given. Without referring to the whole of the language used by the late Lord Collins in the case upon which *Bennett v. Stubbs* (*supra*) was mainly founded, namely, the case of *Wells v. Allott* (*supra*), I think that is made quite plain in two passages of Lord Collins's judgment. He begins at page 846 by saying: "The question we have to determine is whether the plaintiff is entitled to judgment for the whole amount claimed under Order XIV.," and in dealing with that he goes on in the next sentence to say: "It seems to me that, whatever may have been the law before the passing of the Moneylenders Act, 1900, it is impossible now to say that the procedure of Order XIV. can be made applicable to an action by a moneylender to recover interest on money lent, where the loan appears *prima facie* to carry an excessive rate of interest." I think that what the learned Judge is saying there is that it is impossible, dealing with the question which we have to determine, to say that he is entitled to judgment under Order XIV. in an action where the loan appears *prima facie* to carry an excessive rate of interest. He goes on to say: "In such a case the moneylender has not an absolute right to recover what the borrower has agreed to pay, but only a right *sub modo* involving an investigation by the proper tribunal for the purpose of seeing if the plaintiff's *prima facie* right of action is one to which in the particular circumstances effect ought to be given." Then he goes on to say: "The procedure under Order XIV. is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence." That is meant to give a right to judgment, and it is obvious, therefore, that when the Master of the Rolls is saying that the procedure of Order XIV. cannot be made applicable, he means the procedure as defined by him later on—namely, the procedure of a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence, or, in other words, to give judgment.

I think, therefore, that there is no authority other than *Bennett v. Stubbs* (*supra*) which lays down, or indeed which, on my construction of the Rules, could lay down, that where the defendant, sued by a moneylender on a moneylending transaction, makes a *prima facie* defence under the Act there is no power to give the necessary directions under the provisions of the Order, including the power to order the case to be put into the Short Cause list.

The only other question which arises is whether or not the discretion ought to be exercised in this particular case. In reference to that I should like to express my adherence to the views which have been expressed by my Lord and by the Lord Justice as to the propriety of putting such cases into the Short Cause list. First of all, it is quite clear to my mind that there ought to be no general rule, which it is rather suggested to us at the Bar existed before the case of *Bennett v. Stubbs* (*supra*), to put all cases of this kind in the Short Cause list. In the second case, it appears to me that *prima facie* the kind of investigation that has to be embarked upon in order to do justice to the parties is a discussion which is very unlikely to be properly conducted within the limits of time which a short cause ought to take. I think that it is a matter in which the fullest investigation ought to be made, and in which the Master ought to have it quite clearly in his mind that time should be allowed to both parties for the purpose of dealing with the matter. As I say, although I am far from saying that there may not be cases in which the case is so short and so simple that it would come within the formula which was given some time ago by a Judge as a case likely not to take more than an hour, yet in the majority of cases I should have thought myself that it would be extremely difficult to say that such a defence could be adequately and justly tried within the limits of a short cause.

There is one other point to which I wish to refer. Nothing that we have said as to the power to order a case to be tried in the Short Cause list applies to cases where the claim indorsed on the writ is obviously one that does not fall within the provisions of Order III., Rule 6. If it is such a case it seems to me extremely doubtful whether or not the Court has any power to make any order at all except possibly an order giving unconditional leave to defend. The doubt is raised in this way. There is a decision in the Court of Appeal based upon the rule which formerly existed, that in such a case the only order that can be made is to dismiss the application. That is the case of *Symon and Co. v. Palmer's Stores* (1903, *Limited* [1912] 1 K.B., 259), but since that case the provisions of Rule 9 of Order XIV. have been altered, and instead of providing that in such a case the application shall be dismissed, the Rule now says that the application may be dismissed with costs, and it may therefore be that the effect of that is that the Court has still power, although, as I have said, the decision of the Court of Appeal on the old rule is to the contrary; but there is another provision which stands in Order XIV., Rule 9, and that is in substance that when a plaintiff makes an application under Order XIV. in such circumstances that he must have known that he had no right to summary judgment and leave to defend is given, the Court may also dismiss the application with costs. There is a dictum of Lord Justice Buckley's, but a dictum with which I am bound to say that I myself agree, to the effect that it would be an illegitimate use of the provisions of Order XIV. to make an application in a case where it should be quite plain to the plaintiff that he is not entitled to summary judgment merely for the purpose of getting an order for trial in the Short Cause list. Therefore I think that the Master and the Judge in exercising their discretion as to whether or not they should put a case in the Short Cause list are entitled to have regard to the question whether or not the plaintiff in this case, always the moneylender, was or was not justified in his claim for summary judgment. That, of course, depends upon whether or not he had reason to suppose in the circumstances that a defence could be raised, and that if raised it would be likely to be successful, but no general rule can be laid down upon it. If these were found to be the facts, then I think the Court, in exercising its discretion, might very well refuse to order the case to be tried in the Short Cause list, treating the application as being an illegitimate use of Order XIV.

I think that is all that remains to be said, except that in this particular case it appears to me from the facts that the case is an exceptionally simple case, and that there is no reason disclosed why the case should

not be heard in the Short Cause list. The learned Judge obviously did not exercise any discretion, and we are told by counsel that he rather suggested that if he had had a discretion he would have exercised it in the way in which we propose to exercise it.

I therefore agree that this appeal should be allowed and an order should be made that this case should be heard in the Short Cause list, but whether any direction should be given, or whether it should go back to the Master for the purpose of getting directions, is a point which perhaps we might have to consider.

[Solicitors—Messrs. Lazarus and Son ; Mr. F. W. Perkins.]

Railway and Canal Commission. (Sankey, J., Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C.) 1927. Mar. 3.

IN RE DENABY AND CADEBY MAIN COLLIERIES, LIMITED, AND OTHERS.*

Mines—Amalgamation—Scheme—Application for confirmation—"National interest"—"Fair and equitable"—Mining Industry Act, 1926 (16 and 17 Geo. V., c. 28), s. 7 (2).

Observations on the meaning of the expressions "national interest" and "fair and equitable" in s. 7 (2) of the Mining Industry Act, 1926.

This was an application for the confirmation of an unopposed scheme for the partial amalgamation of the Denaby and Cadeby Main Collieries, Limited, the Rossington Main Colliery Company, Limited, the Dinnington Main Coal Company, Limited, and the Maltby Main Colliery Company, Limited, in accordance with the provisions of the Mining Industry Act, 1926, Part I., sections 1 (1) and 7 (2). This was the first application made to the Court under the provisions of this Act.

Mr. MAUGHAN, K.C., who appeared with Mr. Rabagliati and Mr. Osbert Peake in support of the application, stated that the matter had already been investigated by the Board of Trade. There were no objections to the scheme, and it was therefore his duty to satisfy the Court, in accordance with the provisions of the Mining Industry Act, 1926, that the terms of the scheme were in the national interest and were fair and equitable to all persons affected thereby. The four companies owned about the same area of coal to be worked, but the financial position of each company was different. The scheme recognized that two of the companies, Rossington and Maltby, required financial assistance. The method of the scheme was for partial amalgamation by share control and by the provision of a separate company which would acquire all or at least a controlling interest in the Ordinary shares of the constituent companies. Those shares would be divided into several groups for the purpose of enabling all the constituent companies to be represented on the board, and also for the purpose of postponing the payment of dividends on the Rossington and Maltby shares for a certain period.

The working, treating and disposing of coal over a large area would thus be subjected to a single policy. A policy of unified control would enable the financial resources of the whole group to be brought into play in aid of any of the constituent companies. The name suggested for the new company to be formed by the amalgamation was "The Yorkshire Amalgamated Collieries, Limited."

LORD ABERCONWAY, chairman of three of the four companies, gave evidence. He stated that amalgamation would save establishment charges all round. It would enable better provisions to be made for the men employed, both as regards housing and recreation. It would also provide increased opportunities of employment.

Evidence was also given by Major John Leslie, D.S.O., chairman of the Denaby and Cadeby Main Collieries, Limited; by Mr. William Humble, a colliery engineer, and chairman and managing director of numerous collieries, who had made an independent valuation of the four collieries ; and by Mr. William Birkenhead Mather-Jackson, managing director of three of the collieries.

MR. JUSTICE SANKEY, in the course of his judgment, said that the Court had ordered notices to be given publicly and to the members of the companies concerned so that anyone who desired to oppose the scheme might have an opportunity to do so. The Registrar had furnished a certificate that those notices had been given, and that there was no opposition. It might be urged that the application to the Court was unnecessary, since the amalgamation might be accomplished by voluntary agreement. By coming to the Court under the Act, however, the applicants would escape stamp duties amounting to £76,000, and, even if that were their only object, he could see no reason why they should not take advantage of the Act if the law allowed it. He would rather congratulate the coal industry on escaping liability to stamp duties in a way not enjoyed by other depressed industries.

When an application was made to the Court, what was the Court's duty ? As this was the first application, they had thought it desirable to indicate what their views were, though they had not had the advantage of hearing argument against the scheme, which was of the simplest character. Section 7 (2) of the Act provided :—

"The Commission . . . may confirm the scheme either without modifications or subject to such modifications as the Commission think fit, or may refuse to confirm the scheme : Provided that the Commission—(*a*) shall confirm a scheme if satisfied that it would be in the national interest to do so, and that the terms of the scheme are fair and equitable to all persons affected thereby. . . ."

The two questions upon which the Court had to be satisfied were (1) Was this scheme in the national interest ? (2) Were the terms fair and equitable ?

What constituted the national interest was a very difficult question, upon which opinions differed and which might become a political question more suitable to be decided by the High Court of Parliament than by the High Court of Justice. The difficulty was especially shown in a case like the present, where there had been no one to show in what respects the scheme was not in the national interest.

The Court did not wish to lay down any definition of "national interest." Each application must be considered upon its own merits. But they thought that the Court ought to adopt a benevolent attitude towards applications. The tendency of the Act was meant to be favourable to amalgamations.

Colliery amalgamations were said to be likely to effect a cheapening of the production of coal. Where a cheapening was produced, it would be in the national interest that it should be reflected in the selling price of coal. It could not be to the national interest merely that the coal industry should be enriched without the consumer sharing the benefit.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

The present scheme affected a total area of about 33,000 acres, and it was estimated that the scheme, if confirmed, would increase the total annual output of coal from 3,400,000 to 5,000,000 tons. The Denaby and Dinnington Collieries were flourishing concerns. Rossington and Maltby were not in the same position, and one of the great advantages of the scheme would be the assistance which it would render to those two companies. It was also alleged that partial amalgamation would allow a large amount of coal to be won which would otherwise be left as barriers—some 3,000,000 tons would be saved in the Barnsley seam alone.

The partial amalgamation was sought to be effected by the method of share control through a new company holding a controlling interest in the Ordinary shares of the constituent companies with the principal object of vesting in the amalgamated company the constituent companies and of making such financial provisions as would enable the Rossington and Maltby companies to develop their undertakings so as to attain the maximum output.

His Lordship read the grounds on which the scheme was alleged to be in the national interest, which might be summarized as development of Rossington and Maltby ; elimination of barriers ; joint selling arrangements ; increased output and employment ; joint financial resources operating as an insurance against future loss in the event of explosion or disaster to one of the companies involving a breakdown and loss of coal to the nation ; more economical working through the pooling of wagons ; and the reduction of overhead charges through a single controlling policy.

It appeared to him, said his Lordship, that if the scheme was sanctioned all those advantages were likely to be attained—he would not say at once, because of the position of Rossington and Maltby. But anyone with experience of colliery management could see that the amalgamation was likely to produce the results suggested, and he thought that all those advantages were in the national interest.

On the question whether the terms were fair and equitable, he repeated that the Court should maintain a benevolent attitude, always, of course, paying careful attention to any substantial objection. The way in which the present scheme had been put forward had been very fair and reasonable. An independent valuation had been made. As a result of that valuation a scheme for allotting shares in the amalgamated company equivalent to the holdings of ordinary shares in the constituent companies had been drawn up. Debenture-holders and Preference shareholders would be in no way prejudiced.

In accordance with the practice of the Chancery Division the Court had ordered meetings to be held of the shareholders of the constituent companies. At those meetings the scheme was very fully and carefully explained to the shareholders by Lord Aberconway and Major Leslie respectively, and he (his Lordship) was confirmed in his view that the scheme was fair and equitable by the results of those meetings, which approved it by enormous majorities in each case. He could not help thinking that those who voted against it would vote for it if a second vote were taken, since none of them had come to oppose it. For those reasons he thought that they ought to confirm the scheme.

Sir E. Tindal Atkinson, in a judgment agreeing with that of Mr. Justice Sankey, pointed out that the Court had nothing to do with the general policy of amalgamation of collieries or its effect on the industry. They had merely to answer the questions whether a particular scheme was in the national interest and whether its terms were fair and equitable.

Sir Lewis Coward, who also concurred, emphasized the importance of the pooling of wagons, and said that it was not always realized how large a proportion of the capital of a company ought to be allocated to the provision of wagons. He thought that the scheme before the Court would provide the amalgamated collieries with an adequate stock.

The amalgamation of the railways had been followed by disastrous results to the trader. In the area affected by the present scheme railway competition had been almost eliminated with the result that there were congestion and delay in the use of wagons. Lord Aberconway had given evidence that there would have been a supply of wagons if there had been competition, but that it was now impossible to put pressure on the railway companies.

[Solicitors—Messrs Davies, Sanders, and Swanwick, Chesterfield ; Messrs. Johnson, Weatherall, Sturt, and Hardy.]

Court of Appeal.
(Bankes and Scrutton, L.JJ., and Romer, J.)
1927.
Mar. 9.

J. GORDON ALISON AND CO., LIMITED v. WALLSEND SLIPWAY AND ENGINEERING COMPANY, LIMITED.*

Contract—Sale of Goods—Defect—Cylinder for ship's engines—Supply to ship repairers—Subject to "our usual" guarantee clause—Damages for detention of ship—Uncertainty as to clause indicated.

The plaintiffs, a ship-repairing company, requiring a new intermediate pressure cylinder for the engine of a steamer which they had contracted to repair, obtained a quotation from the defendants, who were marine engineers. At the head of the defendants' letter was a printed notice, "All offers are subject to our usual strike and guarantee clauses, accidents, &c." The plaintiffs ordered the cylinder, but after it had been delivered and fitted it was found to be defective. A new cylinder was subsequently supplied by the defendants, but owing to the delay the plaintiffs were not able to complete the repairs in accordance with their contract with the shipowners, and had to pay them damages. In an action to recover the amount of the damages the defendants alleged that the contract for the supply of the cylinder was made subject to "our usual" guarantee clause and that their guarantee clause provided (*inter alia*) that "the contractors shall not in any case be liable for any detention of the vessel or other consequential damages howsoever arising."

Held, that as it was not clear what guarantee clause was incorporated, since the clause suggested by the defendants was inapplicable to the contract, and as it was not proved that the defendants had made it clear that they intended

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

to limit their liability, the plaintiffs were entitled to recover.

Decision of Roche, J. (43 *The Times* L.R., 104) affirmed.

This was an appeal by the defendants from a judgment of Mr. Justice Roche (43 *The Times* L.R., 104).

The plaintiffs, J. Gordon Alison and Co., Limited, a ship-repairing company at Birkenhead, claimed to recover damages from the defendants, the Wallsend Slipway and Engineering Company, Limited, marine engineers on the Tyne, in the following circumstances :—

Early in 1925 the plaintiffs were engaged in repairing a steamer, the Beechwood, and in the course of executing the repairs they had to fit a new intermediate pressure cylinder in the steamer's engine. They ordered the cylinder and fittings from the defendants at a cost of £622, and the cylinder was delivered and fitted on board in due course. When tested under steam pressure it was found to be cracked and useless, and the plaintiffs returned it to the defendants. A new cylinder was subsequently supplied by the defendants, but owing to the delay the plaintiffs were not able to complete the repairs of the Beechwood in accordance with their contract, and they became liable to her owners in respect of the extra time involved.

The plaintiffs compromised the claim of the owners by a payment of £4,000, and they claimed to recover from the defendants that sum, together with a further sum of £281 in respect of expenses and other matters.

The defendants put in a general denial and said that they only contracted to supply a cylinder which would satisfy the test of Lloyd's surveyor, and the cylinder in question had passed the test. They also said that their contract with the plaintiffs was subject to "our usual" strike and guarantee clauses, and that their guarantee clause, which was customary in the trade, was in the following words :—

"The contractors guarantee the machinery against all defects of material or workmanship that may be discovered within a period of six calendar months after completion of the machinery. The contractors will . . . supply and fit at their works new articles and/or materials to replace or make good such defective part or parts of the machinery arising within such period and due to such causes as aforesaid. . . . The contractors shall not be liable to the purchasers in respect of defects whether in original or substituted work or material except to the extent provided for in the last preceding clause, and the contractors shall not in any case be liable for any detention of the vessel or other consequential damages howsoever arising."

While the contract between the plaintiffs and the defendants was under negotiation the defendants wrote on April 25, 1925, quoting their price and specifying the time required for delivery and other matters, and at the head of that letter was a printed notice in red type, "All offers are subject to our usual strike and guarantee clauses, accidents, &c." On April 29, 1925, the plaintiffs wrote to the defendants accepting their tender, but making no reference to the guarantee clause.

Mr. Justice Roche held that the plaintiffs were entitled to recover. His Lordship found, on the evidence, that the cylinder when delivered was defective. With regard to the defence of the guarantee clause, he held that it was not clear what guarantee clause was incorporated. The clause suggested by the defendants was the clause in their usual engine agreement, which was drawn up to meet the case of engines being supplied to a shipowner, and did not seem to meet such a case as the present. Further, it was not proved that the defendants had made it clear that they intended to limit their liability.

The defendants appealed.

Sir John Simon, K.C., Mr. Clement Davies, K.C., and Mr. Lilley appeared for the appellants ; Mr. Miller, K.C., and Mr. Probyn Jones for the respondents.

The Court did not call on counsel for the respondents.

Lord Justice Bankes, in giving judgment, said that the case was a plain one. He agreed that the notice in red type at the top of the defendants' offer was a notice of the existence of some usual strike and guarantee clauses, but he did not agree that there were any strike and guarantee clauses applicable to this case. The guarantee clause which had been suggested, even if it could be relied on, was quite inapplicable to the present contract, and the appeal failed.

Lord Justice Scrutton said that the Court acted on the principle—and it was a very healthy principle—that if a person was under a legal liability and wished to get rid of it he could only do so by using clear words. In the present case there was a clear liability on the defendants to pay the damages, and they had failed to use sufficiently clear words to enable them to escape that liability. The appeal failed.

Mr. Justice Romer agreed.

[Solicitors—Messrs. Thomas Cooper and Co., for Messrs. Ingledew and Co., Newcastle-on-Tyne ; Messrs. Gregory, Rowcliffe, and Co., for Messrs. Laces and Co., Liverpool.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. Mar. 7.

IN THE ESTATE OF JONES, DECEASED.*

Probate — Executor—Appointment of holder of office — Person entitled to probate—Whether holder at date of will or of testator's death.

This probate motion raised the question whether, in a case where the holder of an office had been appointed executor, the person entitled to probate was the holder of that office at the time when the will was executed or at the date of the testator's death.

The Rev. John Jones, late of the Chantry, Garway Hill, Hereford, clerk in Holy Orders, died on March 23, 1926, and by his will dated November 28, 1912, he bequeathed to the president and committee of the Monmouthshire branch of the English Church Union the residue of his property for the benefit of the poor clergy in Monmouthshire. He appointed as executors "the President of the Monmouthshire branch of the English Church Union", and a Mr. George Davies. Failing the above-mentioned persons, he appointed the Public Trustee.

At the time of the testator's death, James Edward Garnons Lawrence was President of the Monmouthshire branch of the English Church Union, while the occupant of that office at the time when the will was

* Reported by Clifford Mortimer, Esq., Barrister-at-Law,

executed was Mr. Edward Steer, who was still living, but had resigned his office.

Mr. Clifford Mortimer moved for probate to Mr. Garnons Lawrence as one of the executors designated in the will. He submitted that, on the construction of the will as a whole, it was clear that the testator intended to appoint as his executor the person who held the office of president at the time of his death and who could give effect to the charitable bequests in his will. The general rule of construction that words indicating an existing individual were considered to refer to the date of the will and not to the testator's death did not necessarily apply where the gift was to a person holding an official position (Jarman on Wills, sixth edition, p. 401); *In re Laffan and Downes' Contract* ([1897] 1 I.R., 469).

Mr. Justice Hill said that he was satisfied that Mr. Garnons Lawrence was entitled to the grant, and made the order as prayed.

[Solicitors—Messrs. E. F. and H. Landon, for Mr. John Moore, Hereford.]

K.B. Div. (MacKinnon, J.) 1927. Mar. 7.

IMPORTERS COMPANY, LIMITED v. WESTMINSTER BANK, LIMITED.*

Bills of Exchange—Cheque—Crossed cheque—"Account payee only"—Forgery of indorsement—Non-liability of collecting bank—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 82.

By section 82 of the Bills of Exchange Act, 1882, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title . . . the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

The plaintiffs, who were merchants in London, bought paper from German manufacturers through S., their buying agent in Germany, and sent him a crossed cheque, marked "account payee only," drawn on the National Provincial Bank in London, and payable to the vendors. S. indorsed the cheque by forging the name of the vendors and added his own name, and he then paid it into his own bank at Dresden. The Dresden bank collected the money from their English agents, the defendant bank, and the latter collected the amount from the National Provincial Bank. In an action for wrongful conversion of the cheque the defendants relied on s. 82 of the Bills of Exchange Act, 1882.

Held, (1) that as there was nothing in the indorsements or in the words "account payee only" to make the defendants suspicious, since S. might have been the managing director of the vendors, the defendants had not been negligent; (2) that the word "customer" in the section included another bank; and (3) that, although the defendants were acting as a collecting bank, they "received payment" within the meaning of the section; and therefore that the action failed.

In this action the plaintiffs claimed £1,905 15s. 11d. as damages for the alleged wrongful conversion of a number of cheques.

Mr. Pritt appeared for the plaintiffs; Mr. Rayner Goddard, K.C., and Mr. Somervell for the defendants.

The plaintiffs were merchants in London, who, in the course of their business, bought from time to time large quantities of paper from manufacturers in Germany. In 1924 they appointed one Schultz as their buying agent in Germany. When they bought paper through him their practice was to send a cheque to him to be handed over by him to the particular manufacturers. The cheque was drawn on the plaintiffs' bank in London, the National Provincial Bank, Limited, and was made payable to the manufacturer, and was crossed and marked "account payee only."

After a time Schultz began a series of frauds. He indorsed the cheques by forging the name of the manufacturers to whom the money was payable, disguising his handwriting for the purpose, and added his own name beneath. He then paid them into his own bank, Heilmann's Bank, Dresden. Heilmann's Bank then collected the money from their English agents, the defendants in this case, and the defendants in due course collected the amount from the National Provincial Bank.

Schultz had now become bankrupt and Heilmann's Bank had also become insolvent, and the plaintiffs, being still liable to the German manufacturers, now sued to recover the amount from the defendants.

By their defence the defendants put in a general denial, and pleaded that Heilmann's Bank was their customer and that they had acted in good faith and without negligence in receiving payment for such customer and sending him the proceeds. They relied on section 82 of the Bills of Exchange Act, 1882. Alternatively, they pleaded that the words "account payee only" were only a direction to the receiving bank concerned and did not in any way affect a collecting bank. The cheques in question were always payable to payees abroad and in the ordinary course of business would always have to be presented by a foreign bank through an English collecting bank. They also pleaded that they had remitted to Heilmann's Bank before they had any notice of the plaintiffs' claim.

Evidence having been called, Mr. Goddard was beginning to address the Court when Mr. Justice MacKinnon said that he would hear Mr. Pritt.

Mr. Pritt referred to section 72 (2) of the Bills of Exchange Act, 1882, as to the law of the country applicable in regard to indorsement and submitted that in German law Heilmann's Bank had no title. As to section 82, he submitted that the defendants did not act without negligence, that they did not "receive payment," but that if they did they did not receive it "for a customer." Section 82 in speaking of a customer meant someone who might be described as a layman. It never was intended to include one bank dealing with another. Heilmann's Bank was a "correspondent" of the defendants, not a "customer." For a collecting banker to ignore indorsements or markings on a cheque was negligence (Paget on Banking, 3rd edition, p. 295).

If the defendants were acting as a receiving bank in dealing with these cheques it was negligence on

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

their part not to see that the indorsements were in order. If they were not a receiving bank they were not protected by section 82. Bankers might do things as a matter of convenience in banking practice, but if they did not keep within the law they acted at their peril. To gain the protection of section 82 the defendants should have paid attention to the express instruction "account payee only." It was no answer to say that banking practice justified them in ignoring those words.

During the argument the following cases were referred to :—*National Bank v. Silke* (7 *The Times* L.R., 156 ; [1891] 1 Q.B., 435) ; *Bevan v. Capital and Counties Bank, Limited* (23 *The Times* L.R., 65, at p. 68) ; *Akrokerri (Atlantic) Mines, Limited, v. Economic Bank, Limited* (20 *The Times* L.R., 564 ; [1904] 2 K.B., 465, at p. 472) ; *Great Western Railway Company v. London and County Banking Company* (17 *The Times* L.R., 700 ; [1901] A.C., 414, at p. 418).

Mr. Justice MacKinnon, in giving judgment, stated the facts, and said that he would deal with the case of one cheque as typical of all. The plaintiffs' practice was to draw a cheque in favour of some German manufacturer and send it out to Schultz in Dresden, whose duty it was then to discharge the plaintiffs' debt by handing the cheque to the manufacturer. Schultz, however, indorsed the cheque by forging the manufacturer's name and adding his own name. In some cases Schultz wrote the indorsement in pencil, but it was held as long ago as 1826 that a pencil indorsement was valid and effective. Schultz then took the cheque to Heilmann's Bank, where he had his own banking account, and paid it in. Heilmann's Bank in due course sent the cheque to the Westminster Bank for collection, having indorsed it to "order of Westminster Bank, value in account." The Westminster Bank received the cheque, and, having indorsed it and presented it to the National Provincial Bank, received the proceeds and credited Heilmann's Bank with them in account.

Prima facie the plaintiffs' claim would be good ; for undoubtedly the defendants had become possessed of the plaintiffs' money. But the defendants relied on section 82 of the Bills of Exchange Act, 1882, which provided that "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title . . . the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Mr. Pritt submitted, first, that the section did not apply because the defendants had been negligent. He contended that as the words "account payee only" appeared on the cheque the defendants should have ascertained that they were really receiving on account of the payee. He further contended that the indorsements ought to have put the defendants on inquiry. In his (his Lordship's) view there was nothing in either of those contentions. There was nothing in the indorsements to make the defendants suspicious ; the cheque was indorsed with the name of the manufacturer and the name of Schultz was added beneath it, and the defendants might perfectly well suppose that Schultz was the cashier or the managing director of the manufacturer concerned.

As for the effect of the words "account payee only," there was really nothing to suggest that that mandate was being departed from. The defendants might naturally suppose that the particular manufacturer was a customer of Heilmann's Bank and had paid the cheque into his account there, and that Heilmann's Bank was collecting it in the ordinary course. There was nothing therefore to support the suggestion of negligence.

Then Mr. Pritt contended that in any case there was no "payment for a customer" within the meaning of those words in the section. His suggestion was that the word "customer" only included a private individual or firm and was not intended to include another bank. He (his Lordship) saw no reason whatever for so limiting the meaning of the word "customer," and he held that Heilmann's Bank was a customer of the defendants within the meaning of the section. It would, indeed, be impossible to define precisely what was meant by a customer if Mr. Pritt's contention was upheld.

Then Mr. Pritt contended that the defendants did not "receive payment" within the meaning of the section because in this transaction the defendants were acting as a collecting bank and not as a receiving bank. But that involved using the word "receiving" in different senses, and it was really clear that the defendants did receive payment of the proceeds of the cheque within the meaning of the section.

The defendants were, therefore, entitled to rely on section 82 of the Bills of Exchange Act, 1882, and judgment must be entered for them, with costs.

[Solicitors—Messrs. Buckeridge and Braune ; Messrs. Travers-Smith, Braithwaite and Co.]

Court of Appeal. **(Bankes, Scrutton, and Atkin, L.JJ.)** } **1927. Feb. 23.**

LEYTON URBAN DISTRICT COUNCIL v. WILKINSON.*

Justices—Appeal—Recognizance—Drainage expenses—Appeal by corporation—Recognizance of clerk—Appeal dismissed by Divisional Court—Leave to appeal—Whether competent—Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 3—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 31 (1) (*d*) (*f*),

By section 31 (1) (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925 :—

"(1) No appeal shall lie . . . (*d*) from the decision of the High Court or of any Judge thereof where it is provided by any Act that the decision of any Court or Judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final ; . . . (*f*) without the leave of the Divisional Court or of the Court of Appeal, from the determination by a Divisional Court of any appeal to the High Court. . . ."

Held, that the Divisional Court still has a right to give leave to appeal where such a right had been given by a previous Act.

Held, also, that although a corporation can enter into a recognizance by a properly authorized agent, yet where, on a case stated by justices, the appellants are a corporation, a recognizance entered into by their clerk, which

* Reported by E. J. M. Chaplin and T. W. Morgan, Esqrs., Barristers-at-Law.

does not show that it was entered into on their behalf and that it is their property which is made liable, does not satisfy the requirements of s. 3 of the Summary Jurisdiction Act, 1857.

Decision of the Divisional Court (43 *The Times* L.R., 35 ; [1927] 1 K.B., 315) affirmed.

This was an appeal from a decision of the Divisional Court (43 *The Times* L.R., 35 ; [1927] 1 K.B., 315) upon a preliminary objection which was taken on behalf of the respondent when a case stated by justices for the Becontree Petty Sessional Division of Essex, on proceedings by the appellants to recover from the respondent drainage expenses under the Public Health Acts, came on for hearing. The questions raised by the objection were whether a corporation was bound to enter into a recognizance to prosecute an appeal, and, if so, whether the recognizance in this case was sufficient.

The Summary Jurisdiction Act, 1857, after providing in section 2 for the making of an application for a case to be stated, enacts in section 3 :—

"The appellant, at the time of making such application and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance before such justice or justices or any one or more of them, or any other justice exercising the same jurisdiction . . . conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court, and pay such costs as may be awarded by the same. . . ."

The recognizance was in this form :—

"Be it remembered that on the 26th day of May, 1926, John Atkinson, of Town Hall, Leyton, Clerk to the Leyton Urban District Council, personally came before me, one of his Majesty's Justices of the Peace for the said County, and acknowledged himself to owe our Sovereign Lord the King the sum following—namely, the sum of £100, to be levied on his several goods and chattels, lands, and tenements if he the said principal fail in the condition hereon indorsed."

The Divisional Court held that, inasmuch as the recognizance entered into did not show that it was entered into on behalf of the corporation and that it was their property which was made liable, it did not satisfy the requirements of section 3 of the Summary Jurisdiction Act, 1857, and they upheld the preliminary objection.

The Leyton Urban District Council (now the Leyton Corporation) appealed by leave.

Mr. Montgomery, K.C., and Mr. William Allen appeared for the appellants ; Sir James O'Connor, K.C., and Mr. G. W. H. Jones for the respondent.

When the appeal came on for hearing, Sir James O'Connor submitted a preliminary objection on behalf of the respondent that no appeal lay by reason of the prohibition contained in section 31 (1) (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925. That section provides :—

"(1) No appeal shall lie . . . (*d*) from the decision of the High Court or of any Judge thereof where it is provided by any Act that the decision of any Court or Judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final. . . . (*f*) without the leave of the Divisional Court or of the Court of Appeal, from the determination by a Divisional Court of any appeal to the High Court. . . ."

He further submitted that by reason of the provisions of that Act there was no jurisdiction in the Divisional Court to give leave to appeal.

Lord Justice Bankes, in giving judgment on the preliminary objection, said that the only construction which could be put on the section of the Act of 1925, was that it, in substance, reproduced the somewhat patchwork condition of things under which it was held that a subsequent statute which gave the Divisional Court a right to grant leave to appeal must be taken to have impliedly overridden, because it did not repeal, a previous statute which provided that the decision of that Court should be final.

Under the Act of 1857, if a special case was stated, it was specially and distinctly provided that the decision of the Court to which the appeal was made was final. To some extent that was varied by the Summary Jurisdiction Act of 1879, but section 45 of the Supreme Court of Judicature Act of 1873 provided that the decision of the Divisional Court should be final unless special leave to appeal to the Court of Appeal was given by the Divisional Court, and by section 1 (5) of the Supreme Court of Judicature (Procedure) Act, 1894, the leave might be given either by the Divisional Court or by the Court of Appeal.

It was quite certain that the draftsman of the Supreme Court of Judicature (Consolidation) Act of 1925 did not intend to restrict the jurisdiction of the Divisional Court by no longer admitting a jurisdiction to give leave to appeal. He might have done it by misapprehension or mistake ; but what he did was this : By section 31 (1) he defined the jurisdiction by providing that no appeal should lie. Then under clause (*d*) in substance he reproduced what was equivalent to the provision of the Act of 1857. Then, when he came to clause (*f*), he, in terms, reproduced the provision of the statute of 1894. Having regard to the fact that the Act of 1925 was a Consolidation Act, clauses (*d*) and (*f*) must be read together in the sense of the decision in *Crush v. Turner* (3 Ex. D., 303) on the statutes existing up to the time of that decision. There being a provision that a Divisional Court might give leave to appeal, the case must be treated as one where the Divisional Court had the right to give leave notwithstanding the provision in section 31 (1) (*d*) of the Act of 1925 with regard to the decision of the Court being final.

For these reasons the preliminary objection failed and the appeal must proceed.

Lord Justice Scrutton and Lord Justice Atkin agreed.

The hearing of the appeal was then proceeded with.

Mr. Montgomery submitted on behalf of the appellants that a corporation was entitled to appeal without entering into a recognizance at all, though the recognizance actually entered into here by the clerk was in order even if not correctly recorded. He contended that the form in which it was recorded was sufficient.

Without calling on the respondent's counsel to argue, the Court dismissed the appeal.

Lord Justice Bankes.—I begin by saying that there are no merits whatever in the objections to the hearing of this appeal from a decision of the Divisional Court, but we have to decide the question of law which has been raised.

The matter arises in this way : the appellants, the Leyton Urban District Council, were parties to a proceeding before justices as complainants, and the justices decided in a way which did not satisfy them. They determined to appeal by way of a special case. They thereupon applied to the justices to state a

special case, and that was done. Under the provisions of the statute, where this procedure is adopted it is necessary that the appellants, who in this case were the district council, should at the time of making such application, and before the case is stated and delivered to them by the justices or justice, enter into a recognizance.

The district council here passed the necessary resolution—if it was to have any effect at all it was the necessary resolution—giving their clerk authority to enter into a recognizance on their behalf, and he thereupon attended before the justices. What exactly happened we do not know, because the details of what happened were not brought before the Divisional Court, and we do not think it right to allow materials to be brought before us at this late stage, one effect of which would be to attempt to contradict the written record. The result of the clerk's appearance before the justices was that a form of recognizance was drawn up, and that recognizance is, I venture to think, manifestly insufficient as a recognizance entered into by the clerk on behalf of the council. The form is the proper form for an individual entering into a recognizance on his own behalf. It recites that Mr. Atkinson, the town clerk, appeared personally before the justices of the peace, and then it sets out the condition of the recognizance. The condition states by way of recital: "And whereas the said" clerk "being dissatisfied with the said determination as being erroneous in point of law"—of course he was not dissatisfied; it was his council that was dissatisfied—"hath applied to the said Court, pursuant to section 2 of the Summary Jurisdiction Act, 1857, and section 33 of the Summary Jurisdiction Act, 1879, to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of the King's Bench Division of His Majesty's High Court of Justice; if therefore the said John Atkinson, after the said Court of Summary Jurisdiction shall have stated a case setting forth the facts and grounds thereof as aforesaid for the opinion of the said Court, shall prosecute without delay such his appeal and submit to the judgment of the said Court thereon," and so on. That is obviously insufficient as a recognizance on behalf of the Leyton Urban District Council. It does not purport to bind them; it does not purport to refer to their appeal; it does not purport to refer to their willingness to abide the result of the judgment, and to pay the costs. In my opinion so far as that point is concerned the Divisional Court could not come to any other conclusion than the one at which they have arrived.

But now this appeal is made to us, and the grounds of the appeal are in substance these. The Leyton Urban District Council is a statutory corporation; a corporation, whether statutory or other, cannot enter an appearance in person; a recognizance is a thing which contemplates a personal appearance; it follows, therefore, that an urban district council cannot enter into a recognizance, and it can be no objection that the recognizance is not in the proper form, because in whatever form it may be it would be a nullity; the council cannot enter into any form of recognizance. That is the first step. The second step is that, that being so, the statute must be read as though it had no application to the district council, because the law is alleged to be that district councils are free to appeal without any of the conditions imposed by the statute as conditions precedent to a right to appeal. That is the form in which the appeal is presented to us, and it depends upon the accuracy of the three contentions: first, that a corporation cannot appear personally; secondly, that the recognizance must contemplate a personal appearance; and, thirdly, that if those two propositions are established the statute is to be ignored.

I am quite prepared to admit that by our common law a corporation could not appear personally; I quite accept that. I quite accept that by the common law a recognizance no doubt contemplated a personal appearance of the person entering into the recognizance, but both of those are provisions of the common law, and in those circumstances the Judges appear in old times to have been faced with the difficulty which arose when statutes were introduced under which corporations could become complainants, and could become appellants, and, if appellants, were under the obligation of entering into a recognizance. One knows that it frequently happened in the history of our common law that when the Judges were faced with difficulties of that kind, there being no statutory provision, they got over the difficulties by making some extension, or variation, or way round the common law, and that is how they got out of their difficulties, and the common law was extended.

It seems to me that in the face of those difficulties there were three ways open to the Court. They might have said: "There cannot be any appeal at all because the corporation cannot enter into a recognizance"; they might have taken that line, and, of course, that would have raised great difficulties. Or they might have said: "We will construe the statute as having no application to persons who cannot comply with all its requirements." That method leads apparently to endless difficulties, but in some of the cases that Mr. Montgomery has quoted to us that method seems to have been adopted. They might have adopted, it seems to me, a much simpler method and have said this: "It is quite true that strictly speaking the common law contemplates the personal appearance of the person who enters into the recognizance, yet in face of this difficulty what is there to prevent us from saying that this is one of the cases in which a corporation may appear by attorney? There are many instances of cases where a corporation appears by attorney, in the same way as there are many cases in which a corporation, statutory or other, makes contracts. Why should not we adopt that method?" I think on looking into the cases it is quite plain that that is the practice which has been adopted, and adopted really without question for a great number of years. It was hinted at by Mr. Justice Bayley in the case to which our attention has been called, of *Cortis v. Kent Waterworks Company* (7 B. and C., 314). Mr. Justice Bayley says, at page 331: "If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognizance." Then we have the case of *Reg. v. Manchester Corporation* (7 E. and B., 453), in which I think Mr. Justice Coleridge had in mind the kind of thing to which I have been referring, when he spoke of the practice that had been adopted which might not be a strict compliance with the law; that means, I understand, the common law, but he said that it was evaded rather than overcome. That means that the Judges in their wisdom found a way round. He says, at page 458: "Moreover, in the correlative case, and on the supposition that the corporate body had been the prosecutors removing the indictment, there would have been a difficulty in strictly complying with the statute, because they could not enter into a recognizance, although we are

aware that in practice this is evaded by one or more members of the body entering into one for them; evaded, we say, rather than overcome." That was in 1857, and then in 1895 we come to *Southern Counties Deposit Bank, Limited v. Boaler* (11 *The Times* L.R., 568; 59 J.P., 536). There Mr. Boaler, who was very acute in taking points, objected that the recognizance entered into in that case by the appellants, the company, was not in order, and he succeeded. He succeeded, not because the corporation could not enter into a recognizance, but because the director who did so on their behalf was not properly authorized by a resolution. In that case Mr. Levett, whom everyone remembers as a great lawyer, cited the old authorities, and he argued on the authority of *Cortis v. Kent Waterworks Company* (*supra*) on very much the same lines as part of Mr. Montgomery's argument in the present case, and that provoked from Mr. Justice Wright this statement of his view, and it is a valuable view because one knows of the familiarity of the late Mr. Justice Wright with the practice on such points as these. When *Cortis v. Kent Waterworks Company* (*supra*) was cited, Mr. Justice Wright said (59 J.P., at p. 536): "That depends on an antiquated notion that a corporation cannot enter into a recognizance, and that, therefore, an enactment requiring an appellant to enter into a recognizance cannot apply to a corporation." So firmly is the practice established that without hesitation—I may say without the slightest hesitation—all over the country recognizances are accepted on behalf of corporations if they desire to appeal and therefore must enter into recognizances, and in other cases where recognizances are necessary. So well is it established and accepted, that people have not apparently troubled to sit down and think out what is the right form in which a person should enter into a recognizance as attorney on behalf of a corporation, and unfortunately in this case, as I have no doubt in thousands of others, they took the common form, which is the form applicable not to a person entering into a recognizance on behalf of a corporation, but a form of recognizance by a person entering into a recognizance on his own behalf. They have, therefore, got into this difficulty, which I hope may not occur again because there are no merits in the objection, and it has prevented the hearing of this appeal. Whether the appeal would have been successful I do not know, but it would have been better and more satisfactory to everybody if it could have been heard.

For these reasons this appeal fails, and must be dismissed, with the usual consequences.

Lord Justice Scrutton.—I agree. Whatever may have been the old law at the time when there were no limited companies and not a great many corporations, and the rules of the common law were very rigid, for 60 or 70 years now the practice has been to allow companies or corporations to enter into recognizances by an authorized agent. He must be authorized, and in *Boaler's* case (11 *The Times* L.R., 568; 59 J.P., 536) a recognizance was held bad because he was not authorized, but it seems to me that the recognizance that he enters into must be one binding his principal, the appellant. You do not get a satisfactory recognizance that A. as an appellant shall prosecute and make his, A.'s, goods liable by filling in a form that B. enters into a recognizance and makes his, B.'s, goods liable. The difficulty in this case has arisen, and I daresay it has arisen in a number of magistrates clerks' offices all over the country if the truth were known, because the taking of a recognizance has been looked upon as a not very important formality, and the clerk taking the recognizance has not taken the trouble to think what exactly he was doing when somebody who was not an appellant proposed to enter into a recognizance. This recognizance was entered into by the clerk, and the clerk acknowledged himself—not the corporation—"to owe our Sovereign Lord the King . . . £100 to be levied on his" (that is the clerk's) "several goods and chattels," and then it goes on: "if the said principal"—and the clerk is not the principal—"fail in the condition hereon endorsed. . . . The condition of the within written recognizance is" so and so. "And whereas" (the clerk) "being dissatisfied with the said determination"—it does not matter whether the clerk is dissatisfied with the determination; the question is whether the principals are dissatisfied with the determination—". . . hath applied to the said Court . . . to state and sign a case," and he binds himself to prosecute his appeal, to submit to the judgment of the Court, and to pay the costs. That is not what it is desired to attain. It is not desired that the clerk shall prosecute, or that the clerk shall submit to judgment, or that the clerk shall pay the costs. What is desired is that the party, the appellants, the corporation, shall prosecute, shall submit to judgment, and shall pay such costs.

For these reasons, which are, I think, the reasons substantially given in the judgments of the Divisional Court, and without going into the very interesting, but, I think, obsolete authorities with which Mr. Montgomery has favoured us for some time, I am of opinion that this appeal should be dismissed.

Lord Justice Atkin.—There are so many proceedings which take place nowadays in Courts of Summary Jurisdiction to which corporations in one form or another are parties, and where it so happens that, as a condition of something being done in the course of the proceedings, or in the course of an appeal, a recognizance has to be entered into by one or other of the parties, that it is a matter of considerable embarrassment that there should be any doubt as to whether a corporation can or cannot enter into a recognizance, and I think the time has come to declare that, whatever the law may have been, the law at the present moment is that a corporation can enter into a recognizance by its duly authorized agent, and such a recognizance must be a recognizance on behalf of the principal, binding the goods of the principal, and binding the principal by the conditions of the recognizance whatever it may be. In order properly to execute such a recognizance, it is necessary to see that the agent shall be duly authorized, and I need not point out the different kinds of corporations, and the limits under which some of them exist as to giving authority to their agent. Sometimes it has to be done under seal, and sometimes it has not. All that I say is that they now can enter into a recognizance by a duly authorized agent.

In this case it appears to me quite plain that the corporation did not enter into a recognizance by a duly authorized agent, but a person who purported to be authorized to make a recognizance entered into a recognizance by which he bound himself to perform the conditions which were mentioned in the recognizance. That does not seem to me to be a compliance with the statute.

For these reasons I think that the judgment of

the Divisional Court was correct, and that this appeal should be dismissed, with costs.

[Solicitors—Messrs. Sharpe, Pritchard, and Co., for Mr. John Atkinson, Leyton; Messrs. Appleton and Co.].

K.B. Div. (MacKinnon, J.) 1927. Mar. 11.

WALLEMS REDERI AKTIESELSKAB v. WM. H. MULLER AND CO., BATAVIA.*

Ship—Charterparty—Dead freight—Charterers' obligation to load full cargo—Failure—Ship's call at port to load other cargo—Delay—Deviation—Mitigation of damages.

The plaintiffs, who were shipowners, chartered a steamer to the defendants to bring a cargo of sugar from Java to Europe, the defendants binding themselves to load a full and complete cargo. A clause of the charterparty provided: "The steamer has liberty to deviate and proceed to and from one or more ports or places in Java in any order . . . to tow and assist vessels in distress, and to deviate for the purpose of saving life or property." The defendants were not able to load a full cargo, and the steamer left with the quantity loaded, and, without the defendants' consent, she called at Alexandria on the voyage and took in oilcake to fill up, the loading of the cake occupying about five days. In an action by the shipowners against the charterers for dead freight the defendants pleaded that by loading the cake at Alexandria the steamer had deviated from the course of the voyage and the plaintiffs had broken the charter contract and had lost their right of action against the defendants for not loading a full cargo. The plaintiffs alleged that they had loaded the cake in order to mitigate damages.

Held, that it was an implied term of every charterparty that, if the charterers failed in their duty to load, the shipowners had a right to take in other cargo to fill the vacant space, provided that to do so was reasonable in the circumstances, the test being whether it would diminish the damages for which the charterers would otherwise be liable, and that, as the loading of the cake must be taken to have been in mitigation of the damages, and as there was therefore no delay unauthorized by the implied term, there was no deviation, and the plaintiffs were entitled to succeed.

In this case the plaintiffs claimed dead freight alleged to be due under a charterparty.

Mr. Clement Davies, K.C., and Sir Robert Aske appeared for the plaintiffs; Mr. Somervell for the defendants.

By a charterparty dated July 27, 1922, the plaintiffs, Norwegian shipowners at Bergen, chartered their steamer, the Storviken, to the defendants to bring a cargo of sugar from Java. The charterparty provided that the steamer, then at Hong-kong, should proceed to Batavia for orders to load at not more than four ports on the north coast of Java a full and complete cargo of sugar in bags—not less than 6,460 tons, and not more than 7,140 tons—which the charterers bound themselves to ship. When so loaded the vessel was to proceed to Port Said for orders to discharge (always afloat) at one, two, or three safe ports in the United Kingdom and/or certain ports on the Continent.

Different rates of freight were provided according as the steamer should discharge at one, two, or three ports; 500 tons per weather working day were to be loaded or unloaded, and if that rate was not observed demurrage was to be paid at a specified rate. The cargo was to be sent alongside and taken from alongside at the expense and risk of the charterers.

In the margin of the charterparty was a clause providing for exceptions, and a further clause as follows:—

"The steamer has liberty to deviate and proceed to and from one or more ports or places in Java in any order . . . to tow and assist vessels in distress, and to deviate for the purpose of saving life or property."

The steamer went to Java as arranged and loaded at Surabaya 5,600 tons of sugar. The charterers were unable to ship more, and the steamer left with that quantity and, by arrangement with the owners, called at Madras and left some of the sugar there. The steamer then proceeded on the voyage to England, and called at Alexandria and took in about 1,000 tons of oilcake, the loading of which occupied five days, to fill up. She then came on to Avonmouth, having been ordered to discharge at Bristol.

The plaintiffs now brought an action for dead freight and failure to load a full and complete cargo according to the charterparty.

The defendants pleaded that a full and complete cargo did not amount to as large a quantity as the plaintiffs contended, and that by loading the oilcake at Alexandria the steamer had deviated from the course of the voyage and had broken the charter contract.

Mr. Clement Davies, in opening, gave particulars of the size and capacity of the steamer. After discussion with experts counsel agreed the capacity at 6,850 tons.

Mr. Somervell submitted that by the charterparty the defendants hired the whole ship, and the plaintiffs undertook that she should proceed without delay to the charter destination. It was true that the defendants were not able to load a full and complete cargo, but the plaintiffs did not treat that inability as a repudiation of the contract since they went on to perform their part of it, subject to their right to claim damages. That being so the plaintiffs had no right to deal with the empty space in the ship without the defendants' consent. In fact they did not even inform the defendants that they were going to load the oilcake. The defendants hired the whole ship and only loaded a part cargo, and that gave the plaintiffs a right to dead freight; but the plaintiffs still could not use the ship for any other purpose unless the defendants agreed.

The loading of the oilcake occasioned a delay of five days, and even a very small delay amounted to deviation. In *James Morrison and Co., Limited v. Shaw Savill and Albion Company, Limited* (32 *The Times* L.R., 712; [1916] 2 K.B., 783) the ship had only gone 107 miles out of her course, and that would only mean a delay of a few hours.

The plaintiffs now contended that they loaded the oilcake in order to mitigate damages, but in fact that was not so. They did not say anything about it, and

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

the defendants only found out about it afterwards when they noticed a stevedore's charge for unloading the cake. And in any event one party to a contract could not mitigate his damages without the consent of the other party when the mitigation interfered with the proprietary or contractual rights of the other party.

The plaintiffs certainly could not obtain dead freight in respect of the space which they had actually used for carrying the oilcake.

He referred to *Aitken, Lilburn and Co. v. Ernsthausen and Co.* (10 *The Times* L.R., 256; [1894] 1 Q.B., 773); *Caffin v. Aldridge* (12 *The Times* L.R., 27; [1895] 2 Q.B., 648); *Joseph Thorley, Limited v. Orchis Steamship Company, Limited* (23 *The Times* L.R., 89, 338; [1907] 1 K.B., 243, 660); *Internationale Guano en Superphosphaatwerken v. Macandrew and Co.* (25 *The Times* L.R., 529; [1909] 2 K.B., 360).

The defendants had the right to order the steamer to three other ports in Java, but they loaded only at Surabaya, and by not loading at other ports they saved the plaintiffs from having to pay beaconage at those other ports. They therefore claimed an allowance for beaconage from anything which the plaintiffs might recover.

The charterparty contained a clause expressly providing for deviation in certain events, and as the parties had dealt with deviation specifically no other right of deviation could be implied.

Mr. Justice MacKinnon, in delivering judgment, stated the facts and said that it was now agreed that the obligation under the charterparty was to load 6,850 tons and the amount loaded in fact was only 5,600 tons. *Prima facie*, therefore, the defendants had committed a breach of their contract by loading 1,250 tons short. In the events which happened the rate of freight payable was 34s. per ton.

At Alexandria the plaintiffs found that there was an opportunity to load 1,000 tons of oilcake, and they loaded that cake without asking for or obtaining the defendants' consent. The defendants now contended that the action of the plaintiffs in loading the cake and spending the time necessary for loading it was a breach of the plaintiffs' duty to prosecute the voyage with dispatch. They said that such breach of duty deprived the plaintiffs of all benefits under the charterparty, including their right of action against the defendants for failing to load a full cargo.

The action of the plaintiffs in loading the oilcake at Alexandria, whether they did or did not intend it to be so at the time, must be taken to have been in mitigation of the damages to which they were entitled from the defendants. It was sometimes said that in such a case there was a duty on the shipowner to take in other cargo in order to mitigate damages. Whether there was such a duty or not, the charterer who had failed to load a full cargo could, if sued for damages, rely on the fact that the shipowner had not done his best to mitigate them. A shipowner was at least entitled to load other cargo, and ought to do so in his own interests.

Assuming, though without deciding the point, that deviation would destroy the contract and the right of action which the plaintiffs had already acquired under it, the real question here was whether in the circumstances there was any deviation at all. Deviation meant departure from the agreed route of the voyage, and the word had been extended to cover delay in performing the agreed voyage. Deviation by delay was a breach of the contract, express or implied, as to the time within which the voyage was to be performed.

In this charterparty there was liberty to tow vessels in distress, and if that liberty was exercised the time occupied in towage would be part of the agreed time of the voyage. Besides the express terms which might be contained in a charterparty there was always an implied liberty to deviate and to spend time in doing so to save life.

Applying the principle of *The Moorcock* (5 *The Times* L.R., 316; 14 P.D., 64), he thought it was an implied term of every charterparty that, if the charterer failed in his duty to load, the shipowner had a right to take in other cargo to fill up the vacant space, provided that his doing so was reasonable in the particular circumstances. If he had the right to take in other cargo he must also have the right to spend the time needed for loading it. The test was whether his taking in other cargo in the circumstances diminished the damages for which the charterer would be liable.

He (his Lordship) thought that there was no deviation in this case—*i.e.*, that in performing the voyage there was no delay which was not authorized by the implied term. It was unnecessary to consider what the position would have been if deviation had been made out. There must be judgment for the plaintiffs, with costs. There was nothing, he thought, in the beaconage point.

Counsel agreed that after setting off certain items the damages would be £1,556.

[Solicitors—Messrs. Botterell and Roche; Messrs. Richards and Butler.]

K.B. Div. (Roche, J.) } 1927. Mar. 14.

HARPER AND ANOTHER v. ASSOCIATED NEWSPAPERS, LIMITED.*

Insurance (Accident)—Death—Exception—Assured not to be in charge of a vehicle—Dismounted bicyclist holding his bicycle—Whether in "charge" of a "vehicle."

By a newspaper policy of insurance against death by accident the insurers undertook to pay £250 in case of death, "if the reader while a pedestrian . . . in a public thoroughfare be killed by accidental impact with a moving vehicle," provided that "the reader be not at the time of the accident in charge of any vehicle."

An insured person who was riding a bicycle got off at the foot of a hill and having pushed it some way stopped to speak to another man and stood holding his bicycle, and an unattended motor-car came running down the hill and struck the insured person and caused his death. On a claim under the policy by the deceased man's executors,

Held, that the word "vehicle" in the policy included a bicycle and as the deceased man was "in charge of" the bicycle within the meaning of those words in the policy the insurers were not liable.

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

This special case stated by an arbitrator raised a question of the construction of an accident insurance policy issued by the *Daily Mail*.

Mr. Woodgate appeared for the claimants; Mr. Tristram Beresford for the respondents.

The facts out of which the case arose were as follow:

The claimants, Martha Louise Harper and John James Hermitage, were executors of one Edward Henry Harper, who was killed on August 12, 1925. The respondents had issued an insurance policy insuring the deceased man against death by accident. The policy provided that if any dispute arose under it the matter should be referred to arbitration. Arbitration in fact took place and the arbitrator stated the present case.

It was agreed before the arbitrator (1) that if the respondents were liable at all they were liable for a sum of £250; and (2) that the only questions in dispute were:—

A. Whether the deceased man was at the time when he sustained the injuries which caused his death

(*a*) a pedestrian in a public thoroughfare within the meaning of clause 6 of the policy; or, (*b*) "riding in a public thoroughfare a bicycle" within the meaning of clause 9 of the policy.

B. Whether a bicycle was a vehicle within the meaning of that word in clause 7 of the policy.

The arbitrator found the following facts:—

The deceased man was a builder at Margate. On the morning of August 12, 1925, he left his place of business intending to call on a matter of business on one Walton who resided at Margate. He went on his bicycle, and in the course of the journey arrived at the foot of a hill and dismounted. He then started pushing his bicycle up the hill. After going a few yards he saw Walton walking on the footpath down the hill towards him. He then moved close to the footpath and stood in the roadway holding his bicycle so that it was between himself and the footpath. Walton also came to a standstill on the path close to the deceased man. A conversation took place between the two men on the business matter in question. An unattended motor-car then came running down the hill at a high speed. A shout of warning was raised and Walton managed to get out of the way, but the deceased man was struck by the car and was so seriously injured that he died on the same day.

The questions stated for the opinion of the Court were those set out above.

The material clauses of the policy were:—

"Clause 6.—£250 in case of death . . . if the reader while a pedestrian (a disabled ex-service man in a self-propelled vehicle shall be deemed a pedestrian) in a public thoroughfare be killed by accidental impact with a moving vehicle. . . .

"Clause 7.— . . . provided that as regards (6) and (7) the reader be not at the time of the accident in charge of any vehicle, loading, unloading, or attending to any vehicle. . . .

"Clause 9.—£250 in case of death if the reader shall be accidentally killed whilst riding in a public thoroughfare a bicycle, tricycle, or motor-bicycle solely for pleasure, but including journeys to and from the reader's usual place of business. . . ."

Mr. Woodgate submitted that the deceased man was a pedestrian at the time of the accident, and came within clause 6.

Mr. Beresford submitted that the deceased man was on a business journey and so was barred from recovering by clause 9, and also that the deceased was at the time in charge of a "vehicle" within clause 7. He was hampered by his bicycle, and failed to escape; his friend, who was not, did escape. A bicycle came within the dictionary definition of a vehicle.

Mr. Woodgate replied.

Mr. Justice Roche, in delivering judgment, stated the facts, and said that, on the one side, it was contended that though the deceased man had started on a business journey on his bicycle he had at the time of the accident become a pedestrian within the meaning of clause 6; and, on the other side, it was contended that the deceased man had not in fact become a pedestrian, and that, even if he had, he was at the time of the accident in charge of a vehicle.

In the view which he took of the matter it was unnecessary to decide whether the deceased man at the time of the accident was a pedestrian or a bicyclist, because he thought that the position was covered by the clause dealing with the middle case. If it had been necessary to decide the point he should have held that the deceased was still a bicyclist and was not a pedestrian at the time of the accident. A bicyclist was none the less a bicyclist because in the course of his journey he found it convenient or necessary to walk up a hill.

It was really unnecessary to decide the point because if the deceased man was a pedestrian he was still in charge of a vehicle within the meaning of clause 7. The word "vehicle" was wide enough to include a bicycle, and if the parties had wished a bicycle to be excluded they could have used language to say so. Here the language of the policy really supported the view that they had intended a bicycle to count as a vehicle. If the deceased man had been killed by being struck by a bicycle the respondents could not have said that that was not a case of impact with a moving vehicle within Clause 6. There must, therefore, be judgment for the respondents.

[Solicitors—Messrs. Kingsford, Dorman, and Co., for Messrs. Walter Hills and Shea, Margate; Messrs. Leonard Bingham and Sharp.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1927. Mar. 10.

LAYZELL AND ANOTHER v. THOMPSON AND OTHERS.*

Highways — Ferry — Franchise ferry—Grant—Evidence.

The Court held that a franchise ferry between South Benfleet and Canvey Island had been granted to the predecessors in title of the plaintiffs, who were in possession of the ferry.

Decision of Romer, J. (43 *The Times* L.R., 58), affirmed.

The defendants in this case appealed from a decision of Mr. Justice Romer (43 *The Times* L.R., 58) granting an injunction to restrain them from disturbing the plaintiffs in the possession or enjoyment of a ferry.

In the action the plaintiffs, Mr. Albert Richard Layzell and Mr. William Henry Theobald claimed a declaration that they were entitled to and were

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqrs., Barristers-at-Law.

possessed of an ancient ferry across Benfleet Creek between the causeway at South Benfleet, Essex, and the highway opposite on Canvey Island. They also sought an injunction to restrain the defendants, their servants, and agents, from disturbing the plaintiffs in the possession or enjoyment of the ferry.

The defendants had established and maintained a rival service at the same place.

The population of Canvey Island had in recent years increased from 300 to 5,000. The defence was that the ferry claimed was not, and could not be, an ancient ferry, as it was only at high tide that it was necessary to cross by boat and there was a public highway across the creek at the same point at which the ferry was claimed.

Mr. Justice Romer said, in delivering judgment, that the ferry claimed was unique in one respect, because at low water the tidal creek could be traversed on foot. The question he had to determine was a difficult one, because of the almost total absence of documentary evidence in support of the plaintiffs' claim. On the whole, regarding himself as a jury, he came to the conclusion that in times gone by there had been a grant of a franchise ferry to the predecessors in title of the plaintiffs who were in possession of the ferry and, that being so, he must grant an injunction.

The defendants appealed.

Mr. Roland Burrows and Mr. H. S. Palmer appeared for the appellants; Mr. Macmorran, K.C., and Mr. Hodge for the respondents.

Mr. Burrows submitted (1) that by reason of certain circumstances, the existence of the public highway between the same points, there could not be a franchise ferry in the place where it was claimed; (2) that on the evidence it was impossible to presume a lost grant of an ancient ferry; and (3) that even if there was an ancient ferry the plaintiffs had not proved their title to it.

Counsel for the respondents were not called upon.

The Master of the Rolls, in giving judgment, said that for his part he should be content simply to agree with the careful judgment of Mr. Justice Romer, but in deference to the argument which had been submitted he would say a few words on a case which perhaps deserved a little more consideration than mere acquiescence.

As regards the first point put forward by Mr. Burrows, the unique circumstances, it was true that at low tide it was possible to cross this waterway dry-shod by planks leading to stepping stones. At high tide the water was about 75 yards across; the creek so formed was a waterway and there had been a passage of barges along it for many years. It was said that, as there was a highway of water at high tide and indications of a highway leading to each shore where the ferry crossed at high tide, and as there was a causeway at low tide, it was impossible that there could be a franchise of a ferry—a ferry which would only be needed during part of the day.

He thought that that suggestion was ill founded, because at certain times, when the tide was near the full, there was an interruption of traffic, and it might take place during business hours and be highly inconvenient. It looked as if there might be need of a ferry, and, if that need were not always so pressing as where there was a channel of water at all tides, the need was proved by the fact that for very many years there had been persons plying as ferrymen.

It had been argued that there was no documentary evidence of the existence of the ferry and no evidence from maps, because the ferry was not in fact marked on those produced. But such maps as had been produced did not seem to be evidence, and a dock book which had been produced from the British Museum also seemed to be of no weight. The really important fact was that for very many years persons in a regular chronological sequence had plied for hire from shore to shore, and he could not, therefore, find in those "unique circumstances," as they were called, anything to contradict the possibility of the grant of a ferry.

In alleging that there could be no presumption of a lost grant, Mr. Burrows had said that the user of the ferry did not prove this presumption; that it was inconsistent with it; that the ferry service varied; that the toll charges varied; that the service had not in fact the consistency which should be found in a properly conducted ferry.

Isolated facts, perhaps, supported that view. There was evidence that in 1910 an application was made by John Wright to the Port of London Authority for a licence for the ferry, and that that body wrote back that they could not see their way to grant a licence and that there was nothing to prevent any person from conveying passengers across the river. But that was not conclusive, because the Port of London Authority had no power to decide the question. Further, there was a man named Whitehead who once claimed that "this is a free ferry." Wright, the predecessor of the plaintiffs, then went to consult the harbour-master, whoever he might have been, and the result was that he gave Whitehead £5 upon an undertaking not to ferry while he (Wright) was alive. That might certainly indicate that Wright was afraid of his claim to a franchise being challenged, but it was not conclusive. The payment of the £5 might have been an act of discretion and not necessarily an admission that there was no franchise of a ferry.

As regards the suggestion that there had been inconsistency in the charges made, there was no doubt that during certain hours of the night there had been heavy charges made by Wright. It seemed that on certain occasions he had asked for more than the 6d. per person ordinarily levied during the night hours, and there was evidence of other instances of inconsistent demands. But in considering that matter Mr. Justice Romer had rightly turned to *Trotter v. Harris* (2 Y. and J., 285), where it was said that in all these cases of ferries there might have been acts done contrary to the duty of the ferryman or the right of the public, but that only meant that ferrymen, like others in this world, were subject to human frailties, and not that there was no ferry. In that case Lord Chief Baron Alexander said (2 Y. and J., at p. 288): "It cannot be contended that a variation in the toll will destroy the right; but that topic is urged as evidence of usurpation. Now, to my mind, that is capable of a very different construction, for no one would court investigation into a right founded upon usurpation by such a measure. The evidence for the defendant is that which ordinarily occurs in every case of this description. Every right of this kind is subject to infringements, which it is, in many instances, impossible to prevent. . . . But the jury must have taken all these circumstances into their consideration, and, having found for the plaintiff, I see no ground to disturb their verdict."

The fact was that even if there had been a certain number of unreasonable and improper demands, yet, when it was found that there was an exercise of this right of ferrying by a long series of watermen, the fact that there had been some irregularities or in-

fringements of the right of the public did not seriously avail to upset the recognition of a right to the ferry so established. Mr. Justice Romer had taken all these facts into consideration in giving his very careful judgment.

A book had been produced by the vicar of Canvey containing an entry that in 1742 a sum of £14 had been expended for a bridge across this creek, but it seemed impossible to say, the width of the creek being 75 yards, that even in the 18th century any bridge could have been built for that sum. The appeal must be dismissed.

LORD JUSTICE SARGANT said that the fact that the alleged ferry started from a highway, to link up with a highway, seemed to him to be all in favour of the plaintiffs ; the fact that at certain states of the tide persons could walk across this creek also seemed no answer to the claim, inasmuch as the inconvenience of having perhaps to wait five or six hours until the tide went down would be amply sufficient to account for the establishment of a ferry. Equally futile was the argument that until the present century there were only 300 persons on the island, for the wants of 300 persons must be catered for as well as those of a larger community.

As to the evidence of title, it was clear, as the Judge below had said, that it was not necessary for the plaintiffs to establish title in the ordinary way ; they might show, and had shown, that they were in possession of the ferry. In Halsbury's Laws of England, Volume XIV., page 559, it was stated that : "A ferry owner is liable to be indicted and fined if he does not keep his ferry in readiness and in good repair, or to an action at the suit of a person who has suffered special damage by neglect of the ferry owner's duties. Another consequence of such neglect may be that the Crown may by proceedings in the nature of *scire facis* or *quo warranto* annul the grant of the ferry. and if necessary vest it in some other person. But neglect does not *ipso facto* destroy the franchise of a ferry." Mr. Roland Burrows said that he did not need to prove actual neglect, or conduct which would render the plaintiffs liable to any penalty ; but that he could show that the plaintiffs had so conducted themselves as to make their conduct inconsistent with the keeping of a proper ferry ; it need not, said counsel, be misconduct, but conduct inconsistent with the existence of a ferry, which the appellants must establish, and they claimed to have done that. Having gone carefully through the evidence, he (Lord Justice Sargant) could find no reason for saying that the Judge below had not arrived at a right conclusion. There had been a continuous conveyance of passengers across this creek at all seasons, wet or fine, between 6 a.m. and 11 p.m. at a uniform charge, and that seemed a strong circumstance to show that there had been the grant of a franchise of a ferry. There seemed to be strong *prima facie* evidence of the existence of the franchise. There might have been instances of extortion, possibly of neglect, but although that state of things might give rise to a right to take proceedings against the plaintiffs, yet it did not apparently seem incompatible with the continued existence of the franchise.

He (the Lord Justice) did not intend to express any opinion as to whether it was permissible to make a higher charge at night. There might perhaps be a franchise which allowed the charge of 6d. at night, but he would not express any view on the matter.

LORD JUSTICE LAWRENCE said that he agreed that the appeal failed, and he was quite content to rely upon the very clear judgment of Mr. Justice Romer. He wished, however, to guard himself against expressing any view as to the amount of tolls which the plaintiffs might charge.

[Solicitors—Messrs. Maitland, Peckham, and Co. ; Messrs. Bentley and Jenkins, for Messrs. Snow and Snow, Southend-on-Sea.]

Chan. Div. (Astbury, J.) } 1927. Mar. 15.

IN RE BOOTH AND THE SOUTHEND-ON-SEA ESTATE COMPANY'S CONTRACT.*

Vendor and Purchaser—Receipt for purchase-money—Power to give—Sole trustee of Darkest England Scheme—Surplus revenue—Temporary investment in land—Sale—"Settlement"—"Capital money"—Whether signatures of two trustees required—Settled Land Act, 1925 (15 Geo. V., c. 18), ss. 29, 94, 95.

The sole trustee of the Darkest England Scheme, connected with the Salvation Army, is not precluded by anything in the Settled Land Act, 1925, from being able alone to give a valid receipt to the purchasers of land in which surplus revenue of the scheme has been temporarily invested. The deed poll constituting the scheme is not made a "settlement" by the Act, and the purchase-money on such a sale is not "capital money" within the Act and is not thereby required to be paid to at least two trustees.

This was a summons by the Southend-on-Sea Estates Company under section 49 of the Law of Property Act, 1925 (which replaced the Vendor and Purchaser Act, 1874), for the decision of the question whether under the Settled Land Act, 1925, General William Bramwell Booth, the vendor of certain property to the company under a contract of sale dated September 17, 1926, could as General of the Salvation Army and sole director of the Darkest England Scheme, alone give to the company, as purchasers, a valid receipt for the purchase-money.

The Darkest England Scheme was a charity supported partly by voluntary contributions and partly by the funds of the Salvation Army, and the General of the Salvation Army for the time being was *ipso facto* director of the scheme. The scheme was constituted by a deed poll dated January 30, 1890, and executed by William Booth, the founder, and then the General, of the Salvation Army. Under that deed the funds of the scheme were under the absolute control of the General of the Salvation Army, subject to a proviso that he must publish balance-sheets. He had power to purchase and sell land and to give good receipts and discharges for purchase-money.

The property in question was conveyed on August 25, 1893, to the late General Booth as director of the Darkest England Scheme. The property became vested in General William Bramwell Booth, executor of General William Booth, as the sole trustee of the scheme, and he agreed to sell it to the Southend-on-Sea Estates Company.

The matter arose under section 29 of the Settled Land Act, 1925, which conferred on trustees for

* Reported by E. K. CORRIE, Esq., Barrister-at-Law.

charitable purposes the powers of a tenant for life, but not those of statutory owners.

The question raised was whether, since section 94 of the Settled Land Act, 1925, provided that capital money under a settlement must be paid to at least two trustees or to a trust corporation, who alone could give a valid receipt, General Booth could give a valid receipt for the purchase-money. That involved the question whether the deed poll constituted a settlement within the meaning of the Act and whether the purchase-money was capital money.

Mr, Topham, K.C., and Mr. F. G. Underhay appeared for the purchasers ; Mr. J. H. Stamp for the Salvation Army.

Mr. Topham contended that under section 29 of the Settled Land Act, 1925, the trustees being constituted tenants for life, the provision as to payment of capital money to two or more trustees must apply ; and that the proceeds of the present sale, being money arising from the sale of settled property, must be capital money. There was nothing to show that the money was really income, and under the Act the purchaser was not bound to inquire into such a matter.

Mr. Stamp said that all the contributions to the Salvation Army were for purposes of revenue. When there was surplus revenue it was invested in the purchase of land or other things until required, but that did not make what was purchased capital. The trustees were, by section 29, given the powers of a tenant for life only for the purposes of the section and not for all the purposes of the Act. It was inconceivable that the Act was intended to refer to such a body as the Salvation Army. The purchase-money in question was not capital money at all and General Booth was selling not under the Act but under his trust deed.

Mr. Justice Astbury said that the question seemed to be one of considerable importance, because all property of the Salvation Army and its subsidiary trusts was vested in the General alone. It was difficult to suppose that the Settled Land Act, 1925, was intended to interfere with an old-established trust, such as that of the Salvation Army. All moneys given to the Salvation Army were given for the purposes of revenue, and if from time to time they were invested in the purchase of land or other investments they did not cease to be revenue, and they were treated as such by the General.

The purchasers contended that section 29 made all land held for charitable purposes "settled land" and gave the trustees the powers of a tenant for life ; that under section 109 the powers given by the trust deed were additional powers to be exercised by the tenant for life ; that sections 94 and 95 applied ; and that the purchase-money, being capital money, could not be paid to less than two trustees who alone could give a valid receipt.

But the provisions of section 29 were only for "the purposes of this section," and, though it was difficult to see what those words exactly meant, he did not think that they made land held for charitable purposes "settled land," or the trustees persons having the powers of a tenant for life for all the purposes of all the sections of the Act.

He did not think that there was in the Act anything which made the trust deed in question a settlement, or made the purchase-money capital money within the meaning of section 94 or of section 117, the interpretation section. He thought that General Booth had shown a good title and could give a valid receipt for the purchase-money.

[Solicitors—Messrs. Dennes, Lamb, and Drysdale ; Messrs. Ranger, Burton, and Frost.]

K.B. Div. (Acton and Talbot, JJ.) 1927. Mar. 16.

KREITMAN v. VIDOFSKY.*

Landlord and Tenant — Restrictions—Occupation of premises by tenant's family—Permission by tenant—Whether tenant protected by Rent Restriction Acts.

This was an appeal by the plaintiff, Mr. Abraham Kreitman (the landlord), from a judgment of Judge Cluer, at the Whitechapel County Court, in favour of the defendant, Mr. Morris Vidofsky, the statutory tenant, in an action for possession of premises known as 20, Cambridge-road, E.1. The question at issue was whether a statutory tenant lost the protection afforded by the Rent Restriction Acts by ceasing to reside on the premises himself and by allowing members of his family to reside there instead.

Mr. Phineas Quass appeared for the appellant ; Mr. J. P. Eddy for the respondent.

Mr. Quass said that the tenant rented the premises a considerable number of years ago. He originally occupied the ground floor and first floor as business premises and the two upper floors for residential purposes. Some years ago he left the two upper floors and had not occupied the premises since for residential purposes, but he had brought his father, mother, and brother into the two upper floors, which they occupied rent free. The county court Judge refused the landlord's claim for possession of the premises on the ground that the tenant's not being in actual occupation of the premises as a resident did not deprive him of the protection afforded to tenants by the Rent Restriction Acts.

Counsel submitted that, in order to entitle the tenant to the protection of the Acts, he must "retain possession" either by residing on the premises himself or through the residence of someone protected by the Acts. Here there was nobody residing on the premises who was so protected.

Mr. Eddy was not called on to argue.

Mr. Justice Acton, in giving judgment, said that, speaking for himself, in regard to cases under the Rent Restriction Acts, the less that was said by Judges, consistently with the duty imposed upon them, the better, as decisions were apt to afford scope for ingenuity in raising new and difficult points.

The county court Judge had said that the respondent was a tenant in occupation protected by the Rent Restriction Acts. It appeared that the matter had come before a Divisional Court before, and that some doubt had been felt in regard to what precisely was meant by the phrase used by the county court Judge and, in answer to an inquiry, the Judge had replied that he had only found as an undisputed fact that the father, mother and brother of the tenant occupied the living rooms with the permission of the tenant.

It could not be shown on the facts that the county court Judge had arrived at an erroneous conclusion in law, and the appeal must be dismissed.

Mr. Justice Talbot concurred.

[Solicitors—Messrs. Teff and Teff ; Messrs. Palmer and Robinson.]

* Reported by T. R. F. Butler and G. F. L. Bridgman, Esqrs., Barristers-at-Law.

Chan. Div. (Clauson, J.) 1927. Mar. 16.

LACTEOSOTE, LIMITED v. ALBERMAN.*

Trade Marks—Assignment—Connexion with goodwill—Trade Marks Act, 1905 (5 Edw. VII., c. 15), s. 22.

The principle that an English trade mark can be assigned only in connexion with the goodwill of the business concerned in the goods for which it has been registered is not satisfied where the owner of the trade mark, being a person who manufactures the goods abroad, assigns it to his sole wholesale agents in England together with the goodwill of the business of importing the goods into England and selling them in this country. In such a case the assignment is invalid unless made in connexion with the goodwill of the manufacturing and vending business of the assignor, and the trade mark, unless the assignment is so made, becomes deceptive in the hands of the assignee and is liable to be expunged from the register.

His Lordship delivered a considered judgment dismissing this action and ordering the rectification of the Register of Trade Marks by expunging therefrom two trade marks registered in 1907 and 1925.

The plaintiffs, Lacteosote, Limited, the sole wholesale agents for the sale of Sirop Famel in Great Britain, sought to restrain the infringement by the defendant, Mr. A. Alberman, a dealer in proprietary drugs, of the registered trade marks of two labels, one being, in substance, an English translation of the other, which was in French.

The defendant, who was selling in this country a pharmaceutical preparation not emanating from the plaintiffs, and on which appeared a label constituting an infringement, brought a motion to rectify the register by removing from it the two trade marks in question.

It was admitted that if the first mark was to be struck off the register the second mark must also be struck off.

In 1907 M. Pierre Famel was manufacturing in France a pharmaceutical preparation known as Sirop Famel of the nature of a cold cure. He registered in England in 1907 the first of the trade marks, a label in respect of "a pharmaceutical preparation for human use," and which bore prominently the words "Sirop Famel." Since 1907 M. Famel had made the preparation in France, had sold it there under a label corresponding to the 1907 mark, and had imported it into England, where it had been sold on his behalf under M. Famel's 1907 mark.

Of recent years, owing to the operation of the rate of exchange between France and England, the price of the preparation in France had been a good deal less than that at which it had been offered in England, and it had, therefore, paid English druggists to buy the preparation in France at the French price, import it into England, and sell it here at a price below that at which M. Famel's selling agents in England offered it.

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

M. Famel and another Frenchman on April 16, 1923, formed the plaintiff company with a capital of £100, with the object of importing Sirop Famel and other preparations of his from France for sale in Great Britain. On May 31, 1923, the plaintiffs entered into an agreement with M. Famel under which they were appointed sole wholesale agents for the sale of Sirop Famel in Great Britain until 1933.

On June 28, 1924, M. Famel executed an assignment to the plaintiffs of the 1907 trade mark in consideration of £5 paid to him by the plaintiffs, "together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered." On September 4, 1924, the plaintiffs were registered as proprietors of the 1907 mark.

On March 13, 1925, the plaintiffs applied for the registration of the second trade mark in question, which was, in substance, a translation of the 1907 mark, and they obtained the registration on April 27, 1926. The goods in respect of which that 1925 mark was to be used were described as "a pharmaceutical preparation for human use made in France."

From the time of the assignment the plaintiffs continued to procure Sirop Famel from M. Famel in France and to sell it in England under, at first, the 1907 mark, and subsequently under the 1925 mark.

Mr. R. Moritz, K.C., and Mr. J. H. Evans-Jackson appeared for the plaintiffs; Sir Duncan Kerly, K.C., and Mr. Kenneth R. Swan for the defendant.

Mr. Justice Clauson, in the course of his considered judgment, said that he was clear that the 1907 trade mark was adapted to distinguish M. Famel's goods without any reference to the importer, and that the 1925 mark distinguished M. Famel's goods and was not adapted to distinguish goods made by the plaintiffs. The plaintiffs had admittedly never made the goods either in England or France. The question was whether the plaintiffs were the properly registered owners of the 1907 mark.

Apart from statute it was established by the decision in *Leather Cloth Company v. American Leather Cloth Company* (11 H.L. Cas., 523, at p. 534) that a purchaser of a mark became owner of it only if he became at the same time purchaser of the manufactory or the business concerned, to the goods of which the mark had been affixed. The first clause of section 22 of the Trade Marks Act, 1905, merely embodied that principle in statutory form (see *Pinto v. Badman Brothers*, 7 *The Times* L.R., 317). The question therefore was whether, when the 1907 mark was assigned to the plaintiffs, they became, at the same time, owners of the business concerned in Sirop Famel.

The plaintiffs only contended that the assignment of June 28, 1924, was an assignment of the business of importing a preparation into Great Britain and selling it here. The first clause of section 22 of the Trade Marks Act, 1905, did not enable a mark distinctive of goods emanating from M. Famel's business (composed of manufacturing and vending departments) to be assigned with a portion of the business, namely, that of vending in Great Britain, which portion was separated from the rest of the business. Otherwise, a mark distinctive of goods produced and sold in the business carried on by M. Famel would become by the assignment distinctive not of goods produced and sold in that business by M. Famel, or his successors, but of goods sold by a newly separated and, therefore, different business by persons who succeeded M. Famel as vendors in Great Britain of the

goods but not as producers of them. Such a position was inconsistent with the principle that a trade mark was distinctive of goods with which a particular business was concerned. If the identity of the business was destroyed the mark was destroyed with it.

The plaintiffs' contention that the assignment was effectual to transfer the 1907 trade mark to them therefore failed, because the mark was not assigned in connexion with the goodwill of the business, namely, M. Famel's producing and vending business concerned in Sirop Famel—within the meaning of the Trade Marks Act, 1905.

That conclusion, come to on the construction of section 22, was corroborated by the judgment of Lord Justice Fry in *In re Apollinaris Company's Trade Marks* ([1891] 2 Ch., 186, at p. 234).

For those reasons the action must be dismissed, and the register rectified by expunging both the 1907 and 1925 trade marks. The plaintiffs must pay the costs of the action and of the motion for rectification.

[Solicitors—Messrs. Taylor, Willcocks and Co.; Messrs. C. Butcher and Simon Burns.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1927.
Mar. 11.

LEVENE v. INLAND REVENUE COMMISSIONERS.
LYSAGHT v. SAME.*

Revenue — Income-tax — Exemption—"Resident"—"Ordinarily resident"—Meaning of expressions—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 46; Sched. C, Rule 2 (*d*).

Consideration of the meaning of the expression "ordinarily resident" in Rule 2 (*d*) of Schedule C of the Income Tax Act, 1918, and of the expression "resident" in s. 46 of the same Act.

In these two cases, which raised the same question on somewhat different facts and were heard together, the appellants appealed from decisions of Mr. Justice Rowlatt, who held, in each case, that they were "resident" in the United Kingdom for the years ending April 5, 1921-1925, for which years the assessments were made under paragraph (*d*) of Rule 2 of Schedule C of the Income Tax Act, 1918, and that they were also "ordinarily resident" within the United Kingdom within section 46 of the Act.

In the first case the appellant, Mr. Louis N. Levene, was the owner of securities of British possessions and of British War Loan, and he claimed relief from taxation in respect of the income arising therefrom. In the case of the securities, his claim was made under paragraph (*d*) of Rule 2 of Schedule C of the Income Tax Act, 1918, on the ground that he was not resident in the United Kingdom for the years in question; and, in the case of the War Loan, under section 46 of the same Act, on the ground that he was not ordinarily resident in the United Kingdom during those years.

Mr. Levene was a British subject and had formerly been interested in a financial business in London. He discontinued that business in 1911, and since that date had had no occupation. He lived in Curzon-street, W., until early in 1918, when he decided to break up his establishment and to live abroad. In December, 1919, he went abroad and did not return until July 10, 1920. Since then he had been in this country for 19 weeks in 1920, 21 in 1921, 20 in 1922, 20 in 1923, and 22 in 1924. During the remainder of those five years he was staying at Monaco and at various places in France. He and his wife had been in indifferent health, and had been advised to live in the South of France and to avoid the United Kingdom in the winter months.

One of the reasons for their visits to England was to obtain medical advice, and they also came to visit their relatives. Other reasons were that the appellant might take part in certain Jewish religious observances, visit the graves of his parents at Southampton, and deal with his income-tax affairs.

The Special Commissioners were satisfied that when the appellant left this country in December, 1919, he had formed the intention, which he had consistently carried out ever since, of living abroad for the greater part of the year, and of returning to this country each year, remaining here for considerable periods, but not for a period equal in the whole to six months in any year.

Taking into consideration all the facts in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachment abroad, the Special Commissioners came to the conclusion that, at least until January, 1925, when the appellant took the lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom, and they dismissed the appeal.

On appeal, Mr. Justice Rowlatt affirmed the decision of the Special Commissioners.

The other appellant, Mr. S. R. Lysaght, was born in England of Irish parents, and for many years before 1919 lived at Flax Bourton, near Bristol, being a managing director of John Lysaght, Limited, iron founders and engineers, with works at Bristol and Cardiff.

In 1919 he partially retired, and went to live in Ireland, where he owned property. He remained an advisory director to Lysaght, Limited, at a salary of £1,500 a year, and was in the habit of coming to England about once a month for directors' meetings and other purely business purposes. His wife never came with him. He rarely came to London, and generally made the Spa Hotel, Bath, his headquarters on his English visits. He occasionally went to Scunthorpe, Lincolnshire, where the company had a branch. During the last five years he had made three trips to Australia and South America on behalf of the company.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners, who found that the appellant was "resident" and "ordinarily resident" in the United Kingdom during the years in question.

Mr. Latter, K.C., and Mr. Cyril King appeared for the appellant Levene, and Mr. Latter, K.C., and Mr. S. R. Benson for the appellant Lysaght; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown in each case.

The Court, having taken time for consideration, delivered judgments unanimously affirming the decision of Mr. Justice Rowlatt in Levene's case, but, Lord Justice Lawrence dissenting, allowing the appeal in Lysaght's case.

Levene's Case.

The Master of the Rolls.—This is an appeal from a judgment of Mr. Justice Rowlatt dated July 23, 1926, by which he affirmed the decision of the Special Commissioners holding the appellant liable to the assessment made upon him.

The questions for decisions are whether he was

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

entitled to exemption from income-tax on War Loan interest under section 46 of the Income Tax Act, 1918, as a person not ordinarily resident in the United Kingdom, and on interest on securities of British possessions under Rule 2 (*d*) of the General Rules applicable to Schedule C as a person not resident in the United Kingdom; and the years under review are the four financial years 1921-25.

It is unnecessary to repeat the facts found by the Special Commissioners, and set out in the case stated. The first three paragraphs of their careful decision summarize sufficiently those upon which the decision must turn:—"The appellant is a British subject and until March, 1918, he was a householder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918, until January, 1925, he did not occupy any fixed place of residence, but lived in hotels, whether in this country or abroad. He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then went abroad and in each subsequent year he had spent between seven and eight months abroad and between four and five months in the United Kingdom. We are satisfied upon the evidence that when he left the United Kingdom in December, 1919, he had formed the intention, which he has consistently carried out ever since, of living abroad for the greater part of the year, and of returning to this country each year and remaining here for considerable periods but not for a period equal in the whole to six months in any year."

The terms "resident" and "ordinarily resident" occur many times throughout the Income Tax Act, 1918. Thus in section 46 the words are "persons who are not ordinarily resident in the United Kingdom"; in Clause 1 of Schedule D, the word is "residing"; and in Rule 1 applicable to Case IV. of Schedule D the words are "not resident." There are many other places where the words are to be found. I find it difficult to attach any distinction of meaning to the word "ordinarily" as affecting the term "resident," unless it be to prevent facts which would amount to residence from being so estimated, on the ground that they arose from some fortuitous cause, such as illness of the so-called resident or of some other person, which demanded his continuance at a place for a special purpose otherwise than in accordance with his own usual arrangement and shaping of his movements.

I agree with Mr. Justice Rowlatt that to find residence it is not necessary to find a building or "seat" as that word is sometimes used. A resident may pass from place to place, house to house, hotel to hotel, for life at a hotel has become a fixed habit with many owing to the exigencies of modern life, and he may still be a resident. I also agree with Mr. Justice Rowlatt's view as to the meaning and effect of Rule 2 (*d*) of the General Rules applicable to Schedule C. There are a number of decisions upon the meaning of "residence" in various Acts of Parliament, but none of them assist in deciding the question of its meaning under the Taxing Acts.

Residence must indicate something more than mere presence. In the cases that have been decided on this question some efforts have been made towards definition, but as a rule by way of contrast to the facts of the case under review.

Thus, in *Attorney-General v. Coote* (4 Price, 183) the subject had become possessed of a house in Connaught-place. The antithesis put by Baron Graham was framed:—"Was his residence occasional or for a temporary purpose?" And the answer given based on the fact of the possession of a house in London was in the negative. Two sailors were held to be resident where their wives and family lived—(*In re Young*, 1 Tax Cas., 57, and *Rogers v. Inland Revenue*, 1 Tax Cas., 225)—and where they themselves went when on shore.

In *Lloyd v. Sulley* Lord Shand (2 Tax Cas., 37, at p. 45) describes the negation of residence as "temporary without any characteristic of settled residence about the occupation of his house at Minard," in Argyllshire. *Turnbull v. Foster* (6 Tax Cas., 206) was held to be in contrast with *Lloyd v. Sulley* (*supra*). The subject was a merchant carrying on business in Madras, and had his usual residence in Madras, and was not in the United Kingdom at all during the year of assessment, though his wife and family were there.

In *Cooper v. Cadwalader* (5 Tax Cas., 101) an American came to Scotland regularly in the shooting season and could have come whenever he liked. He had a complete establishment, so that his arrival was not for a casual purpose, but in accordance with his intention and habit of life. The above observations or tests, so called, may be of service in order to remind the Court of the points that must not be overlooked, but they afford no concrete definition.

Probably it is not possible to frame one. Residence must be a question of degree and of fact; and I think the Special Commissioners were right in saying that the subject's claim to exemption must be determined on the balance of the facts in each case.

I suggest as a characteristic factor for consideration, even if it does not fulfil the nature of a test—to ascertain whether the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice, where for a time he is embedded in the enjoyment of what he desired to attain and has found in the abode of his own option.

Another factor may be found, and an important one—if he returns to and seeks his own fatherland in order to enjoy a sojourn in proximity to his relatives and friends.

The Special Commissioners have acted in accordance with these principles. They had abundant material on which in the application of them to the facts of the case their conclusion could be based.

In my judgment they came to a right decision, and I agree with Mr. Justice Rowlatt. For these reasons this appeal must be dismissed, with costs.

Lord Justice Sargant.—The appellant here has been charged with income-tax for the five financial years ending on April 5, 1925, in respect of (*a*) interest or dividends of securities of British possessions payable in the United Kingdom, and (*b*) income from British War Loan. He has claimed relief from this income-tax as to (*a*) under Rule 2 (*d*) of the General Rules of Schedule C of the Income Tax Act, 1918, and as to (*b*) under section 46 (1) of the Act itself; and he has been refused relief in both cases, as to (*a*) on the ground that he has not proved that he was not resident in the United Kingdom, and as to (*b*) on the ground that he has not shown that he was not ordinarily resident in the United Kingdom. In each case the appellant had to prove or show the facts necessary to obtain relief to the Commissioners of Inland Revenue, since the Treasury have directed that claims under section 46 (1) shall be dealt with by the Commissioners of Inland Revenue.

The facts so proved or shown appear in the case

stated by the Special Commissioners ; and we have to decide on those facts whether the Special Commissioners were wrong in law in deciding that the appellant had not proved that he was not resident in the United Kingdom during the years in question. I use the word "resident" only and omit the phrase "ordinarily resident" because, whatever possible distinction between the word and the phrase may be drawn on the facts of some particular case, I cannot see in the facts of the present case anything to warrant the drawing of any such distinction. His habit of life through each of the five years has been in its ordinary course.

In the rule and the section in question "resident" must, I think, be given a meaning corresponding to that of "residing" in the phrase "any person residing in the United Kingdom" in heads (*a*) (i.) and (ii.) of the first charging section in Schedule D of the Act. The first meaning of the word "reside" in the Concise Oxford Dictionary is "have one's home, dwell permanently" ; and that the word is used in this charging section with this connotation appears to be made reasonably clear by Rule 2 of the Miscellaneous Rules applicable to Schedule D, which exempts from the class of persons residing in the United Kingdom any person "who is in the United Kingdom" for a temporary purpose only and not with a view or intent of establishing his residence therein and who has not actually resided in the United Kingdom for a total period of six months in the year of assessment. The language of this Rule draws a marked distinction between mere physical presence, called "actual residence," which by the final words of the Rule makes a person chargeable, if he is actually resident for six months, and that presence which is in the course of being at home and therefore amounts to residence in the ordinary sense. In other words, the residence which makes a person chargeable depends not on mere presence in the United Kingdom (unless that is for six months in all), but on the quality of the presence in relation to the objects and intention of the person sought to be made chargeable.

The appellant lays great stress on the connotation of the word "reside" as implying a home or an establishment, and differentiates his case from those of *Lloyd v. Sulley* (2 Tax Cas., 37), *Cooper v. Cadwalader* (5 Tax Cas., 101), *Thomson v. Inland Revenue* (56 Sc. L.R., 10), and *Pickles v. Foulsham* (9 Tax Cas., 261) on the ground that in those cases the taxpayer had a home or establishment in the United Kingdom. He points out that not only did he give up the lease of his house in London in the year 1918, but that since then he has lived entirely in hotels, whether in England or abroad, until January, 1925, when he took a lease for nine years of a flat at Monte Carlo. And he contends that, while merely living at various hotels in the United Kingdom for four or five months in the year, he cannot properly be said to be residing in the United Kingdom within the meaning of the statute.

I agree that the cases referred to do not conclude the matter against the appellant, but, on the other hand, I do not think that they assist him. They determine that when the individual has a home here in the ordinary sense he is taxable ; but they do not determine that he cannot have a home here unless he has an establishment here. It seems to me that an individual may so arrange his life as to constitute an hotel his residence in the sense of being his home ; and although, if he stays at a series of hotels in different places in the United Kingdom, he may not be resident in ordinary language at any one of those places, he may yet be resident in the United Kingdom. The very point came up for decision in *Reid v. Commissioners of Inland Revenue* (10 Tax Cas., 673), which was a rather stronger case for the taxpayer than the present and was decided in favour of the Crown ; and, in my judgment, that decision was correct.

The Special Commissioners have treated the question quite properly as one of degree and to be determined on the balance of facts in each case. They have found the facts most carefully and have stated fully the considerations that actuated them. I cannot find that they have omitted any relevant considerations, or have taken into account any that are irrelevant ; and I cannot see any reason for differing from their conclusions or from the judgment of Mr. Justice Rowlatt. It seems to me that, during the years in question, the appellant elected in each such year to adopt a regular system of life, in accordance with which he and his wife made their abode and lived in this country for a period of between four and five months in each year, and that they were therefore resident in the United Kingdom not merely in the sense of being present here but in the fuller sense of making their home here.

What practical difference, if any, has been or will be caused in the appellant's position in this respect by the lease of the flat at Monte Carlo from January, 1925, is outside the limits of this case.

Lord Justice Lawrence.—I agree that this appeal should be dismissed. Mr. Justice Rowlatt, in upholding the decision of the Commissioners, has followed the Scotch case of *Reid v. Commissioners of Inland Revenue* (10 Tax Cas., 673). In my opinion, that case was rightly decided and is indistinguishable from the present case.

Lysaght's Case.

The Master of the Rolls.—This is an appeal from Mr. Justice Rowlatt's judgment dated November 17, 1926, confirming the decision of the Special Commissioners that the subject was liable to the assessment made upon him.

The facts are fully stated by the Special Commissioners. The appellant sold a residence which he had near Bristol and went with his family to live at Mallow —that is, not far from a residence in County Cork which he had inherited from his father but which was sold to the tenants after he had become possessed of it. It is clear upon the facts that, so far as he could do so, he changed his home life from England to Ireland. Since then he has come over to England to attend the monthly board meetings of John Lysaght, Limited. The meetings are held at Bath. He also visits the branch business of the company at Scunthorpe, in Lincolnshire. Except for these business visits, he remains in Ireland and looks after his estate there of some 800 acres. The Special Commissioners find that these visits to England are solely for business purposes ; the appellant's wife never accompanies him.

The case appears to be one analogous to that of the merchant who goes to a place to attend a market regularly as often as that market is held ; to that of the barrister who regularly attends the assizes at a particular town. The reason for the visit of the merchant or barrister is that it is paid to the locality where his business requires him. In the present case, if the board of directors determined to hold their meetings at Bristol or Cardiff or Lincoln, the appellant's visits to England would be paid to one of those towns as readily as to Bath and Scunthorpe. In my judgment a man may come repeatedly to this country and yet

not acquire a residence, for he may go to a place to which duty or business calls him, and whither he resorts for such space of time only as that duty compels him to remain or the business requires his attendance. That is a place which is fixed not by himself alone but is determined by other considerations than his own desire or volition—a visit to which is necessitated and determined by causes exterior to his mere will, and they might have led him somewhere else, if the path of duty had lain in a different direction.

Such visits may have other characteristics and so justify a finding of a residence in relation to them. But tested by the observations or factors to which I have made reference in *Levene's* case, the present case appears to me to fall on the other side of the line.

There remains, however, the question that has given me some concern—that is, is the matter so much a question of fact that it is not open to this Court to review the decision of the Special Commissioners ? Mr. Justice Rowlatt, in his judgment, felt unable to differ from the Special Commissioners. They have found the facts, but in paragraph 5 " held " upon those facts that the appellant was both ordinarily resident and resident in the United Kingdom for each of the years in respect of which the claim to exemption arises. They thus applied the law as they thought it should be interpreted to the facts which they had found.

It is unnecessary to go through the many cases decided on this point, for in *Great Western Railway Co. v. Bater* (38 *The Times* L.R., 448 ; [1922] 2 A.C., 1) Lord Wrenbury states the course to be followed succinctly in a sentence, at p. 30 : " It was for the Special Commissioners to find and state all the facts. . . . It was not for the Court to question those facts in any way. But the question for the Court was whether, upon those facts, Mr. Hall held an office or employment of profit within the meaning of the Act. That is a question of law. What does the Act mean ? What is the true construction ? " Emphasis is added to the decision of the House that the question before it was one of law and not of fact merely because of its divergence from the decision of the Court of Appeal, which had decided otherwise. Lord Sterndale had plainly stated in his judgment that the Court of Appeal could not interfere with the result of the facts found.

Applying the decision in *Bater's* case (*supra*) in the House of Lords to the present case, I am satisfied that this Court can review the result which the Special Commissioners held to follow in law upon the facts found. The meaning of " residence " in the Income Tax Act, 1918, must be a question of law ; and upon the facts found by the Special Commissioners the Court must determine whether the subject has brought himself within the terms of the exemption in the Act rightly construed.

In my judgment, therefore, this Court can reconsider the case upon the question of the meaning of " residence " in law, and ought to hold that the facts found do not satisfy that meaning and constitute residence. The result is that the subject is entitled to the exemption claimed. The appeal will be allowed with costs, and the Inland Revenue Commissioners will be directed to allow the exemption.

Lord Justice Sargant.—In this case the appellant is seeking a relief from taxation similar to that in the case of *Levene v. The Commissioners of Inland Revenue.* I need not repeat the remarks that I made in that case as to the meaning of the word " resident " and the phrase " ordinarily resident," but I should add that in this case, as in that, I see no reason for drawing any distinction between the word and the phrase. Everything here, as there, has followed an ordinary course.

So far, this case is analogous to the *Levene* case, but the facts here are very different. Here there is the very important distinction that, throughout the whole period during which the appellant is alleged to have been in course of becoming resident in the United Kingdom, he has undoubtedly been keeping up a home in Southern Ireland and residing there in the ordinary sense of the word. His visits to England have been for short periods of a week only in each month, have been for strictly business purposes only, and have not been in the society of his wife. They have for the most part been to Bath and Bristol, but have sometimes extended to Scunthorpe when the exigencies of business have rendered this further journey necessary or advisable. There has been no choice by him of England as a desirable abode, and no intention of being present here otherwise than in the course of his duties ; and no one could, I think, predicate of the appellant with accuracy that he ever had the intention of making England his home in the ordinary sense of the word. It is, of course, possible that a man may have two residences during the same period of assessment, but it is far less likely that he should have a second residence here when he, throughout and apart from temporary absences, is continuously residing and keeping a continuous home elsewhere.

I put the case during the argument of a man living in a house or lodgings at some such place as Richmond or Reigate and travelling to the City every week-day to earn his living there. In such a case everyone would say that he resided at the place where he slept, and that he worked or earned his living in the city ; and I think that this would be so, though his tenure of his office in the city might be much more permanent than that of his house or lodgings in the country, or though he might arrange to sleep in town occasionally when he was kept specially late at work. One element in arriving at this conclusion would be that residence would ordinarily be determined by the place where he slept, not where he worked, but another element would, I think, be that the place where he slept and lived would be determined by his own choice, and in view of the social amenities which he might expect to enjoy in that district ; while the place where he worked would be much less dependent on his own volition and independent of social considerations. But be this as it may, he would in ordinary language be said to be resident in Richmond or Reigate and not to be resident in the city, though a greater part of his waking hours were passed in the city than in his suburb.

In the present case, owing to the greater distance between his home and the scene of his work, the appellant is forced to remain in the United Kingdom for several days and nights continuously. But, on the other hand, the periods during which he is at his home in Southern Ireland are far longer, and I think that in this case, at least, as much as in the hypothetical case of the city worker, the appellant would be considered in ordinary parlance to have his residence at his home in Southern Ireland, and not to have a second residence in the United Kingdom by reason of his recurrent occupational presence there. Further, the purpose of the presence of the appellant in the United Kingdom may, in my view, be fairly described as " temporary," notwithstanding its being of a regularly recurrent character, and it certainly has not been with any " view or intent of establishing his

residence therein"; and thus he appears to fall within the exemption granted by Rule 2 of the Miscellaneous Rules applicable to Schedule D.

Accordingly, with great respect to the learned Judge, I differ in this case from the result at which he and the Special Commissioners have arrived, and think that the appeal to this Court should succeed.

In doing so I do not think that I am differing from the Special Commissioners on any question of fact. As I read their decision they have carefully found the facts, and have segregated them from any question of law; and the facts so found I entirely accept. But they have then gone on to decide a question of law on those facts, and have "held" that on the facts found the appellant resided in the United Kingdom. This is a conclusion of law within the principles of Lord Wrenbury's reasoning in *Great Western Railway Company v. Bater* (38 *The Times* L.R., 448; [1922] 2 A.C., 1); and it is solely as to this conclusion of law that I differ from them and from Mr. Justice Rowlatt.

Lord Justice Lawrence.—In this case I have the misfortune to differ from my colleagues, and I need hardly say that in view of the judgments which have just been delivered I profoundly distrust my own opinion.

The appellant claims exemption from income-tax on British Government securities under section 46 of the Income Tax Act, 1918, and repayment of income-tax on foreign and Dominion Government securities under Rule 2 (*d*) of the general rules applicable to Schedule C of the same Act; both these claims are in respect of the two fiscal years ending April 5, 1923, and April 5, 1924, respectively.

In order to succeed in these claims the appellant has to prove to the satisfaction of the Commissioners of Inland Revenue that during the years in question he was neither resident nor ordinarily resident in the United Kingdom.

The Commissioners for the Special Purposes of the Income Tax Acts having held that the appellant was both resident and ordinarily resident in the United Kingdom in each of the two years in question, the appellant required them to state a case for the opinion of the High Court.

In the case the Special Commissioners, after setting out the facts and the contentions of the parties, state their conclusions as follow: "We held that the appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ending April 5, 1923, and April 5, 1924, respectively."

I have found some difficulty in reconciling the various decisions and judicial *dicta* (which will be found conveniently catalogued in Dowell's Income Tax Laws, 9th Edition, pp. 231 to 236) on the question how the Court ought to deal with a case stated for its opinion in the form adopted in the present case.

The Solicitor-General contended that as the appellant had not shown that the Special Commissioners had taken an erroneous view of the construction of the Act no question of law had arisen, and further, that as there was evidence upon which the Special Commissioners could have reached their conclusions there was no jurisdiction to review their findings of fact that the appellant was resident and ordinarily resident in the United Kingdom. This contention finds support in many judicial utterances, including the speech of Earl Loreburn, Lord Chancellor, in *Farmer v. Cotton's Trustees* (31 *The Times* L.R., 478; [1915] A.C., 922, at p. 930), where it is stated that the Commissioners' determination is conclusive unless erroneous in point of law, and that there is no jurisdiction to review it upon any issue of fact, but that the Court could interfere if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, or if there were no evidence upon which their decision could be supported.

Mr. Latter, on the other hand, contended that the question whether the appellant was resident or ordinarily resident in the United Kingdom in any given period within the meaning of the relevant section and rule was a mixed question of fact and law, the question of fact being, moreover, a compound fact (to use the expression of Sir George Jessel, Master of the Rolls, in *Erichsen v. Last,* 8 Q.B.D., 414, 422) depending upon the true effect of a number of instances, and that it is for the Court to decide as a matter of law whether upon a consideration of the facts found in the case the appellant was or was not resident or ordinarily resident in the United Kingdom during the periods in question. This contention also finds support in many judicial utterances, including the speech of Lord Parker of Waddington in the same case of *Farmer v. Cotton's Trustees* (*supra*), where the following passage occurs: "The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment the question is one of law only."

In the present case Mr. Justice Rowlatt went into the facts which were stated in the case to have been admitted or proved before the Special Commissioners, and directed his mind to the point whether they were right in law in holding that the appellant was resident and ordinarily resident in the United Kingdom. The course so taken by the learned Judge is in accordance with that adopted by all the Courts in the case of the *American Thread Company v. Joyce* (29 *The Times* L.R., 266) and in other cases, and is, in my opinion, the right method of dealing with the present case, as it is hardly to be supposed that the Special Commissioners intended to state the appellant out of Court, especially as they were careful in stating their conclusion to use the words "we held" and not "we found as a fact."

In these circumstances I am of opinion that the question for this Court is whether upon the facts stated in the case the Special Commissioners and the learned Judge were right in law in holding that the appellant was resident and ordinarily resident in the United Kingdom within the true meaning of the section and rule in question, and I propose to confine my judgment to this point.

The words "reside" and "residence" are flexible terms and may have different meanings according to the context in which they are used.

Both in section 46 and in Rule 2 (*d*) of Schedule C the expression "resident in the United Kingdom" is used in contrast to "resident out of the United Kingdom"—the section and rule are not concerned with residence at any particular place or places within the United Kingdom. When speaking of a person being resident in a certain country at large as distinguished from being resident at some particular spot or in some particular town, the expression does not, in my opinion, necessarily connote that the person has a fixed place of abode in the country in which for the time being he is resident. The expression, in my opinion, bears much the same meaning as in the sentence "during his comparatively short resi-

dence in England he was unable to master the English language." That the expression is used in this wide sense is, I think, confirmed by the provisions of Rule 2 of the Miscellaneous Rules applicable to Schedule D which exempts a person from the charge to tax under that schedule as a person residing in the United Kingdom in respect of profits or gains received in respect of possessions or securities out of the United Kingdom who *is* in the United Kingdom for some temporary purpose only, and not with any view or intent of establishing his residence there, and who has not *actually resided* in the United Kingdom at one time or several times for a period of six months in the whole, but enacts that if any such person *resides* in the United Kingdom for the aforesaid period he shall be chargeable for that year. This rule (which does not apply to cases under section 46 or under Schedule C) seems to me to show that but for its provisions a person would or might be chargeable to tax under Schedule D as a person residing in the United Kingdom, although such person were only in the United Kingdom for a temporary purpose and although he actually stayed in the United Kingdom for less than six months, and it further shows that a person actually staying in the United Kingdom for six months is resident therein for the purposes of the charge to tax under Schedule D, although he is only staying therein for a temporary purpose and not with any intention of making his home therein.

Whether a person is resident in the United Kingdom within the meaning of the enactments in question in the present case is no doubt a question of degree, and depends on a due consideration of all the facts, but, in my opinion, a person who regularly comes to and stays for a substantial period in the United Kingdom is *prima facie* resident therein within the meaning of these enactments, although he may not have any fixed place of abode therein, and the onus is upon him to satisfy the Special Commissioners or the Court that he is not so resident.

The expression "ordinarily resident in the United Kingdom" in section 46 necessarily bears a narrower meaning than the expression "resident in the United Kingdom" in Rule 2 (*d*). It assumes that the person is resident in the United Kingdom but contemplates that he may not be "ordinarily" resident therein. I agree with the opinion expressed by the Lord President in *Reid's* case (10 Tax Cas., 673) and by Mr. Justice Rowlatt in *Levene's* case as to the meaning of the qualifying adverb "ordinarily," which, in my opinion, is used in its primary and natural sense, "in conformity with rule or established custom or practice" or "as a matter of regular practice or occurrence." In this sense "ordinarily" is in contrast with "casual" or "occasional," and I did not understand Mr. Latter to quarrel with this construction.

I now come to consider whether the facts stated in the case justify the conclusion reached by the Special Commissioners and by Mr. Justice Rowlatt.

The appellant has his home in Ireland, where he resides with his family when in Ireland; he has no dwelling-house in the United Kingdom, and generally stays at the Spa Hotel, Bath, when he comes to England. These facts, although important, are not conclusive. The Act itself contemplates that a person may be resident and ordinarily resident in more places than one (see, *e.g.*, Rule 4 of the Miscellaneous Rules applicable to Schedule D). As regards staying at the Spa Hotel I have already expressed my opinion that in order to be resident in the United Kingdom within the meaning of the section and rule it is not essential that a person should have a fixed place of abode or an intention of making his home therein. At the present time, owing to various causes, even persons who admittedly are permanently resident in the United Kingdom frequently live altogether in hotels or boarding houses, and move about from place to place.

On the other hand, the appellant is in the regular employ of John Lysaght, Limited, as advisory director at a fixed salary. The head office and works of John Lysaght, Limited, are in England, and the appellant's employment necessitates his regular presence in England for about one week in every month of the year. Further, the appellant has a banking account at a bank in Bristol, and is a member of the Savile Club in London.

The case is near the line, but, in my opinion, the determining factor is that the post which the appellant holds in John Lysaght, Limited, causes him to come regularly to England and to stay in the United Kingdom for a substantial period in each year. The fact that the appellant stays regularly in England for about three months of the year for the discharge of his duties as the servant of an English company, in my opinion, constitutes him a person who is both resident and ordinarily resident in the United Kingdom.

In these circumstances I find myself unable to hold that the Special Commissioners were bound as a matter of law to be satisfied that the appellant was neither resident nor ordinarily resident in the United Kingdom for the years in question.

In my opinion, the decision of Mr. Justice Rowlatt was right, and the appeal ought to be dismissed, but as my colleagues take the contrary view the appeal will be allowed, with costs.

[Solicitors—Mr. M. A. Jacobs for the appellant Levene; Messrs. Whites and Co. for Messrs. Clarke, Sons and Press, Bristol, for the appellant Lysaght; the Solicitor of Inland Revenue.]

Court of Appeal.
(Bankes and Scrutton, L.JJ., and Romer, J.)
1927. Feb. 28.

REX v. GRAIN—EX PARTE WANDSWORTH GUARDIANS.*

Local Government — Gratuity to officer sanctioned by Ministry of Health—Superannuation allowance based on gratuity—Disallowance—Surcharge—Poor Law Amendment Act, 1844 (7 and 8 Vict., c. 101), s. 32—Local Authorities (Expenses) Act, 1887 (50 and 51 Vict., c. 72), s. 3—Poor Law Officers' Superannuation Act, 1896 (59 and 60 Vict., c. 50), ss. 2, 3, 12, 19.

Acting upon a recommendation of the Ministry of Health (made without statutory authority), a board of guardians paid a gratuity to a registrar of births and deaths. That payment, having been sanctioned by the Ministry, could not be disallowed by the district auditor. On the retirement of the registrar the guardians granted him a superannuation allowance based on the average of his remuneration by fees *plus* gratuity in the preceding five years. The district auditor dis-

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

allowed so much of the allowance as was based on the gratuity, and surcharged it on certain guardians and ex-guardians.

Held, that the district auditor was wrong in disallowing and surcharging the payment, as he was bound to treat the gratuity as forming part of the registrar's "emoluments" within the meaning of s. 19 of the Poor Law Officers' Superannuation Act, 1896.

Decision of the Divisional Court (43 *The Times* L.R., 38 ; [1927] 1 K.B., 540) affirmed.

This was an appeal from a decision of the Divisional Court (43 *The Times* L.R., 38 ; [1927] 1 K.B., 540) upon a rule *nisi* for a *certiorari* which was directed to Mr. H. W. W. Grain, the district auditor of the Wandsworth Union, to bring up and quash a certificate of disallowance and surcharge of a sum of £27 17s. 1d. in the accounts of the Wandsworth Guardians for the half-year ending September 30, 1925.

The question arose out of the payment of gratuities to registrars of births and deaths to meet the increased cost of living. Those gratuities, for which there was no statutory sanction, were authorized and recommended to boards of guardians by circulars of the Local Government Board (now the Ministry of Health), dated May 2, 1918, and May 14, 1920. The circulars pointed out that since registrars were paid by fees and not by salary there was no authority to pay a war bonus, but that great hardship was caused in some cases by the diminution of fees. Boards of guardians were therefore invited to recommend, on lines laid down in the circulars, the payment of gratuities to those officials which the Ministry would be prepared to sanction.

The Wandsworth Board of Guardians, in accordance with those circulars, granted a gratuity to Mr. W. V. Minter, the registrar of births and deaths, and that gratuity was paid for two years, subject to a deduction of 3 per cent. towards superannuation allowance when Mr. Minter should retire. Though there was no statutory sanction for the payments, the district auditor could not disallow them because of the provision of section 3 of the Local Authorities (Expenses) Act, 1887 (50 and 51 Vict., c. 72) :—

"Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board."

On Mr. Minter's retirement a superannuation allowance was granted to him in February, 1922, based on fees *plus* gratuities. The payment of that allowance was not challenged until the half-year ending September 30, 1925, as it was assumed to have been paid on the correct basis. On that occasion, however, a more searching inquiry was made, and the fact that the gratuities were included in arriving at the amount of the basis was disclosed.

The district auditor thereupon disallowed (and surcharged on certain guardians and ex-guardians) the sum of £27 17s. 1d., part of a payment of £137 1s. 10d., in respect of the half-yearly instalment of Mr. Minter's allowance of £274 3s. 8d. That disallowance represented the difference between the amount due on the basis of fees alone and the amount calculated on the basis of fees *plus* gratuity.

The district auditor took the view that though he was precluded from disallowing the gratuities the authority of the Ministry did not legalize their payment, and that they were not "emoluments" of the officer within the meaning of section 3 of the Poor Law Officers' Superannuation Act, 1896 (59 and 60 Vict., c. 50), which enacts that the scale for superannuation allowances to an officer or servant under the Act shall be based upon the average amount of salary or wages and emoluments during the five years ending on the quarter-day preceding the day on which he ceases to hold his office or employment. "Emoluments" are defined in section 19 of the Act as including "all fees, poundage, and other payments made to any officer or servant as such for his own use."

The effect of the disallowance and surcharge, if correct, was to reduce Mr. Minter's allowance from £274 3s. 8d. to £218 9s. 6d. per annum.

The rule was obtained at the instance of the guardians upon the grounds that the district auditor had no jurisdiction to disallow and surcharge the payment, that the gratuities were "emoluments" within the meaning of the Poor Law Officers' Superannuation Act, 1896, that the sanction of the Ministry of Health legalized the payments of the gratuities, and that the payment was allowed by the district auditor at several previous audits.

The Divisional Court held that the district auditor had no power to surcharge the amount. Section 32 of the Poor Law Amendment Act, 1844, did not authorize the surcharge of a payment which was illegal unless it was due to the negligence or misconduct of the accounting party.

It was held also by the Lord Chief Justice and Mr. Justice Avory (Mr. Justice Salter dissenting) that the district auditor was wrong in disallowing the payment, as the gratuity formed part of the registrar's emoluments within the meaning of section 19 of the Poor Law Officers' Superannuation Act, 1896.

The district auditor appealed.

Mr. Montgomery, K.C., and Mr. Croom-Johnson appeared for the appellant ; Mr. Wingate-Saul, K.C., and Mr. Crouch for the respondents.

Lord Justice Bankes.—The matters which have been discussed in this case are, no doubt, of very considerable importance, and if they all were matters upon which a decision had been arrived at in the Court below it would be necessary, I think, for this Court to express its view upon that decision ; but, as I read the judgment of the learned Judges in the Divisional Court, they only decided one branch of the matters which have been discussed before us, although they did express an opinion upon the other branch, at the same time stating that that particular matter did not strictly arise for their decision.

In those circumstances it seems to me that what was said by the Divisional Court on that point is really *obiter,* and it is not necessary for us, therefore, to express any definite or decided opinion upon that branch of the arguments which have been addressed to us.

Now, the matter arises in this way. The validity of a disallowance by a district auditor and the consequent surcharge—using that expression in the sense in which I think it is used in these Poor Law Statutes —surcharge of the amount upon individual guardians who had expressly authorized the payments, was challenged, and it was challenged by way of proceeding by *certiorari* to bring up his order to be quashed on the ground that it was an order that he had no jurisdiction in law in making. The payment was a payment by way of superannuation allowance to a registrar of births and deaths, and it is necessary in this connexion to refer to two separate classes of statutes. There is the class of statutes dealing with the position of the registrar of births and deaths and

his remuneration, and there is the class of statutes which deals with the position of the district auditor under the Poor Law Acts and the authority and jurisdiction of the Local Government Board—now the Ministry of Health—to regularize, if I may use that expression, certain payments by boards of guardians which might otherwise be properly objected to on the audit by the auditor.

Now, first of all, with regard to the statute regulating the registrars of births and deaths, there is the Births and Deaths Registration Act, 1836, setting up the office of the registrar and providing for his appointment. I need not refer to the particular provisions of that statute; but when you come to the statute of 1874 it is necessary to refer to that, because it is under that statute, and under section 29 of the principal Act, as the Act of 1836 is called, that the registrar derives his right to payment for the work he does. Under the Act of 1874, section 27 provides that "Every superintendent registrar and registrar respectively shall be entitled to the fees specified in the second schedule to this Act, and every such fee shall be paid to him by the persons and on the occasions pointed out in such schedule, and may be recovered as a debt due to him, and subject to the prescribed rules he may refuse to comply with any application voluntarily made to him until the fee is paid." In section 31 of that statute there is the provision that "the payment to the registrar under section twenty-nine of the principal Act of two shillings and sixpence for each of the first twenty entries of births and deaths in every year which he has registered shall be paid to him for each of the first twenty entries of births and deaths in each quarterly account made out and verified in manner directed by that Act." That is a payment which, under section 29 of the principal Act, is payable by the guardians.

We start, therefore, with this, that the payment to the registrar of births and deaths is a statutory payment, the amount of which is defined and limited by statute. Speaking generally, in my opinion, any payment to the registrar by the guardians, who are themselves the statutory authority with no right to lay out or expend moneys entrusted to their care in any other than the statutory ways, in excess of the statutory fees which are set out and defined by various Acts of Parliament defining their position and duties, constitutes an illegal act; but certain power and authority is given to the Ministry of Health—formerly the Local Government Board—to deal with special cases in a very special way. The first of those statutes is the Poor Law Audit Act, 1848. Before I arrived at this stage of the matter, I ought to have stated that under the Poor Law Acts the appointment of auditors is provided for, and the duties of those auditors are set out, and the payments which boards of guardians may legally make are defined, and there are provisions which indicate the extent of the duty and authority of district auditors in disallowing payments which in their opinion are improperly made, and for surcharging—using that expression in the proper sense—against the accounting person, and also making persons who may not be the actual accounting persons, but persons who are directly responsible for the payments, by requiring them to make those payments good. That being the state of the law, section 4 of the Act of 1848 provides that "where any appeal shall be made to the said commissioners against any allowance, disallowance, or surcharge made by any auditor in the accounts of any guardians, overseers, or their officers, it shall be lawful for the said commissioners to decide the same according to the merits of the case; and if they shall find that any disallowance or surcharge shall have been or shall be lawfully made, but that the subject matter thereof was incurred under such circumstances as make it fair and equitable that the disallowance or surcharge should be remitted, they may, by an order under their seal, direct that the same shall be remitted, upon payment of the costs, if any, which may have been incurred by the auditor or other competent authority in the enforcing of such disallowance or surcharge."

Now, it is quite plain that by the provisions of that statute a right of appeal is given to the person who is surcharged, and a right of dispensation is given to the commissioners, because provision is made for cases where the disallowance or surcharge has been lawfully made, which therefore would include a case where a district auditor had properly disallowed an illegal payment made and had surcharged the person responsible for the making of that illegal payment; and although he had acted quite properly and had disallowed only an illegal payment, this section clearly gives the commissioners jurisdiction to remit the disallowance if they consider it fair and equitable.

What the effect of that section is upon the original payment itself has been considered in *Attorney-General v. Merthyr Tydfil Union* (16 *The Times* L.R., 251; [1900] 1 Ch., 516), and it was not, in my opinion, a mere dictum of Lord Justice Lindley, because it was material to consider in that case how the matter came, or could come, before the Court at all, and the learned Lord Justice distinctly indicated that in his view the effect of an order under that section was not to turn a payment which was an illegal payment into a legal payment, but it merely was a conferring of an equitable jurisdiction upon the proper authority to remit. An illegal payment having been made, perhaps under mistake or perfectly *bona fide*, the payment itself was not altered in character; and had the payment been challenged in a law court either when it was intended or threatened to be made, or, indeed, after it had been made, the Court would have expressed the opinion, which it was bound to hold, that there was nothing in this section which altered the character of the payment and made what was on the face of it obviously an illegal payment a legal payment.

So the matter stood when the law in reference to these remissions of payment only applied after the district auditor had completed his audit and made his certificate. Then came the Local Authorities (Expenses) Act, 1887, which is quite a short Act, and, in my opinion, is clearly intended to extend the jurisdiction created by the Act of 1848 so as to make it apply to a payment before it comes before the district auditor; and the proper authority having exercised its discretionary equitable authority before the matter comes before the auditor, it is only reasonable that provision should be made that the auditor should not, after that authority has been exercised, feel himself compelled to disallow or to treat as an illegal payment for the purpose of his certificate a payment which has been made under statutory authority. So we get to the Act of 1887, which provides by section 3 that "expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board." Speaking for myself, I cannot see that the foundation of Lord Justice Lindley's decision in reference to the Act of 1848 is in any way displaced by this Statute of 1887, and it seems to me to follow from his decision and the decision of the Divisional

Court that the provision of this Statute is no more affected than the provision of the Statute of 1848 in reference to the essential character of the payment which is challenged as being illegal.

So much for the history of the two sets of Statutes with which we have to deal on one branch of this discussion.

The next stage is this, that as a result of the circulars issued by the Local Government Board, boards of guardians were invited to put the registrars of births and deaths on the same footing as their other officers in reference to war gratuities. It was, of course, competent for the Local Government Board to do that because, whatever their opinion might be as to the legality of making these payments, they clearly recognized and knew that they had as between themselves and the district auditors the right to say that the district auditors should not disallow payments which had been made in pursuance of the invitation to treat the registrars on the same footing as other officers of the guardians. In this particular case the effect of the circular was that this gentleman, whose case is now in question, was granted a gratuity of a particular amount. The effect of granting him that gratuity was that, as between the guardians, the Local Government Board, and the auditor, that was an authorized payment in every case in which permission was obtained from the Local Government Board for making the payment, and therefore on every occasion, so long as this gentleman continued in his office, and received these payments, they were payments which were recognized payments, payments which, had they been challenged from the outset, might possibly have had to be disallowed ; but so long as the matter remained as between the officer, the board of guardians, the Local Government Board, and the district auditor, they were authorized and recognized payments. Were they during that time part of the emoluments of his office ? I should be very loth to say or suggest that any payments which were, for all purposes, illegal payments, or improper payments should be held to come within the expression " emoluments of a man's office " ; but here you have a position which I should think is quite unique, and that is this, that although by statute an officer's salary is limited to a particular amount, and by statute the district auditor is appointed to see that the officer is not paid more than that amount, there is at the same time a dispensing authority in a government department which has a right to say to the district auditor, if in the exercise of his duty he declares a certain payment to be an illegal payment and a matter for surcharge, " You cannot disallow or surcharge this particular payment, because we allow it in advance of the audit." When you find a payment of that particular category and class, then I am prepared to say that it does come not only within the ordinary language but is within the meaning of the statute the emolument of the person to whom those payments are made.

The next stage is this : This gentleman having retired a statute comes into force in which provision is made that his retiring pension shall be based upon a certain proportion of his salary and emoluments, and the particular dispute here arises in this way, that although the auditor's hand was tied while these payments were being made and he could not either disallow a payment or surcharge the person authorizing it, yet he claims the right, those payments having been made, to challenge the amount of the pension paid, because it includes a sum arrived at by the inclusion of these payments which, whilst they were made, he was not entitled to challenge.

Now, in my opinion, the true effect of this legislation is that, at any rate, it does not lie in the mouth of the auditor to say that payments which, whilst they were made, he could not be heard to say were not emoluments, yet as soon as the man retires and they are not paid quarterly or half-yearly, or whatever it may be, are emoluments or payments which he is entitled to challenge. If that is so—and I think that is the view which has been adopted by the Divisional Court and really in substance is what their judgment amounts to—in my opinion the appeal fails and must be dismissed with the usual consequences.

I only wish to say on the other branch of the case on which opinions are expressed in the Court below, that I do not think those opinions are any part of a decision, and they do not therefore, in my opinion, call for a decision from us ; but I do wish to say that I think there will be a good deal to be said, whenever the matter comes up for decision, for the view that the Poor Law Statutes to which our attention has been called do recognize a jurisdiction in the district auditor for challenging illegal payments, against a party who, in ordinary law, may not himself be the actual accounting party. I express no opinion upon the matter, but I think that when, if ever, this particular question arises which was discussed in the Divisional Court and has been discussed before us, as to whether or not the jurisdiction of a district auditor to disallow and surcharge is confined to a right to surcharge in cases of misconduct or negligence, there is a good deal to be said for the view that there is another class contemplated by these statutes, and that is the person who may, in ordinary language, not be the accounting person, yet is the person who has primarily authorized the payment and who is made responsible not because he or she may be the individually accounting person, but is the person who is the person individually responsible for the making of the payment. I do not give any judgment to that effect or bind myself with regard to what my opinion may be if the matter had been more fully argued ; but I do desire to say that I do not think the decision of the Divisional Court ought to be treated as a judgment on that point, and our decision rests entirely upon the other matter which has been discussed in reference to whether or not the district auditor had any right to challenge this particular payment made under the circumstances in which it comes before us.

Lord Justice Scrutton.—If we had been asked to express a final opinion on a number of matters on which opinions are expressed in the judgment of the Divisional Court and on which arguments have been addressed to us by Mr. Montgomery I should certainly have desired to hear Mr. Wingate-Saul at some length and to consider my judgment ; but in the view I take of the case this appeal can be dismissed on a comparatively narrow ground which is, I think, the ground on which the majority of the Divisional Court decided ; that is a ground relating simply to the position of the district auditor only in regard to the facts of this case.

The case arises in this way. The registrar of births and deaths, who is not a servant of the board of guardians and cannot be dismissed or controlled by them, is remunerated first of all by a scale of fees, depending on the number of births and deaths he registers, fixed by an Act of 1836 and paid by the Guardians, and, secondly, by a scale of fees con-

tained in an Act of 1874 for services rendered in the way of supplying certificates, copies of certificates and extraordinary work to persons who register. As he is not a servant of the board of guardians I see no power in them to pay him a salary or a gratuity. When the Great War changed the face of England and the conditions of England (1) the number of births fell very much; (2) the unfortunate deaths which took place did not take place in the jurisdiction of the English registrars; and (3) the cost of living went up very much. In those circumstances, not unnaturally, it occurred to the Local Government Board that registrars of births and deaths were not sufficiently remunerated, and two circulars were issued in which the Local Government Board suggested to boards of guardians and told them that they might safely grant gratuities to registrars in order to put them in the same position as the salaried servants who were having increases by way of war bonus, and undoubtedly those gratuities which many boards of guardians proceeded to grant and which the Wandsworth Board of Guardians, the parties in this case, granted, were sanctioned by the Local Government Board; and under an Act of 1887 if the Local Government Board had sanctioned them the district auditor was forbidden to disallow them on the ground that they were illegal, even though they were, as this gratuity was, in my opinion, illegal. Accordingly the board of guardians granted to Mr. Minter in this case a gratuity, and the Act of 1887 prevented the district auditor from striking it out as illegal whatever his opinion was. When in that and the following years the board of guardians granted a gratuity, treating it as an emolument under the Acts relating to superannuation they deducted from it in each year the contribution that should be deducted under the Superannuation Acts, and the district auditor, who was forbidden in each year to disallow that item, though he might think it illegal, under the Statute of 1887 did not disallow it or in any way deal with the deduction of the superannuation allowance; and whether he noticed it or not I think he was right in taking the view that if he was bound to treat the thing as legal he could not treat it as illegal for the purpose of superannuation. So for several years from Mr. Minter's gratuity there was deducted in each year 3 per cent., I think it was, or a percentage, at any rate, for superannuation. Then Mr. Minter retired, and the question of his pension for which he had been paying during some years came up. It was assessed on the basis that the gratuity was an emolument which was to be taken into account in calculating his pension according to the statute. Then the district auditor struck. He said in effect:—I have been bound to treat this gratuity as legal under the Act of 1887 because the Local Government Board has sanctioned it; I have, in effect, treated it as legal when each year a percentage was deducted from it for the purpose of paying Mr. Minter's superannuation; but I can, now that the calculation is to be made, treat it as illegal and strike it out from the calculation of the pension, thereby reducing the amount which should be paid to Mr. Minter in respect of his pension, and I disallow it and I shall surcharge those who voted for it.

The question is, can the district auditor do that? The powers of the Local Government Board with respect to these disallowances are derived, first of all, from the fourth section of the Act of 1848, which provides that if an appeal is made to them against the allowance, disallowance, or surcharge by an auditor, it shall be lawful for the Commissioners to decide the same according to the merits of the case, and if they find that the allowance was unlawfully made, which would be in a case where the payment was illegal, but that the subject-matter was incurred under such circumstances as made it fair and equitable that the allowance should be remitted, they could remit the disallowance. At a later stage it seems to have occurred to everyone and to Parliament that it was a little farcical if the Local Government Board had power to remit for equitable reasons a surcharge when it had been made, and had approved the original payment which was disallowed, that the district auditor should have to go through the form of disallowing it in order that the Local Government Board should then exercise their power of setting his disallowance aside, so that the Act of 1887, as I read it, provided that if beforehand the Local Government Board had sanctioned the payment and would, therefore, obviously, if the surcharge had been made, disallow the surcharge, the district auditor should not make a disallowance and surcharge on a matter which it was quite obvious the Local Government Board would then proceed to disallow, which may perhaps be described in a legal phrase as avoiding circuity of action. It is quite true that in the *Merthyr Tydfil* case (16 *The Times* L.R., 251; [1900] 1 Ch., 516), Lord Justice Lindley expressed his view as to the effect of one of those statutes, the statute of 1848, as to the powers of the Court and said that the power given to the Local Government Board to disallow a surcharge for equitable reasons did not prevent the Court from saying that the payment was illegal. It is quite true that the Court there had only before it the statute of 1848. The *Merthyr Tydfil* case (*supra*) related to a topic, which is always with us, that of paying Poor Law relief to strikers. An action was brought by the Attorney-General, suing on the relation of a colliery company, for a declaration that the Board of Guardians could not legally pay relief to strikers. The Local Government Board had not at that time expressed any opinion about the strike; they had not sanctioned the payment; there had been no surcharge of payment and they had not disallowed any surcharge; but what was said in argument was: You, the Court, cannot have any power because Parliament has now remitted this matter to the Local Government Board, who have the power, if there is an illegal payment, to disallow the surcharge if they think it is equitable that it should be disallowed; and, secondly, the power of the Court has gone. It was with respect to such a position that Lord Justice Lindley used the well-known words which were concurred in by the rest of the Court at page 546. It appears to me that that passage applies as much to the statute of 1887 as it does to the statute of 1848 and the Local Government Board or any other public department has not been given a power to dispense with the statutes of the realm; that it is still open to the proper authorities, and I abstain from discussing whether it should be a ratepayer only, or, as in the *Merthyr Tydfil* case (*supra*), the Attorney-General on the relation of the ratepayer, to obtain, at any rate, a declaration that a payment is illegal in spite of the fact that the Local Government Board has sanctioned it. I also abstain from discussing a matter which will require considerable argument, I think, whether under any circumstances such a proceeding can result in an order for repayment of a sum paid; but that applies to the action of the Courts, and in my view the district auditor is still bound by the Act of 1887 not to disallow a payment which the

Local Government Board have sanctioned and still more, of course, not to surcharge in respect of a payment which the Local Government Board has sanctioned. Neither I do not see how it can be open to the district auditor to say : " I am prevented from saying that this payment is illegal, but I can say in a proceeding consequential on that payment that it is to be treated as illegal in the consequential proceeding, though it cannot be treated as illegal in the main proceedings." That seems to me to be reducing relations between the district auditor, the Local Government Board, and the statute to an absurdity. I think in this case that when the main payment of the gratuity cannot be challenged by the district auditor he cannot indirectly challenge it by saying : " Though I cannot challenge it in the proceedings for payment of emoluments I can challenge it in the proceedings for payment of superannuation based on a calculation of this emolument," and on that ground, which I hope I have stated clearly—and it is a narrow ground and it is, I think, the ground on which the Lord Chief Justice decided the case, though he went on to deal with questions which, in his opinion, did not strictly arise—on that ground I desire to affirm the decision of the Court below.

I am not to be taken as expressing any opinion, and I do not think the decision of the Divisional Court is binding on the point whether there is any difference in construction between section 32 of the Poor Law Amendment Act of 1844 and section 247 of the Public Health Act, 1875. The Lord Chief Justice, in his discussion of the questions which did not, in his opinion, strictly arise, thinks there is such a difference. I do not desire to express any opinion on the matter. I do not think the Lord Chief Justice's view is binding on other Courts and I have considerable doubts whether his view can be sustained if the matter is ultimately discussed. But, as I have said, I am not expressing any final opinion on the point. I do not think there is any binding decision in the Court below, and I myself reserve the question for future discussion, whether it is possible to say that you can only surcharge if there is negligence or misconduct and cannot surcharge in the mere case of an illegal payment. I repeat what I said about the previous matter, and I wish to say as to that that I do not consider that the Court below decided it in a way to bind anyone. I do not myself express any opinion on the matter. When the question is discussed, in my view—this is founded upon my unfortunate experience in the Poplar case, *Roberts v. Hopwood and Others* (41 *The Times* L.R., 436 ; [1925] A.C., 578)—it will be necessary to begin much earlier than 1844. I think you must begin with the powers of magistrates, and you will soon be faced with the difficult question of the transition from overseers who passed on to overseers in the next year and strictly accounted to boards of guardians who had no other accounting officers, and while this statute seems to me quite plain about what was the position, the language of the statute on the subject of whether boards of guardians were accounting bodies as distinguished from their officers who accounted seems to me to raise very many difficult questions. Those two matters, I think, are the main matters in the judgment below upon which I wish to guard myself against expressing an opinion, and I wish to say that, in my opinion, having been expressed *obiter*, as the Lord Chief Justice says, they do not bind future Courts, the matter being open to be argued in a case where it strictly arises.

I desire to dismiss this appeal on the very limited ground which I have stated.

Mr. Justice Romer.—The first question to be determined by this appeal is as to whether for the purpose of ascertaining the superannuation allowance of the registrar the district auditor was or was not bound to treat as an emolument of the registrar the gratuities paid to him by the guardians with the sanction and, indeed, at the instance of the Ministry of Health. If he was so bound then this appeal necessarily fails. Now, emolument for the purpose of the Poor Law Officers' Superannuation Act, 1896, has been defined by section 19 of that Act, and it is stated that it includes all fees, poundage, and other payments made to any officer or servant as such for his own use. These gratuities were undoubtedly paid to the registrar for his own use and by that same section, section 19, it is provided that for the purpose of the Act the registrars are to be deemed to be in the service of the guardians. So far the matter seems plain sailing, but then it is said that only those payments can be treated as forming part of the emoluments which were legally made. Now, although these payments were sanctioned by the Ministry of Health for the reasons given by Lord Justice Scrutton, I think they were not for all purposes legal payments ; but, in my opinion, having regard to the words of the Act of 1887, the district auditor, for the purposes of his audit, was bound to treat these payments as having been legally made and, therefore, as emoluments for the purposes that I have mentioned. For these reasons, and for these reasons only, I think that this appeal should be dismissed.

The other points arising on the appeal, interesting and difficult points, have not been fully argued, and, therefore, I cannot express any concluded view about them. I will only say this, that as at present advised it seems to me that there is very good ground for the contention that the words " misconduct " and " negligence " in section 32 of the Act of 1844 are referring, and referring only, to cases where an accounting party is surcharged in the strict meaning of that word ; that is to say, where he is being made responsible for sums which he has not in fact received, but which he ought to have received.

[Solicitors—Messrs. Sharpe, Pritchard, and Co. ; Messrs. W. W. Young, Sons, and Ward.]

Court of Appeal.
(Bankes and Sargant, L.JJ., and Avory, J.)

1927.
Mar. 17.

NORTHWOOD AND OTHERS v. LONDON COUNTY COUNCIL.*

Land — Acquisition — Arbitration — Appeal— Acquisition of Land (Assessment of Compensation) Act, 1919 (9 and 10 Geo. V., c. 57), s. 6 (2).

By s. 6 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919, the decision of the High Court upon a case stated by an arbitrator under the Act is final and conclusive.

Held, that the effect of this provision is that where an arbitrator states a case under the Act for the opinion of the Court and afterwards incorporates the decision of the Court in his award, and the claimants then move before a Divisional Court to have the award set aside on the ground

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

that the decision so incorporated is wrong in law, there is no appeal from the rejection of the motion.

This was an appeal from the decision of a Divisional Court (Mr. Justice Salter and Mr. Justice Talbot) on an application made on December 10, 1926, to set aside the award of an arbitrator, or, alternatively, a portion of it, on the ground that it was bad in law on the face of it. At the hearing before that Divisional Court the London County Council argued that the Court had no jurisdiction to entertain the motion to set aside the award, because the decision of the High Court on any case stated by an arbitrator was, by section 6 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919, made final and conclusive.

The decision of the High Court referred to was given on May 21, 1926, by another Divisional Court (Lord Hewart, C.J., and Mr. Justice Salter and Mr. Justice Branson) which the arbitrator incorporated in his final award.

The Divisional Court (Mr. Justice Salter and Mr. Justice Talbot) dismissed the application, and the claimants appealed to the Court of Appeal.

An official arbitrator (Sir Anker Simmons, K.B.E.) had stated a case in respect of an improvement scheme made under Part II. of the Housing of the Working Classes Act, 1890. The main question which had to be dealt with was whether the official arbitrator was entitled to take into account the fact that certain premises were fully licensed and to award compensation accordingly. The facts of the case are fully set out in the report of the hearing before the Divisional Court—Lord Hewart, C.J., Mr. Justice Salter, and Mr. Justice Branson—(see 42 *The Times* L.R., 508 ; [1926] 2 K.B., 411).

Mr. Macmorran, K.C., and Mr. H. G. Robertson appeared for the appellants ; Mr. Montgomery, K.C., and Mr. William Allen for the London County Council.

A preliminary objection having been taken on behalf of the respondents that no appeal lay by reason of the provisions of section 6 (2) of the Act of 1919, counsel for the appellants contended that the decision appealed against was not a decision within the scope and meaning of the section and could, therefore, be appealed against.

Lord Justice Bankes said that it seemed to him to be a plain point which arose upon the construction of section 6 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919. The appellants were the owners of property which had been scheduled under a housing scheme. A claim was made for compensation, and was referred to arbitration. A special case was stated by the arbitrator in accordance with the provisions of section 6 (1) of the above Act. The matter then came before a Divisional Court, and upon all the points submitted to them by the arbitrator the Court gave answers against the view contended for by the appellants. The arbitrator then proceeded to make a final award in a form which incorporated as part of the award both the special case and the decision of the Divisional Court.

That gave the appellants the opportunity of saying that, although they could not appeal directly because of the provisions of section 6 (2) of the Act, yet it was open to them to contend that, as the award was bad in that form because the decision of the Divisional Court was wrong, an appeal had become possible.

To that an objection had been taken that the Court of Appeal had no jurisdiction to hear an appeal by reason of section 6 (2) of the Act, which provided :— "The decision of the High Court upon any case so stated shall be final and conclusive, and shall not be subject to appeal to any other Court." And the point was therefore taken that the decision of the Divisional Court in the present case upon the special case, whether stated in answer to a question put to the Court in a consultative case or in a case stated under section 6 (1) of the Act of 1919, was final and conclusive.

The question to be decided, then, was whether this case could be brought within the decision of the House of Lords in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited* ([1912] A.C., 673). That decision was given in these circumstances. A special case had been stated by an arbitrator under section 19 of the Arbitration Act, 1889, for the opinion of the Court in its consultative capacity. Although there were no express words referring to an appeal in that section, the question whether there was an appeal had been raised and decided in *In re Knight and the Tabernacle Permanent Building Society* (8 *The Times* L.R., 783 ; [1892] 2 Q.B., 613). The decision there was that no appeal lay because there was no decision or judgment where the opinion of the Court was merely asked. Lord Justice Bowen put the matter thus at page 619 :—

"But there is another way in which an arbitrator may, during the arbitration, take the opinion of the Court. Under section 19 he may voluntarily take, or by Order of the Court or a Judge he may be compelled to take, by means of a special case, the opinion of the Court for his guidance, and as a step for arriving at his own ultimate award in the matter. That is an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords."

In the *Westinghouse* case (*supra*), where an award which was expressed to be made as incorporating an opinion of the Court on a question of law, and a motion had been made to set the award aside as containing an error of law on the face of it, it was held that the Court had jurisdiction to set aside the award.

The appellants attempted to apply that principle in this case. They persuaded the arbitrator to embody in his award the decision of the High Court, and then argued that the whole award was bad on the face of it. But the two cases were not in the same category. Viscount Haldane, L.C., however, in giving his opinion, said this : "No doubt an opinion given by the Court under the provisions of the Arbitration Act is not a judgment or order, and is, therefore, not susceptible of being the subject of an appeal. But, in my opinion, that is the only reason why it cannot be appealed." That is to say, because it is not in the nature of a judgment or order. But where there was a provision such as section 6 (2) of the Act of 1919, which, in the plainest terms, made the decision of the Court, in whatever form it might be, upon a special case stated under that section final and conclusive it seemed to him to be impossible to get round the words of that subsection.

The result was that the preliminary objection succeeded and the appeal must be dismissed.

Lord Justice Sargant said that he was of the same opinion. The matter arose in an arbitration to which the provisions of the Act of 1919 applied and in which the question to be considered was whether compensation should be awarded for site value only or whether the fact that the premises on the land were licensed premises should be taken into account. The arbitrator, having by section 6 power to state a case at any stage of the proceedings, exercised his right and stated a special case, in which he awarded compensation only for the use of the land.

Having regard to the provisions of section 6 (2) of the Act he (the Lord Justice) thought that the words of that subsection were clear and imperative and applied to a decision of the Court, either at an intermediate stage or at the conclusion of the proceedings, so as to make it equally unappealable at whatever stage it was pronounced.

Mr. Justice Avory agreed. The award of the arbitrator incorporated a decision of the High Court, and when the appellant relied on an error on the face of the award he was challenging a decision of the High Court. It did not cease to be a decision of the High Court because it was adopted as part of an award. Being a decision of the High Court it was, by section 6 (2) of the Act, unappealable.

The preliminary objection succeeded and the appeal was dismissed.

[Solicitors—Messrs. Marson and Toulmin ; Mr. D. P. Andrews.]

Railway and Canal Commission. (Sankey, J., Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C.) 1927. Mar. 17.

IN RE APPLICATION OF TILMANSTONE (KENT) COLLIERIES, LIMITED.*

Mines—Coal-mine—Working facilities—Ancillary right—Carrying away coal—Conveyance over land outside lease—Jurisdiction to sanction—Aerial ropeway—Refusal of sanction—Mines (Working Facilities and Support) Act, 1923 (13 and 14 Geo. V., c. 20), ss. 1 (2), 5 (2).

Under ss. 1 (2) and 5 (2) of the Mines (Working Facilities and Support) Act, 1923, the Railway and Canal Commission has jurisdiction to grant facilities for the conveyance and carrying away of coal over land other than that contained in the ambit of the mining company's lease. The Commission, however, refused to sanction a scheme for an aerial ropeway for the conveyance of coal from the Tilmanstone colliery to Dover Harbour, on the grounds that, though a scheme for a ropeway could be put forward which would be feasible and in the national interest, the particular scheme for which sanction was asked was incomplete, and the plans were inaccurate and illusory, and on the evidence the Commission was unable to say whether the arrangements at the Dover end were feasible or in the national interest.

* Reported by G. F. L. Bridgman and J. W. Hall, Esqs., Barristers-at-Law.

The Court read their reserved judgments dismissing this application, which had occupied the Court for nine days.

The applicants applied under section 5 (2) of the Mines (Working Facilities and Support) Act, 1923, for the sanction of the Court to a scheme to carry an aerial ropeway or railway from the Tilmanstone Colliery, Kent, to Dover Harbour, a distance of 6½ miles. The ground of the application was that the existing railway rates and charges payable to place the applicants' coal free on board at Dover Harbour amounted to 5s. 9d. a ton. That figure, the applicants alleged, was excessive. It did not enable them to produce coal at a competitive rate and, if continued, would result in the colliery being closed.

Mr. Clement Davies, K.C., Mr. Gordon Bamber, and Mr. Ivor Brace appeared for the applicants. Mr. J. G. Joseph, for the Dover Harbour Board, supported the application. Counsel for the opponents were :—Mr. Arthur Moon, for the East Kent Light Railways Company ; Mr. R. P. Croom-Johnson, for the Misses Zillah and Susannah Gray, of Wigmore Farm, Eythorne, Kent ; Mr. Wrottesley, K.C., for the Channel Steel Company, Limited ; Mr. H. V. Rabagliati, for the Earl of Guildford, of Waldershare Park, near Dover ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. H. M. Giveen, for the Secretary for War ; Mr. Hubert Hull, for the Commissioners of Crown Lands ; and Sir John Simon, K.C., Mr. Tyldesley Jones, K.C., and Mr. Bruce Thomas, for the Southern Railway Company.

Mr. Justice Sankey read the joint judgment of himself and Sir Lewis Coward.

In the course of his judgment he said :—The applicants' scheme was to erect an aerial ropeway from a terminus at Tilmanstone over a distance of about 6½ miles to a terminus on the property of the Dover Harbour Board. The applicants alleged that the proper and efficient working of their minerals was unduly hampered, and they contended that it was in the national interest that the application should be granted. They also asked for the cancellation under section 13 of the Mining Industry Act, 1926, of an agreement dated October 16, 1926, made with the East Kent Light Railways Company.

As a result of the notices given by order of the Court a large number of persons appeared in opposition to the application. Many of them were landowners who, after the case had proceeded for a short time, were satisfied with the terms which, subject to the Court's approval, the applicants were prepared to offer them. The opposition had narrowed itself down to that put forward by the Southern Railway Company and the East Kent Light Railways Company, and to the suggestions made by the Attorney-General on behalf of the War Department, and by Mr. Joseph on behalf of the Dover Harbour Board.

The Tilmanstone Colliery was one of four collieries operating or about to operate in the Kent coalfield. Owing to the depth to which the shaft had to be sunk—1,500ft. to 3,000ft.—and to the nature of the superincumbent strata, which caused a large amount of water to be discharged into the working, both the development and the maintenance of the colliery presented great financial and practical difficulties. There was evidence that it cost £1,000,000 to develop a colliery in the Kent coalfield, but Tilmanstone was now employing nearly a thousand men.

Although the life of a coalfield depended on output, it was said to be from 50 to 70 years. The difficulties caused by water might be judged from the fact that at Tilmanstone the pressure of water was 20 tons per ton of coal, and pumping machinery, which had

to deal with 2,000 gallons per minute, had to be set up at three stations—at the 600ft. level, at the 1,140ft. level, and in the seam at 1,650ft. The estimated cost of pumping per ton of coal raised was 2s. 6d. It was hoped to reduce this to 1s. a ton by pumping in one throw.

The present output of the colliery was about 1,000 tons per day. The pithead price varied greatly, and was sometimes as much as 24s. a ton. But it was hoped that the development of the colliery, if the application to approve the scheme were granted, would result in raising the output to 4,000 tons per day, which would make a pithead cost of 12s. or 13s. a ton, and greatly increase the number of men employed.

Mr. Tilden-Smith, the principal shareholder in the Tilmanstone Colliery, estimated that even on an output of 250,000 tons the cost would still be 12s. or 13s. per ton. The coal was about 75 per cent. small, for which a market was found in neighbouring works, while some was sent to Queenborough to be shipped into barges. In 1923 23,000 tons were shipped at Dover for foreign export, but the vessels available were small, not more than 350 tons, and no coal had been exported since.

Mr. Tilden-Smith was anxious to foster the export trade at Dover, but in view of the character of the coal it was necessary to sell f.o.b. or c.i.f. at very cheap prices. It was said that the applicants would have to quote 21s., c.i.f., to get a trade. It was stated on the application that the cost of placing the coal f.o.b. at Dover Harbour was 5s. 9d. a ton and that the cost by the aerial ropeway would not exceed 1s. 9d. a ton.

Thus, if the expectations of the applicants were realized, the cost of transit to Dover would be greatly lessened. In addition, the colliery would have the carriage of the coal in their own hands from pit to port. It was sought to be said on their behalf that, by an agreement which they alleged they had entered into with the Dover Harbour Board, that Board would assist them in the export operations by erecting a bunker, by means of which the coal could be discharged from the ropeway into the ship's holds. So the scheme as it subsequently developed was to provide not only for a shorter transit but also for the creation of shipping facilities for coal at Dover Harbour itself.

There could be no contradiction of the statement that if matters had remained as they were at the date of the application there never would have been an export trade of Tilmanstone coal at Dover. The rate charged by the Southern Railway made the cost of the coal f.o.b. at Dover prohibitive, and there were no shipping facilities. Unless something could be done either in the nature of an aerial ropeway or of a great reduction in the rate, the export of Kent coal from Dover would never materialize.

Negotiations took place with reference to a reduction of the rate. The Southern Railway could not be expected to carry Kent coal at a loss in order to develop the Kent coalfield. But the Court regretted that the business men on both sides were not able to solve the problem. In those circumstances Mr. Tilden-Smith resolved to invoke the assistance of the Mines (Working Facilities and Support) Act, 1923, and made the present application.

The matter was a serious one because Mr. Tilden-Smith, if he could not get his coal exported from Dover, would have to close the colliery. That would be a calamity against the national interest. The colliery would rapidly become flooded and a large amount of coal would be permanently lost. Over and above that, a very large number of men would be thrown out of employment in an industry where already a large number were unemployed, and the various trades carried on, and the shops and buildings erected for their accommodation, might become derelict.

A heavy responsibility was cast upon the Court, as it was satisfied that, unless a very great reduction in the rate to Dover Harbour were obtained or an aerial ropeway sanctioned, those results might follow. It had been proved to the Court that such a ropeway as the present had been carried across the lines of other railways without detriment to the working of those railways.

The opposition of the Attorney-General had been withdrawn, subject to the contentions that the Crown could not be bound by the order, that the military requirements of the Crown must be met, and that the Crown must be free to make its own bargain.

The attitude of the Dover Harbour Board was equivocal, and the Court could not help thinking that it was unwise and improper of the applicants to start their application before coming to a definite understanding with the Harbour Board. The application as it first came before the Court was an application for a scheme "with one end in the air," but the applicants had assured the Court that before the case was completed an agreement would be arrived at with the Board.

Sir John Simon, for the Southern Railway, had contended that the Court had no jurisdiction to grant the application. He contended that the words "carrying away" in the phrase "working, carrying away, treating and converting minerals," in s. 1 (2) of the Act of 1923, must be given the same meaning as similar words in mining leases, and that therefore in the present case the Court had no jurisdiction to grant any facilities for the conveyance and carrying away of coal over land other than that contained in the ambit of the lease.

They were unable to agree with that construction of the statute, nor did they think that they ought, by a narrow construction of the words, to whittle down or diminish the provisions of an Act which had already enabled many millions of tons of coal to be worked which otherwise might have been lost to the nation. The Act dealt with minerals, not leases, and among the ancillary rights was the "conveyance" of minerals, not merely the "carrying them away" which was the usual phrase in a mining lease. The plea to the jurisdiction failed.

From the evidence before the Court they were satisfied that a ropeway was: (1) a cheap method of conveying coal over the particular distance in question, the cost being about 6½d. a ton; (2) an efficient way of carrying the coal; and (3) a safe way of carrying the coal. They were told that England was behindhand in this method of conveyance when compared with foreign countries.

The case proceeded to the end of the autumn term, but the scheme was still incomplete because by then no definite agreement had been come to with the Dover Harbour Board, and no proper plans of a complete scheme had been placed before the Court (and, indeed, they had never been placed before the Court). As the Christmas vacation necessitated an adjournment, the Court suggested that the Southern Railway and the applicants should meet and see if an arrangement could be come to with regard to a reduction of the railway rate and the construction of loading facilities.

By a letter dated January 6, 1927, the Southern

Railway offered a new rate, which was a very great reduction on the original cost of 5s. 9d. In effect it was, for an output of between 200,000 and 250,000 tons per annum, 2s. 8d. per ton for a longer distance than was covered by the old rate. The letter concluded :—"The rates are subject to any general modification of rates which may take place during their continuance."

The applicants objected that that last clause enabled the railway company to alter the rate at any time, but the company pointed out that they were themselves subject to the control of the Railway Rates Tribunal and had not a free hand. Sir Herbert Walker had assured the Court that it was impossible for the Southern Railway to quote lower rates and they accepted his evidence. Mr. Tilden-Smith had had some very hard things to say about the way in which the Southern Railway had neglected the Kent coalfields—*e.g.*, that he had been trying for 15 years to get them to have a proper rate, and that any investment in the Kent coalfield was not worth a row of pins while the rates remained at their present level.

The Court thought that the Southern Railway did not entirely deserve those strictures. They could not be expected to carry coal at a rate which was uneconomical to themselves. They had not the experience or appliances for dealing with coal which some of the other great railways had. They were not a mineral line. The Court must not be thought to be saying that the Southern had no skilled, competent, and efficient managers and agents, but they did rather think that the Southern Railway might be of opinion, and rightly so, that it was not worth their while to cater for the export of Kent coal. The Court wished to be very careful on this point because they recognized the ability and desire of the general managers to do their best in the national interest.

Turning to the figures, here again the scheme had been put forward without that careful and complete consideration which such an undertaking ought to receive. Mr. Tilden-Smith was a man of great energy, but he was rather like the man who sat down to build a house without counting the cost thereof. When the hearing was resumed on February 16 no agreement had been come to with the Dover Harbour Board and no complete or proper plans were put before the Court. The figures as to the estimated cost of the undertaking were far from complete and were to demonstration inaccurate.

Their Lordships dealt with some of the inaccuracies, but came to the conclusion that coal could be conveyed more cheaply by the ropeway than by rail. Some scheme for the erection of a ropeway from Tilmanstone to Dover Harbour could be substantiated as being in the national interest, but at present they were not in possession of accurate figures or accurate forecasts.

The case went on from day to day, but still no agreement with the Dover Harbour Board was produced, and no proper plans for a complete scheme were forthcoming. It was not till the case for the opponents had been concluded and counsel for the Southern Railway was replying that any agreement or any complete plans were placed before the Court. Then, on March 7, 1927, a set of ten plans was produced which, it was said, referred to the completed scheme, and a sort of agreement which, it was said, the Dover Harbour Board had come to with Mr. Tilden-Smith.

The plans were most unsatisfactory. One was dated 1910, another 1918, and one Saturday, March 5, 1927, months after the case started, and the final plan was subsequently sought to be altered. The Court could not pass judgment upon such plans without evidence, so Mr. Roe, the contractor for the line, was called to give the final plans his blessing. He had only just seen them and had not been down to Dover to verify them. Someone at the back of the Court assured counsel for the applicants that it would be quite safe to have the trestles erected in the water but the Court would be failing in its duty if on such plans it decided to allow the scheme.

They were assured that the Dover Harbour Board had approved, but before dealing with the agreement said to have been concluded with the Board they would sum up their findings as far as they had gone. They thought that (1) a scheme for a ropeway could be put forward which would be feasible and in the national interest ; (2) the present scheme was wholly incomplete, the figures and the plans were inaccurate, wrong, and illusory ; (3) they were quite unable to say whether the arrangements said to be made at the Dover end were feasible or in the national interest. No independent engineer of position or repute able to speak of them had been called.

The agreement said to be come to between Mr. Tilden-Smith and the Dover Harbour Board was a document of a most extraordinary character, and again they thought that they would not be doing their duty in saying that the present proposals came within the category of being in the national interest. To begin with there was no agreement between the applicants and the Dover Harbour Board at all. The only agreement was between Mr. Tilden-Smith, a shareholder, and the Board, and he was not to assign or underlet the benefit in the scheme in any way except with the consent in writing of the Board, such consent not to be unreasonably withheld.

They were quite at a loss to know when and under what conditions he would be prepared to assign it to the applicants, but, if he refused to assign, the profit was at an end. The matter did not stop there.

It was no doubt quite a small matter that the agreement was not even dated and had not the seal of the applicant company. And there were clauses in it to which the Court could never give its sanction. It was for the Court to approve the plans and specifications of the aerial ropeway, but the agreement provided that it should be erected only in accordance with such plans as the Board approved.

There were many other clauses open to the same objection. A great many people could bring the scheme to an untimely end because the sanctions of a great many people had to be obtained. Mr. Tilden-Smith could determine it at the end of the fifth year, and the benefit of the scheme apparently passed to his executors, so that, should he have the misfortune to die, what would be the position time alone must decide.

It had been pointed out that the Court could make amendments of the agreement in the discussion of the Minutes of Order. It was true that it was the practice of the Court to consider the details of an agreement when drawing up the Minutes of Order, but only when they had found on proper evidence that the proposed scheme and application were in the national interest, or, to put it in the language of private Bill practice, they considered the clauses when they had passed the preamble. At the present moment the question was whether the preamble had been proved. After some further review of the relevant arguments of counsel, their LORDSHIPS found that the preamble was not proved.

It was not necessary for the Court to decide whether the agreement with the East Kent Light Railways Company, by which the colliery company guaranteed a minimum traffic of 1,500 tons a week, was one which the Court had jurisdiction to cancel, and they would require more argument to persuade them that they had such jurisdiction. But on the facts that agreement should not be interfered with.

The East Kent Light Railways depended upon Tilmanstone for their trade, and, at the request of Tilmanstone, had spent some £94,000 in constructing the span of railway to Shepherdswell. It would be the height of injustice to interfere with the agreement. Mr. Tilden-Smith ought not, in order to make the colliery company pay, seek to get a reduction of price from nearly every person who had entered into contracts with the company.

If the anticipations were justified on which alone they would be prepared to allow the scheme he could fulfil the agreement quite easily. He said that he would be able to produce, if the scheme were allowed, 1,000,000 tons a year. *Ex hypothesi* only half would go over the ropeway and the remainder would more than enable him to perform that agreement.

They had reached their conclusion with real regret, because they thought that some scheme for a ropeway was probably the solution of the question. But they could not sanction that ropeway on the evidence which had been given, and Mr. Tilden-Smith had only himself to blame if he had incurred the costs of the application by putting forward a scheme which was incomplete in its inception, and which still remained incomplete, with estimates inaccurate, illusory, and quite impossible for the Court to act upon.

Sir E. Tindal Atkinson delivered a separate judgment agreeing with the other members of the Court.

On the ground that more time had been occupied than would have been required if the scheme had been in order the Court made a special order as to costs. The Southern Railway Company would have their costs of the seventh, eighth and ninth days of the hearing, the East Kent Light Railways Company would have their costs of the whole, and the other objectors their costs of the first and second days.

[Solicitors—Mr. Arthur E. Burton ; Messrs. Mowll and Mowll, for Messrs. Mowll and Mowll, Dover ; Messrs. F. C. Mathews and Co. ; Messrs. T. F. Peacock, Fisher, Chavasse, and O'Meara ; Messrs. Milles, Jennings, White, and Foster ; Messrs. Frere, Cholmeley, and Co. ; the Treasury Solicitor ; the Official Solicitor to the Commissioners of Crown Lands ; Mr. Wm. Bishop.]

Court of Appeal.
(Bankes and Sargant, L.JJ., and Avory, J.)

1927.
Mar. 22.

KOECHLIN ET CIE. v. KESTENBAUM BROTHERS.*

Bills of Exchange—Indorsement—Signature of payee—Bill drawn in France—Acceptance in England—Indorsement in France by payee's agent in agent's own name—Sufficiency by French law—Action by indorsees—Whether acceptors liable on bill—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), ss. 32 (1), 72 (1).

A bill of exchange was drawn in France by E. V. upon the defendants in London to the order of M. V., and the defendants accepted it. It was indorsed in France to the plaintiffs by E. V. with the authority of M. V., but the signature was not expressed to be for M. V., and on presentment the defendants declined to pay the bill as it did not bear the indorsement of M. V. In an action by the indorsees against the acceptors evidence was given that a valid indorsement might be made according to French law by an agent signing his own name if he was so authorized by the payee, and the trial Judge held that though by s. 72 (1) of the Bills of Exchange Act, 1882, the validity of the indorsement "as regards requisites in form" was governed by French law, this provision did not let in the French law so as to dispense with the signature of the payee as required by s. 32 (1), and the plaintiffs could not recover.

Held, that as the trial Judge had accepted the evidence as to the French law, and as by s. 72 (1) of the Bills of Exchange Act, 1882, the validity of the indorsement as regards requisites in form was governed by French law, the plaintiffs were entitled to recover.

Decision of Rowlatt, J. (43 *The Times* L.R., 148), reversed.

This was an appeal by the plaintiffs, Messrs. F. Koechlin et Cie., of 53 Rue de Châteaudun, Paris, from a judgment of Mr. Justice Rowlatt (43 *The Times* L.R., 148) in an action in which they sued the defendants, Messrs. Kestenbaum Brothers, of 21, Manchester-avenue, Aldersgate-street, E.C., to recover £461 10s. 10d. as acceptors of a bill of exchange for 60,000 French francs, dated December 14, 1925, of which the plaintiffs were the indorsees.

The bill of exchange on which the action was brought was drawn in France by E. Vigderhaus on the defendants in London, payable at the end of February, 1926, to the order of M. Vigderhaus. The plaintiffs alleged that the bill was drawn by M. Vigderhaus and indorsed by him to the plaintiffs. It was, in fact, both signed and indorsed by E. Vigderhaus, the son of M. Vigderhaus. The signature was not expressed to be for M. Vigderhaus, but evidence was given that E. Vigderhaus had authority to sign for his father, M. Vigderhaus, and that he frequently did so in his own name without the words "for M. Vigderhaus."

The defendants denied that M. Vigderhaus was the drawer and that he had duly indorsed the bill to the plaintiffs ; and they alleged that the plaintiffs were not holders of the bill in due course.

Evidence was given on behalf of the plaintiffs by a French lawyer who deposed that a valid indorsement might be made according to French law by an agent signing his own name if so authorized by the payee.

Mr. Justice Rowlatt held that, although by section 72 (1) of the Bills of Exchange Act, 1882, the validity of the indorsement on the bill "as regards requisites in form" was governed by French law, that provision did not let in the French law so as to dispense with the signature of the payee as required by section 32 (1) of the Bills of Exchange Act, 1882, and that the

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

plaintiffs could not recover. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

Mr. H. du Parcq, K.C., and Mr. R. F. Levy appeared for the appellants ; Mr. Rayner Goddard, K.C., and Mr. N. L. C. Macaskie for the respondents.

Lord Justice Bankes, in giving judgment, said that the case had been very well and very fully argued, and it raised a very interesting question, but the question raised had really been settled by the Bills of Exchange Act, 1882.

The action was brought by indorsees of a French bill of exchange, drawn in France, against the acceptors. The acceptors challenged the right of the indorsees to recover payment of the bill. It was drawn payable to M. Vigderhaus. The defendants' case was that the indorsement was not in order because, the bill being drawn in favour of the father, M. Vigderhaus, the indorsement must also be by the father, but that it was, in fact, by his son, E. Vigderhaus.

The plaintiffs answered that if the son, E. Vigderhaus, had authority to sign on behalf of his father, then, by the law of France, it was quite sufficient to make the indorsement valid by French law for the son to sign the bill in his own name *simpliciter* ; and that, the indorsement being good by the law of France, the plaintiffs were entitled to sue the acceptors.

The first question was what was the law of France on the matter. That was a question of fact. One witness, a French lawyer, was called before Mr. Justice Rowlatt and he said that the law was that a valid indorsement might be made according to French law by an agent signing in his own name if so authorized by the payee. In cross-examination he said that, although that was the law, everybody did not follow that practice. Banks and other big concerns required persons who signed as agents to use words showing that they were signing on behalf of their principals. But the law was that to make a valid indorsement it was quite sufficient to indorse a bill in the way in which the bill in this case was indorsed. One might criticize the practice in France as being an inconvenient one, but that did not affect the law.

Mr. Justice Rowlatt only heard one witness on that point and his evidence was not contradicted. The father, M. Vigderhaus, in his evidence, said that millions of francs of his money had been dealt with by means of similar indorsements. The Court had refused leave to call further evidence on the question of French law, and, therefore, the only question was whether, on the facts before him, Mr. Justice Rowlatt was wrong in deciding that the indorsement was valid by French law. He (Lord Justice Bankes) was not able to say that he was.

It was decided in *Embiricos v. Anglo-Austrian Bank* (21 *The Times* L.R., 268 ; [1905] 1 K.B., 677) that the rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer took place, applied to the transfer of bills of exchange or cheques by indorsement. There was thus clear authority, if it were required, that the ordinary rules of international law applied to the indorsement in this case, that French law applied to it, and that the indorsees had a perfectly good title to the bill. Why then should not they recover against the acceptors ?

Section 72 of the Bills of Exchange Act, 1882, provided that

"Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :—(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made. . . ."

The bill in this case was, in form, according to the law of France ; and the validity, as regards requisites in form of the supervening contracts, such as, *inter alia,* indorsement, was to be determined according to the law of the place where it was made. When once the position was accepted that the indorsement was good according to the law of France, and therefore good for all purposes, there was nothing else that could be wrong with the bill except requisites in form which, section 72 of the Act of 1882 having been passed in the form in which it was passed after the case of *Bradlaugh v. De Rin* (L.R., 3 C.P., 538 ; reversed, L.R., 5 C.P., 473), must be governed by French law.

The appeal must be allowed and judgment must be entered for the plaintiffs.

Lord Justice Sargant, in concurring, said that in his view there was ample evidence to justify Mr. Justice Rowlatt in coming to the conclusion that the indorsement in this case was valid according to French law. With regard to the second question—*i.e.,* the right of the plaintiffs to recover on the bill in this country—that was really concluded by the decision in *Bradlaugh v. De Rin* (L.R., 5 C.P., 473), as adopted by the Legislature in passing section 72 of the Bills of Exchange Act, 1882.

The effect of the decision in *Bradlaugh v. De Rin* (*supra*) was to draw a distinction between a foreign bill and an inland bill, which had been dealt with in *Lebel v. Tucker* (L.R., 3 Q.B., 77). The result of the Act of 1882 was that any person dealing with a foreign bill of exchange was in a less certain position than when dealing with an inland bill. It was clear by section 72 of the Bills of Exchange Act, 1882, that the law of the place where the bill was made was to apply.

The present case did not go nearly as far as *Embiricos v. Anglo-Austrian Bank* (21 *The Times* L.R., 268 ; [1905] 1 K.B., 677).

The question whether the bill could be properly indorsed only in the name of the father, or whether it could be indorsed in the name of the son, was purely a question of form and was therefore covered by section 72 (1) of the Act of 1882. Even if that were not so, it was covered by subsection 2 of the same section.

The plaintiffs were entitled to succeed, and the appeal must be allowed.

Mr. Justice Avory said that he had entertained considerable doubt whether the French law was sufficiently proved before Mr. Justice Rowlatt. That Judge had expressed his surprise at the evidence of the expert, and he (Mr. Justice Avory) shared his surprise on that point. But, as Mr. Justice Rowlatt had accepted the evidence of the expert, it appeared to him (Mr. Justice Avory) that the result which had been arrived at by the other members of the Court necessarily followed having regard to section 72 of the Act of 1882. He therefore agreed that the appeal should be allowed.

[Solicitors—Messrs. Herbert Baron and Co. ; Mr. Henry Snowman.]

K.B. Div.
(Branson, J., and a Common Jury.) } 1927. Mar. 21.

ASKEW v. GRIMMER.*

Negligence — Practice — Personal injuries—Defendant insured—Statement of that fact to jury.

On the trial by a Judge and jury of an action for damages for personal injuries alleged to have been caused by negligence, the practice is, where the defendant is insured against liability, not to inform the jury of that fact.

As Mr. STENHAM, counsel for the plaintiff, was opening this claim for damages for personal injuries, arising out of a street accident—the facts of which were of no general interest—he stated to the jury that the defendant had admitted liability, but had referred the plaintiff to his insurance company.

Mr. DOUGHTY, K.C., who appeared with Mr. Walker Carter for the defendant, at once asked his Lordship to discharge the jury. It was, he submitted, the invariable practice that a jury should not be told that an insurance company was concerned.

Mr. STENHAM submitted that he was entitled to put in evidence the whole conversation between the plaintiff and the defendant. He had carefully considered the position with reference to this particular case, and thought that it was fair to mention it.

Mr. DOUGHTY said that he thought that there was nothing in the practice books on the point, and that he had no authority which he could cite as a matter of law. In a large experience of these cases, however, he had never known it done. There was an apocryphal story of a member of the Bar, who should remain nameless, who was said to have told the Divisional Court:—"I have looked very carefully into the matter, and to tell the jury that there is an insurance company is not a cause for granting a new trial, but is merely a gross breach of professional etiquette."

Mr. STENHAM protested. He had considered the matter carefully; he might have committed an error of judgment, but he had thought that it was fair to tell the jury in this case of the insurance company.

Mr. DOUGHTY pointed out that if the defendant had said what was alleged, the insurance policy would probably be invalidated.

MR. JUSTICE BRANSON said that he thought that it was the practice not to tell juries that an insurance company was involved, and that it was, perhaps, an error of judgment to have done so now. But, in view of the discussion, he felt sure that the jury would realize that it would be most unfair to the defendant to treat him as being insured, because if he had said what was alleged it might turn out that he was not insured at all. The most convenient course would be that the trial should proceed, and if he (his Lordship) were wrong, the Court of Appeal could then correct the matter.

The hearing then proceeded.

[Solicitors—Messrs. Hutchinson, Sons, and Gomm; Messrs. R. H. King and Co.]

* Reported by J. W. HALL, Esq., Barrister-at-Law.

K.B. Div.
(Roche, J.) } 1927. Mar. 22.

JAMES v. BRITISH GENERAL INSURANCE COMPANY, LIMITED.*

Insurance (Accident)—Motor-car—Third-party risks—Assured drunk when driving—Manslaughter through negligence—Right to recover on insurance—Public policy.

A driver of a motor-car who is insured against third-party risks, and who through negligence, consisting in getting drunk and in driving the car while he was in that condition, has collided with another vehicle and thereby committed manslaughter, is not precluded, on grounds of public policy, from recovering on his insurance, inasmuch as in such a case the criminal act is merely negligent and not wilful.

This was an action in which Mr. Frank Courtney James claimed, on an insurance policy issued by the defendant company, to be indemnified in respect of a motor accident in which he was involved on June 3, 1925. A motor-car driven by the plaintiff collided with a motor-bicycle, killing a man named Tait and injuring another named Shadwell. The cost of the repairs to the car and motor-bicycle amounted to over £80.

Shadwell began an action against the plaintiff and recovered £1,500 and costs taxed at £182 7s. 7d. The present plaintiff himself incurred costs in defending the action and in attending the inquest on Tait, the police court proceedings, and the assizes at Devizes, where he was tried and convicted of the manslaughter of Tait and was sentenced to 12 months' imprisonment.

The defendants contended that they were not liable, as the accident happened while the plaintiff was committing criminal acts, in that he was drunk and driving a motor-car to the danger of the public, which resulted in his conviction for manslaughter. They contended that the plaintiff thereby increased the risk borne by the defendants, and if and so far as the policy constituted an indemnity to the plaintiff against the consequences of his criminal acts it was contrary to public policy and void. The defendants further alleged that in the proposal form the plaintiff falsely stated that he was free from physical defect, and omitted to state that the car was the property of his father. They claimed that the policy was void and denied liability.

Mr. H. du Parcq, K.C., and Mr. Malcolm Hilbery appeared for the plaintiff; Mr. Barrington-Ward, K.C., and Mr. R. T. Monier-Williams for the defendants.

Mr. DU PARCQ said that if a man had not been killed there would be no question of the plaintiff's right to recover. Mr. Justice Bailhache, in *Tinline v. White Cross Insurance Company* (37 *The Times* L.R., 733; [1921] 3 K.B., 327) said that the fact that there was negligence or even gross negligence did not on the ground of public policy or on any grounds prevent an assured person from recovering. In that case the driver was not drunk; in this case he was, but that, he submitted, was immaterial.

The car was, in fact, paid for partly by the plaintiff and partly by his father; exact ownership was immaterial. Counsel also dealt with the alleged physical defect.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

Mr. BARRINGTON-WARD submitted that it was against public policy that the plaintiff should receive any indemnity against the consequences of his criminal acts. It was wilful misconduct for a man to get drunk when about to drive a car.

Counsel on both sides agreed to accept the shorthand note of the proceedings at the Wiltshire Assizes as correctly representing the evidence given there and to admit that the plaintiff was convicted of manslaughter on that evidence.

After evidence of the ownership of the car and the plaintiff's physical condition,

His LORDSHIP asked Mr. Monier-Williams where he suggested that the line was to be drawn between a crime which deprived a man of his right to recover and one which did not. Was it not a question of intention? Otherwise it seemed difficult to find any halfway house between complete indemnity and complete loss of indemnity.

Mr. MONIER-WILLIAMS said that, accepting intention as the test, to get drunk was an intentional act.

His LORDSHIP said that he thought that where a man committed a crime which necessarily involved intention, then it was contrary to public policy that he should be indemnified against the consequences. In the case of other crimes it was a question whether there was intention. Unless he were compelled by decided cases to hold otherwise, he thought that it would be altogether contrary to public policy to hold that a man could not cover by insurance his liability to third persons arising out of dangerous driving. It would be a serious thing if juries, magistrates, and Judges had to know that if a man were convicted of any offence the injured party could not recover any effective damages.

Mr. HILBERY submitted that what was being sought was not indemnity against the results of a criminal act, but against a civil liability arising out of an act which had a double aspect. A man could not enter into a contract to be indemnified against the immediate consequence of his criminal act—that was to say, the punishment which it was the intention of the law that he should suffer; but here the plaintiff was seeking indemnity against a collateral civil liability.

MR. JUSTICE ROCHE, in the course of his judgment, said that the plaintiff was insured with the defendant company against divers matters, such as third-party risks, including accidental bodily injury to any person. The company also undertook to pay for the defence of any proceedings in a police court.

The circumstances leading up to the claim were simple but unfortunate. In June, 1925, the plaintiff, while driving the car in respect of which the policy was issued, collided with a motor bicycle driven by Shadwell, a subaltern in the Army, and carrying as a passenger—whether in a sidecar or on a pillion did not appear—another subaltern named Tait. As a result of the collision Tait was killed and Shadwell was injured.

No civil proceedings ensued in respect of Tait, who probably had no dependants who suffered pecuniarily through his death. But Shadwell brought an action in which he recovered damages and costs, and costs were incurred by the present plaintiff. Shadwell had not yet received those damages because the plaintiff was not in a position to pay them unless he had a right to have recourse to the present defendants. That was not strictly material but was not altogether negligible when one came to consider the question where public policy really lay.

James was charged with the manslaughter of Tait and with unlawfully wounding Shadwell. It appeared at the trial that the plaintiff had been at a wedding, and had been foolish enough and wrong enough to have too much to drink. He was convicted of the manslaughter of Tait, and was sentenced to 12 months' imprisonment. The charge in relation to Shadwell was not proceeded with, the indictment remained on the file, and there was no actual conviction in respect of the subject-matter of the present claim.

The important contention of general interest that was raised by the defence was that, inasmuch as the plaintiff was guilty of a crime, it was against public policy that he should be indemnified by his insurers. But he (his Lordship) would first deal with other points raised by the defence.

His LORDSHIP found as facts, after reviewing the evidence—(1) that the plaintiff was the owner of the car; (2) that the plaintiff was free from physical defect at the time of the proposal; and (3) that the item of £252 5s. claimed for the costs of the defence at the assizes was not recoverable under the terms of the policy, and the claim must be reduced accordingly.

It remained to deal with the question of public policy. That was a question of very general importance, because if the contention of the defendants was right it cut at the root of a very large number of motor insurances. He could see no half-way house. The principle, if applicable at all, was applicable to all persons driving to the public danger. It would extend, moreover, beyond motor-car insurance. It would extend to workmen's compensation insurance in cases where workmen were injured by accidents caused by breaches of the Factory Acts.

Fortunately for himself, this matter had been the subject of a decision by a Judge very experienced in insurance matters, Mr. Justice Bailhache, in *Tinline v. White Cross Insurance Company* (37 *The Times* L.R., 733; [1921] 3 K.B., 327). In matters of this sort as affecting public policy the rights and duties of Judges were clear. They had to attend to matters of public policy. If there were ever any doubt on that point it had been cleared away in the well known case in 1857 of *Brownlow v. Egerton* (4 H.L., Cas., 1). But the doctrine of public policy should not be carried a step further than was necessary and Courts were very reluctant to extend it. Rules of law were themselves unchanging, but the applications were infinitely various and might be variable from time to time and from place to place. If any rule could be found it was the duty of the Judge to follow the rule, and he had found a careful judgment of Mr. Justice Bailhache dealing with the very point now in dispute. It had been sought to distinguish the present case from *Tinline's* case (*supra*), but he was unable to do so. In *Burrows v. Rhodes and Another* (15 *The Times* L.R., 286; [1899] 1 Q.B., 816, at p. 828) Mr. Justice Kennedy said:—

"It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void."

Mr. Justice Bailhache, applying the rule, held that the plaintiff could recover an indemnity because, though he might have done what was unlawful he did not do it in circumstances in which it was manifestly unlawful or in which he knew it to be unlawful. So, in the present case, the act which

brought about the criminal liability was a negligent one; it was not a wilful doing of the act by which the doer injured or killed the other persons.

He was not prepared to hold that in the case of negligence there was such a degree of criminality as made it contrary to public policy that the plaintiff should recover.

It was sought to distinguish this case from *Tinline's* case (*supra*) on the ground that the plaintiff here was drunk. He found it difficult to believe that the plaintiff was any worse morally than a person who in his sober senses drove to the danger of the public. Both were guilty of negligence for which they were liable in a criminal court. In neither case had they intended the injury.

The effect of holding that the plaintiff could not recover would be that in no case in which a person was driving to the public danger would he be able to rely on his insurance. The proposal that had been made that all persons who drove motor-cars should be compelled to insure against third party risks might be mentioned as a reason for caution in extending the rule as to public policy.

On the facts, he did not arrive at the conclusion that the plaintiff deliberately put himself into a condition of drunkenness and in that condition drove a car; he did so through folly. There must be judgment for the plaintiff for £1,857 4s. 11d.

[Solicitors—Messrs. Blundell, Baker and Co., for Messrs. J. M. B. Turner and Co., Bournemouth; Messrs. Clifford Turner and Hopton.]

Court of Criminal Appeal. (Avory, Shearman, and Sankey, JJ.) 1927. Mar. 14.

REX v. HAYWARD. REX v. LAWRENCE.*

Criminal Law—Habitual criminal—Leading persistently a dishonest or criminal life—Previous convictions—Proof—Evidence of an admission by the prisoner—Whether evidence of identification required.

These were successive appeals by habitual criminals against sentences of preventive detention. The only point calling for a report in each case was the mode of proof of previous convictions other than the three convictions required to constitute the offence.

Mr. Albert Crew appeared for the appellant Hayward; Mr. Eustace Fulton for the Crown in the first case; and Mr. F .D. Levy for the Crown in the second case.

Mr. Crew submitted that all convictions ought to have been strictly proved by an officer who could identify the accused, and he referred to *Rex v. Turner* (18 Cr. App. R., 161); *Rex v. Seymour* (17 Cr. App. R., 128); *Rex v. Culliford* (6 Cr. App. R., 142); *Rex v. Stewart* (4 Cr. App. R., 175), which, he submitted, overruled *Rex v. Franklin* (3 Cr. App. R., 48).

Mr. Justice Avory, in delivering the judgment of the Court dismissing the appeal, said that in *Rex v. Franklin* (3 Cr. App. R., 48) the Court had decided that evidence of previous convictions was properly given without evidence of identification if there was any evidence of an admission by the prisoner. That case had been acted on ever since, and the Court had never decided otherwise, in spite of the headnote to *Rex v. Stewart* (4 Cr. App. R., 175), which was wrong. Here there was evidence of an admission by the prisoner who said to the officer who was reading his record over to him: "You needn't go through the list. I've had it before." Nor did the prisoner go into the box to deny any of the convictions.

In the second case Mr. Justice Sankey said that the law was well settled and had been reiterated by Mr. Justice Avory in the previous case. The appeal was frivolous.

[Solicitors—The Registrar of the Court of Criminal Appeal; the Director of Public Prosecutions.]

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Chan. Div. (Clauson, J.) 1927. Mar. 24.

BOHEMIAN UNION BANK v. ADMINISTRATOR OF AUSTRIAN PROPERTY.*

Treaty of Peace—Enemy property—Retention and liquidation by Allied Powers—Austrian company—Change of nationality—Transfer to that of Czechoslovakia—Exemption of individual citizens—Whether company entitled to same exemption—Treaty of St. Germain-en-Laye, Arts. 53, 70, 249 (*b*).

A company which at the date of the dissolution of the Austrian Empire was a national of that Empire, and which by Arts. 53 and 70 of the Treaty of St. Germain-en-Laye became *de jure* a national of Czechoslovakia, is not liable to have its property rights retained and liquidated by the Allied Powers under Art. 249 (*b*) of the Treaty, and is in the same position in that respect as an individual citizen similarly circumstanced.

The plaintiffs in this action claimed to be entitled to the possession of certain property belonging to them and now held by the Administrator of Austrian property, and to an injunction to restrain the Administrator from parting or in any way dealing with it. The property in question was of the value of about £54,000.

The plaintiffs, a joint stock company, established in 1872 in Prague, Bohemia, whose head office had continued ever since to be in Prague, alleged that at the time of the coming into force of the Treaty of St. Germain-en-Laye they were a company of Czechoslovakian nationality.

The defendant, purporting to act under the provisions of Article 249 (*b*) of the Treaty (whereby the Allied Powers reserved the right to retain and liquidate all property within their territories belonging at the date of the coming into force of the Treaty to nationals of the former Austrian Empire), and of paragraph 1 (ix.) of the Treaty of Peace (Austria) Order, 1920 (whereby the right so reserved was exercised), had retained certain property of the plaintiffs.

The plaintiffs contended that they were not nationals of the former Austrian Empire within the meaning of Article 249 (*b*) or of the Treaty of Peace (Austria) Order, 1920.

They alleged that they became a Czechoslovakian company by virtue of Article 2 of Law No. 11 of 1918,

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

or, in the alternative, that they ceased to be nationals of the former Austrian Empire and acquired Czechoslovakian nationality by virtue of the provisions of section VI. of Part III. of the Treaty of St. Germain-en-Laye.

The defendant alleged that the property was subject to the charge created by the Treaty of Peace (Austria) Order, 1920.

Article 249 (*b*) of the Treaty of St. Germain-en-Laye was as follows :—

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, or companies controlled by them, and are within the territories . . . of such Powers, including territories ceded to them by the present Treaty or under the control of those Powers. . . .

"Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso facto*, in accordance with its provisions, the nationality of an Allied or Associated Power, including those who under Articles 72 or 76 obtain such nationality with the consent of the competent authorities, or who under Articles 74 or 77 acquire such nationality in virtue of previous rights of citizenship (pertinenza) will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph."

"Article 53.—Austria, in conformity with the action already taken by the Allied and Associated Powers, recognizes the complete independence of the Czechoslovak State which will include the autonomous territory of the Ruthenians to the south of the Carpathians."

"Article 70.—Every person possessing rights of citizenship (pertinenza) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory."

Sir Patrick Hastings, K.C., and Mr. J. W. Scobell Armstrong appeared for the plaintiffs ; the Solicitor-General (Sir Thomas Inskip), K.C., and Mr. J. H. Stamp appeared for the defendant.

Sir Patrick Hastings, in opening, said that the bank was originally an Austrian company taking its nationality from its seat at Prague. In 1918 there was a revolution, a new Government was set up, and Czechoslovakia became an independent State. According to the Austrian law, which was adopted as the law of the new State, the company became a Czechoslovakian company because the seat of the bank was in Czechoslovakia. The plaintiffs were in law and in fact a Czechoslovakian company. The Peace Treaty referred to Czechoslovakia as one of the Associated Powers, and it was a signatory to the Treaty. The plaintiffs were Czechoslovakian nationals. Having no right of indemnity, they were put into a worse position than Austrian nationals if this property went into the clearing-house. The Treaty made it plain that the signatories contemplated that the nationality of a company might be changed by the transfer of territory. (See Article 272.)

The plaintiffs were before the date of the Treaty nationals of the former Austrian Empire, but on the change of boundary they became nationals of Czechoslovakia. Within six months from the date of the Treaty they satisfied the Administrator that they were a company situated in Czechoslovakia. On the break-up of the Austrian Empire the plaintiffs were clothed with Czechoslovakian nationality. The plaintiffs had acquired the nationality of an Associated Power within the meaning of the proviso to paragraph 3 of Article 249 (*b*)—that is to say, the nationality of a Czechoslovakian. The right of citizenship under Article 70 applied to a company.

The Solicitor-General said that he might assist by stating that he agreed that as from October, 1918, the Bohemian Bank was under Czechoslovakian law and, in the law of the Austrian Republic, a Czechoslovakian national within the meaning of the Treaty. Citizenship or pertinenza could, however, only be acquired by an individual. A company which was a national of the Austrian Empire at the date of its dissolution was subject to the charge under Article 249 (*b*).

Dr. Karplus, a practising advocate and counsel for the French Legation in Vienna, was called by the defendant to give his opinion of the law regulating rights of citizenship and pertinenza, and the meaning and extent of those terms, and said that, according to Austrian law, a company could have neither citizenship nor pertinenza. "Pertinenza" was an Italian word, and certain political rights went with it, such as a right to vote.

The Solicitor-General submitted that primarily the application and interpretation of the Order in Council had to be considered, and if one found a clear meaning in the Order no reference could be made to the Treaty, but if it was ambiguous one could look at the Treaty. The term in Article 249 (*b*) "nationals of the former Austrian Empire" included corporations. The first question was whether this bank was "a national of the former Austrian Empire," and, secondly, whether it was a person who acquired *ipso facto*, in accordance with the provisions of the Treaty, Czechoslovakian nationality. Taking Article 70 alone, it was clear that no person obtained the nationality of the new State unless he possessed rights of citizenship or pertinenza in that territory, and a corporation could not possess those rights within the meaning of Article 70. The policy of this Treaty ought not to be considered in attempting to give an interpretation to its meaning. There was here only one interpretation which a Court could put on Article 70 and the following articles, and there was not sufficient ambiguity to make it look elsewhere for the meaning.

Sir Patrick Hastings, in reply, submitted that the plaintiffs were within Article 70, and that Articles 53 and 89 were also sufficient to enable them to succeed.

Mr. Justice Clauson, in giving judgment, said that the action must succeed, and a declaration as asked for would be made, or such declaration as should be agreed upon by counsel. He based his judgment on Article 70 and Article 53, on the ground that there was an express provision in the Treaty that Czechoslovakian corporations were entitled to the benefit of the exemption from the power to retain and liquidate all property within the territories of the Allied Powers belonging at the date of the coming into force of the Treaty to nationals of the former Austrian Empire. In Article 70 citizenship included civil rights, and the effect of Article 53 was to make Czechoslovakian *de facto* nationals Czechoslovakian nationals *de jure*. The Treaty meant to include corporations among those persons who had acquired

ipso facto, in accordance with its provisions, Czecho-slovakian nationality within the meaning of the proviso to Article 249 (*b*). The defendant must pay the costs of the action.

[Solicitors—Messrs. Adler and Perowne; the Solicitor to the Clearing Office.]

K.B. Div. (MacKinnon, J.) 1927. Mar. 24.

HEYN AND OTHERS v. OCEAN STEAMSHIP COMPANY, LIMITED.*

Contract—Carriage of goods by sea—Theft from steamer at discharge wharf—Absence of fault or privity of carrier—Discharge by stevedores—Responsibility of carrier for his "agents or servants"—Whether stevedores within that expression—Burden of proof—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. III., r. 2, Art. IV., r. 2.

The plaintiffs shipped at Liverpool on the defendants' steamer a quantity of cloth for carriage to Shanghai. By the bill of lading the defendants were to have the protection given by the Carriage of Goods by Sea Act, 1924. After discharge was begun at Shanghai by stevedores, who were independent contractors, some of the cloth was stolen from the steamer. It was admitted that the loss had occurred without the actual fault or privity of the defendants themselves. In an action for damages for breach of contract,

Held, that the stevedores must be treated as "agents or servants" of the defendants within Rule 2 of Article IV. of the Schedule to the Act, and, as on the facts the defendants had failed to establish that the theft had not been committed by the stevedores' men, the plaintiffs were entitled to recover.

In this action the plaintiffs claimed a sum of £82 as damages for breach of contract in relation to the carriage of certain rolls of cloth from Liverpool to Shanghai.

Mr. Raeburn, K.C., and Mr. H. Atkins appeared for the plaintiffs; Mr. Miller, K.C., and Mr. J. Dickinson for the defendants.

The amount of the damages was agreed at £82, but though the sum was small other claims depended on the result of this case, and the action by the present plaintiffs was regarded as a test action.

It appeared that in December, 1925, the plaintiffs shipped at Liverpool on the defendants' steamer Eumæus 72 cases of cloth for carriage to Shanghai. By the bill of lading the defendants were to have the protection given by the Carriage of Goods by Sea Act, 1924.

The Eumæus arrived at Shanghai on January 11, 1926, and moored at a wharf with her starboard side to the wharf. Discharge was begun on January 12 by stevedores who were independent contractors and not servants of the defendants. Discharge only took place during the day, and ceased at 5 p.m.

On the night of January 12 a barge was left alongside the port side of the Eumæus and about 3 a.m. on January 13 a quartermaster who was on duty on the Eumæus saw some Chinese coolies dragging bales of cloth across the barge to a junk which had drawn up on the other side of it. The alarm was given, and it was found that a bunker door in the side of the steamer, giving access to the barge, had been opened; that six cases of the cloth were missing; and that the remaining 66 had been removed from the hold in which they were stowed and placed in the bunker ready for taking through the opened door.

The police arrested certain Chinese and recovered three of the missing cases, the cloth in which was badly damaged. The remaining three cases had not been traced.

The plaintiffs made a claim for damages, but the defendants refused payment and relied on the provisions of Article IV., Rule 2, subsection (*q*), of the Schedule to the Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22).

Rule 2 of Article III. of the Schedule to the Act provides as follows:—

"Subject to the provisions of Article IV. the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Rule 2 of Article IV. provides:—

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from [a number of enumerated causes, such as perils of the sea, strikes, insufficiency of packing and latent defects not discoverable by due diligence, and]

"(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

It was supposed that the theft must have been carried out by Chinese labourers who had concealed themselves in the hold during the daytime, but the defendants had not been able to discover how or by whom it had been effected.

Evidence having been given,

Mr. Raeburn submitted that the defendants had failed to discharge the burden of proof which was expressly laid upon them by subsection (*q*); that they had not proved either that the robbery was not committed by their own servants or agents, or, if it was committed by outside persons, that they had exercised due care to keep them out. The duty of the ship under Article III. was not only to carry the goods, but also to "discharge" them. All the goods must be handed over safely unless the shipowner could show affirmatively that he was relieved from liability under Article IV.

Mr. Miller submitted that the evidence showed that the defendants had exercised due care.

Reference was made to *Owners of the Cargo of the City of Baroda v. Hall Line* (42 *The Times* L.R., 717).

Mr. Justice MacKinnon, in the course of his judgment, stated the facts, and said that he was satisfied on the evidence that the defendants took proper precautions to guard against theft during the night: the ship was brilliantly lighted and a watch was kept on deck. It was admitted that the loss occurred without the actual fault or privity of the defendants themselves. The case depended on the interpretation

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

of subsection (*q*) and on whether that subsection when correctly interpreted relieved the defendants from liability.

The subsection said "fault or privity of the carrier *or* the default or neglect of the servants or agents of the carrier." In the latest edition of Scrutton on Charterparties the editors suggested that the word "or" [in italics] must mean "and," which was really a suggestion that the word "or" in the Act of Parliament had been used by mistake and that the Act should be amended by replacing the word "or" by the word "and."

He was not satisfied that it was the duty of any Judge to alter the words of an Act of Parliament, particularly when the suggested alteration was required not for the purpose of making sense of something which was unintelligible, but for the purpose of carrying out what was supposed to be the policy of the Act.

The point, however, had not been argued or relied on by the defendants, and the case had proceeded on the basis that the word "and" should be read in place of "or." He would therefore deal with the case on that footing, but in doing so he was not deciding that "or" should be read as "and," and if the point was raised before him hereafter he should feel free to deal with it as he thought fit. He would only say that in his view the disjunctive word "or" could never mean the conjunctive "and."

Mr. Raeburn relied on the use of the word "nor" in the latter part of subsection (*q*), but he did not think that that made any difference. *Prima facie* the loss in this case was one which, if unexplained, must make the defendants liable, and the defendants could only escape liability by bringing themselves within some exception. The burden of proof would be on the defendants by common law and the Act did not add anything to it.

Had the defendants established that the robbery took place without the default or neglect of their servants or agents? So far as the ship's officers and crew were concerned, they had taken every precaution to guard against the extreme pertinacity and ingenuity of native thieves. But whoever the thieves were they must obviously have had considerable knowledge of the nature of the cargo and of the internal structure of the steamer, and he thought that the persons most likely to have that knowledge were the stevedores' men. They also were the persons who would have most opportunity of concealing themselves in the hold or passages, and he drew the inference that the theft was committed by the stevedores' men. At all events the defendants had not succeeded in establishing that it was not.

A further point arose on the fact that the stevedores were independent contractors and not the servants of the defendants. Must they be treated as "agents or servants" of the defendants within the meaning of subsection (*q*)? It was an arguable question, but in his view they must. Both by common law and by Rule 2 of Article III. the carrier's duty was to "discharge" the goods which he had carried, and if he chose to employ an independent contractor to carry out that duty for him the independent contractor became his agent or servant within the meaning of the subsection.

The defendants had therefore failed to discharge the burden of proving that the loss had not occurred through the fault or neglect of their agents or servants, and there must be judgment for the plaintiffs for the sum claimed, with costs. As the action was a test action there would be High Court costs.

Mr. DICKINSON said that the defendants had pleaded on the basis that "or" did not mean "and," and he wished to keep the point open if the case went elsewhere.

[Solicitors—Messrs. Denton, Hall and Burgin; Messrs. Stokes and Stokes, for Messrs. Cameron, MacIver and Davie, Liverpool.]

Court of Appeal.
(Bankes and Scrutton, L.JJ., and Romer, J.)

1927.
Mar. 8.

ROBERTS v. ANGLO-SAXON INSURANCE ASSOCIATION, LIMITED.*

Insurance (Accident)—Motor-car "to be used only for commercial travelling"—Statement incorporated and made basis of contract—Warranty or description of risk—Arbitration—Award bad on its face—Award set aside.

The respondent had insured his motor-car with the appellants by a policy which incorporated and was based on a proposal and declaration by the respondent which warranted that the motor-car was to be used only for commercial travelling. During the period covered by the insurance, the respondent's motor-car was being used to carry passengers, when it caught fire and was destroyed.

Held, that the statement that the motor-car was to be used only for commercial travelling was descriptive of the risk and that the motor-car was not covered by the policy when it was being used to carry passengers. The award of the arbitrator in favour of the respondent was set aside, because it was bad on its face.

This was an appeal by the insurance company from a decision of the Divisional Court dismissing a motion to set aside the award of an arbitrator given against the insurance company.

The award was made in an arbitration on a claim by the respondent under a policy of insurance on his motor-car. The motor-car was insured for £225. On October 4, 1925, while the motor-car was being used to carry passengers, it caught fire and was destroyed. The insurance company resisted the claim on the ground that the motor-car was warranted to be used only for commercial travelling. The arbitrator made his award in favour of the insured for the sum of £150. The insurance company moved to set aside the award on the ground that it was bad in law.

The insurance policy incorporated a proposal, the material parts of which were as follows:—"Question.—State clearly the purposes for which the vehicles are to be used. Answer.—Commercial. Question.—State nature of goods to be carried. Answer.—Textile goods. . . . I warrant the above statement and particulars are true, and I agree that this declaration shall be held promissory and shall form the basis of the contract between me and the Anglo-Saxon Insurance Association, Limited, and I am willing to accept a policy subject to the terms, exceptions and conditions prescribed by the Association therein."

The policy contained, in the schedule, particulars of the motor-car which was insured, followed by these

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

words in print, "Warranted used only for the following purposes," and then written in in type were the following words : "Commercial travelling."

The Divisional Court dismissed the motion and the insurance company appealed.

Mr. H. du Parcq, K.C., and Mr. Fox-Andrews appeared for the appellants ; and Mr. Wallington (Mr. Ansley with him) for the respondent.

Lord Justice Bankes.—This is an appeal from the Divisional Court which raises the question whether an award made by a commercial arbitrator is bad upon the face of it. The matter referred to the arbitrator was whether or not the insurance company were liable on a policy with the assured in the events which happened, and in reference to one of Mr. Wallington's arguments I start by saying that I think, on the face of these materials and having regard to what the arbitrator has stated, we must take it that the contract between these parties is expressed in the policy, because the arbitrator makes no reference to any point such as was raised by Mr. Wallington, or any indication that he thought the contract must be rectified or anything of the kind. He starts off by saying what the contract between the parties is, namely, the policy, and then he sets out the material clause in the policy upon which the whole question turns. It was an insurance of a motor-car, and in the schedule inserted in the policy there are particulars of the insured vehicle followed by these words in print, "Warranted used only for the following purposes," and then written in in type to apply that to this particular case there are the words "Commercial travelling." So the contract between the parties contained a clause that this vehicle, for the purpose of the insurance, was "Warranted used only for the following purposes : commercial travelling."

If this matter had come before me either as an arbitrator or as a Judge of first instance, or as a Judge sitting to decide the question on a special case stated for the opinion of the Court, I should have had no hesitation whatever in saying that in my opinion the true construction of this clause is the construction which was put upon the language of the insurance policy in the case of *Farr v. Motor Traders' Mutual Insurance Society* (36 *The Times* L.R., 711 ; [1920] 3 K.B., 669), namely, that in this class of policy when persons insert clauses, whether described as warranties or whether stated to be part of the description of the vehicle, indicating that the vehicle is to be used in some restricted way, my opinion in that case, and in this case and in similar cases, is and would be that the parties had used that language as words descriptive of the risk, and that, as a result, when the vehicle is not being used in accordance with the description it is not covered ; but it does not follow at all that because it is used on some one occasion, or on more than one occasion, for other than the described use, the policy is avoided. It does not follow at all. If the proper construction, on its language, is a description of the limitation of the liability, then the effect would be that the vehicle would be off cover during the period during which it was not being used for the warranted purpose, but it would come again on the cover when it was again used for the warranted purpose. I am quite clear about that, and I have no difficulty in expressing my opinion in reference to that matter. But that is not the point that we have to decide in this case. What we have to decide in this case is whether or not the arbitrator's award is bad on the face of it. Now this is what the arbitrator has found ; it is in paragraph 4. He finds that, although the motor vehicle was at the time of its destruction by fire being used for the carriage of passengers, that was in no way either a contributory cause of the fire or the actual cause of the loss of the motor vehicle by the fire, and that the words on the policy, "Warranted used only for the purpose of commercial travelling," were in no sense either a warranty or a promise going to the root of the transaction between the parties which ought to avoid or relieve the Association from their liability under the said policy. I cannot help saying that the arbitrator expressed himself in most unfortunate language in that clause, because I am quite uncertain as to what he means. First of all, he does not negative the idea that the car was not being used for commercial travelling ; he said it was used for the carriage of passengers. The passengers may all have been commercial travellers, or they may have been persons who had been taken for a ride as prospective customers. One does not know, but one would assume that what the arbitrator meant, although he did not state it, is that the car was not being used for commercial travelling ; and it was, and I think very properly, admitted by Mr. Wallington that this case has to be decided on the footing that that is what the arbitrator did mean. I assume, therefore, that the arbitrator commenced by stating that at the time of the fire the car was not being used for commercial travelling. Then he goes on to say that that fact "was in no way either a contributory cause of the fire or the actual cause of the loss of the motor vehicle by the fire." Now, if he puts that in because that was to him a sufficient reason for holding that the warranty clause had no application to the case at all, it is perfectly obvious that this is an error on the face of the award, because it is quite immaterial whether the fact that the car was being used in this way was or was not "a contributory cause of the fire or the actual cause of the loss of the motor vehicle by the fire."

Now what happened in the Court below was this. They took a charitable view of the arbitrator's language and they proceeded to inquire whether, apart from the language which he used, the clause was capable of a construction the effect of which would be that the insurance company would still be liable. Mr. Justice Salter took one view of the language and Mr. Justice MacKinnon took another view of the language, and they both of them seemed to think that they could find a construction of this language which did not relieve the insurance company from liability. Mr. Justice MacKinnon directed his attention, as it seems to me, entirely to the question whether a construction ought to be put upon this language the effect of which would be to avoid the policy altogether. In that connexion he came to the conclusion that it was possible to put a construction upon the language as being language of description of the character of the user of the vehicle. Mr. Justice Salter, on the other hand, after going through the cases to which our attention has been called—cases where learned Judges put constructions upon the particular language applicable to description of the premises or other subject-matter—came to the conclusion that these words were capable of a construction (to use his language) referring to the habitual use of the vehicle. This is what he says. After expressing his own opinion first of all, and then dealing with the cases, he says : "I think this is not so plain a case as that"—that is, referring to one of the cases that had been cited to him—"Then comes the question, if that is the true meaning of this promise, that the car shall be used as a matter of business in a general

way, and the regular user is to be only commercial, is there evidence of any breach ? "

I start with this, that if you take the language of the award literally there is no other possible conclusion except that there is an error of law on the face of it, because the arbitrator apparently gives an entirely wrong reason for coming to the conclusion to which he did come ; and he, secondly, expresses the view in reference to the obligation of the parties as set out in the policy that he thought that the case was one in which the insurance company ought not to be relieved from their liability. It is impossible to say that an arbitrator who expresses himself in that way does not show on the face of the award an error of law ; but, treating the matter from the point of view of the Divisional Court, it seems to me that they went beyond the language and sought for themselves to decide whether the view taken by the arbitrator was possible having regard to the language used. Of course, if that is the question that comes before us, it comes really more in the nature of a special case, and we have to decide whether the view taken by the Divisional Court and expressed by them was the right view of the language used in the policy ; in other words, it comes back to the question : What is the true construction of this clause ? And I agree that when once you get to that point there is only one true construction, because the true construction is the one which the Court which is called upon to construe the language gives. I do not think, strictly speaking, we are called upon to put a construction upon the language having regard to the form of the award, but assuming that we are, I with respect am unable to agree with the view expressed by those learned Judges. In the first place, I do not think we can get away from the words " warranted only." I do not attach undue importance to " warranted," but when I find " warranted " used in conjunction with " only " it seems to me impossible to get away from the conclusion that it is there definitely stated by the parties as a condition that the user of this vehicle shall be only for the purpose indicated. If that is so, it excludes the construction put upon the language by either learned Judge ; and when one has to say for oneself what the true construction is, I only repeat what I began by saying, that I think the true construction is a construction similar to the one which was put upon similar language in *Farr's* case (*supra*).

For these reasons I think that the appeal must be allowed and the award must be set aside on the ground that it is bad on the face of it.

Lord Justice Scrutton.—This is a case of some little difficulty, as is shown by the different opinions held by the different people who have considered this policy, and it is made more difficult by the fact that it arises in such a way that we have to consider whether there is an error of law on the face of the award—itself not an easy question.

There are really two questions, I suppose, that we have to consider : (1) What does the policy mean on the facts so far as they are found by the arbitrator or agreed ; and (2) Does the award show an error of law on the face of it, so that we can set it aside ? I deal with the policy first. The plaintiff accepted the policy and sued on it, and he must take the policy, therefore, with its terms ; he has not applied to rectify it, and the policy purports to insure a motor vehicle, an Overland de Luxe, of a certain horse-power and with a certain registered letter and number " warranted used only for the following purposes : commercial travelling." But the policy also recites that the assured has made a proposal and declaration which it is agreed shall be the basis of the contract, and we, therefore, have to look at the proposal and declaration. The proposal and declaration, which are applicable to commercial motor vehicles or trade vehicles, have two questions and answers : " State clearly the purposes for which vehicle will be used " —it is " will be "—" Commercial. State nature of goods to be carried "—" to be "—" Textile goods." Reading those two answers together with " warranted used only for the following purposes," I think that " used " in the policy means " to be used." It is " will be used " in question 4 and " to be carried " in question 5, and " used " is quite capable of being interpreted as " to be used." But it is " to be used only." What is the effect of that ? Looking myself at the policy and the declaration, with such knowledge of insurance law as I possess after spending a good deal of time—with great advantage to myself—in unravelling policies, it seems to me that that is a promissory declaration as to the risk. " I will insure you in certain circumstances, but only in certain circumstances." It is the same as the well-known warranty or promise in marine insurance, " warranted no St. Lawrence between the 1st October and the 31st March," which means that if the ship goes into the St. Lawrence and is lost between those dates you do not recover under the policy because that is not the risk that the insurance company have undertaken. There are very similar clauses in life policies, under which if you die outside the United Kingdom or within certain dangerous latitudes or longitudes in certain dangerous countries you are not insured because that is not the risk which the insurance company have undertaken. I read this clause by itself, that is to say, before I look at the award and before I look at the discussion which has taken place in the Divisional Court, as being a promise as to the future use of the car, limiting the risk which the insurance company undertake, and, at any rate, meaning this, that if a loss occurs when it is not being used for the purpose of commercial travelling, the insurance company is not liable.

Now, three other persons, before it came into this Court, have stated what they think is the meaning of it ; first of all, the arbitrator. I have some difficulty in making out what the arbitrator did mean. I think he probably meant, and I think Mr. Wallington was quite right in agreeing that it should be taken as if he had stated that he meant, that he agreed that the car at the time of the loss was not being used for commercial purposes. Then he says : " I find that, although the said motor vehicle was at the time of its destruction by fire being used for the carriage of passengers, this was in no way either a contributory cause of the fire or the actual cause of the loss of the motor vehicle by the fire, and that the words on the policy ' warranted used only for the purpose of commercial travelling ' were in no sense either a warranty or a promise going to the root of the transaction between the parties which ought to avoid or relieve the Association from their liability under the said policy." Now, I take that to be a finding of fact and to mean : " This car at the time of the loss was not being used only for the purpose of commercial travelling ; it was being used for a purpose which was not commercial travelling at all, but that use did not cause the fire either actually or as a contributory cause, and I find as a matter of law on the construction of the policy that those facts do not in any way excuse the insurance company under the

clause 'warranted used only for the purpose of commercial travelling.'" The language, of course, is curious because he finds that it is not a clause which ought to avoid the policy or relieve the Association from liability. What would avoid the policy or relieve the Association would be facts which would amount to breach of the clause, and I read the award as construing the policy in this way, that the fact that the car was used for non-commercial purposes, the user not causing or contributing to the fire, is not a breach of the clause "warranted used only for the purpose of commercial travelling," which clause is not a promise going to the root of the transaction between the parties so as to relieve the Association from their liability for the fire. I think, for the reasons I have given, that is a wrong construction of the clause.

In the Divisional Court Mr. Justice Salter says expressly that he does not agree with the language in which the learned arbitrator states his finding, and he proceeds in this way: "It has been urged upon us that these words: 'Warranted used only for the following purposes: commercial travelling' are merely description, or are a mere honest intention of the insurer at the time when he effected the insurance. I do not think, looking at the policy as a whole, and including in it the promissory statements in the proposal, that it is possible to say that this is a mere description or a mere statement of present intention. I think it is a promise for the future, and I think it is a promise which is fundamental." That, of course, differs from the view that the arbitrator took. Then in discussing the cases the learned Judge comes to the conclusion that the true meaning of the clause is that the car may be used as a matter of business in a general way, and that the regular user is only commercial. That seems to me to give no effect to the word "only" in the policy. It strikes the word "only" out, because "only" excludes user other than commercial, in my view, and it seems to leave it possible that a gentleman who generally uses a car commercially may take it down to Pendine Sands to run it in a speed trial and yet recover when a fire happens in the course of the trial. Mr. Justice MacKinnon does not take that view. He takes an earlier view in this sense, that he does not think it is a fundamental clause; he thinks the language is such that it is ambiguous and one of the equally possible meanings may be that it only relates to user of the car at the time when the policy is taken out and is a description of the car at the time when the policy is taken out. That seems to me to give no effect, first of all, to the answers to the questions "Purpose for which vehicle will be used" and "Nature of goods to be carried," or to the word "only" in the policy.

Now comes the question, assuming that what I have said is the right construction of the policy, Can we deal with the arbitrator's award? This is not a special case; it is an award made by an arbitrator, and the general rule is that if you go to an arbitrator you take him for better or for worse, and if he makes a mistake of fact that is your fault for going to a tribunal which makes a mistake of fact. Generally, if he makes a mistake in law that is your look-out, because you choose your tribunal and if the tribunal makes a mistake in law you take the tribunal for better or for worse; but there is an exception clearly decided by the cases, first of all by *Hodgkinson v. Fernie* (3 C.B. (N.S.), 189), and then by the decision of the House of Lords in *British Westinghouse, &c., Company v. Underground, &c., Company of London* ([1912] A.C., 673), that if upon the face of the award it shows that he has made an error in law then you may set the award aside. It is not for me to discuss the desirability of that exception; it is clearly established, and it is carried so far that where the arbitrator has asked the Court to assist him in law by stating a consultative case and the Divisional Court has told him what in their view the law is, and under the statute there is no appeal from the Court which has told him what the law is, if the arbitrator then is desirous of showing how correct he is and states on the face of his award that he has been told by the Court that the proper construction of the document before him is so and so and he has acted upon it, there is an appeal which may go to the House of Lords; and if the House of Lords or the Court of Appeal should think that the decision of the Divisional Court was wrong, there is an error of law appearing on the face of the award, although the arbitrator was bound to act under the consultative opinion that he got from the Court and although at the time there was no appeal from that opinion. That has been decided by the House of Lords, and, again, it cannot be questioned.

Now, if that is so, is there in this award an error of law appearing on the face of the award? In my view the arbitrator does show on the face of the award that he has put a construction on the language of the contract that he has to interpret which is not the right construction. In my view there is only one right construction. There may be other constructions contended for, but there is in my view only one right construction—that determined by the highest tribunal which has dealt with the matter for the time being. This decision of this Court will be the right construction unless some higher tribunal says it is the wrong construction, but it does not seem to me possible to say there were several views that the arbitrator might have taken, and that he has taken one of them, and, therefore, we cannot interfere, because it is one which he has taken and one which he might take; it is not like the finding of a jury where there are two possible findings on the evidence, and the Court will not interfere because there was evidence on which the jury might find one way or the other. The question is, What is the true interpretation of the words used? And in my view, if you can come to a decision there is only one true interpretation. The case where you cannot come to a decision is where there are two meanings equally probable and you cannot say which is right and you cannot say which is the true construction.

In my view, therefore, there is an error of law appearing on the face of the award in that the arbitrator has stated a construction of the policy, under which he had to interpret the rights of the parties, and it is a wrong construction, and, if so, the award must be set aside.

Mr. Justice Romer.—I agree. The dispute between the parties turns upon the true construction to be put upon these words, "Warranted used only for the following purposes: commercial travelling." If it appears on the face of the award that the arbitrator has put a wrong construction upon those words, then in my opinion the award is bad in law upon the face of it, none the less that the question of construction may be doubtful and difficult. I understand from the decision of this Court in *Farr v. Motor Traders' Mutual Insurance Society* (36 *The Times* L.R., 711; [1920] 3 K.B., 669), a case which I gather was not drawn to the attention of the Divisional Court, that

those words are capable of three constructions, that is to say, they must bear one of three constructions : either they are pure words of description—words of description only—or they constitute a definition of the risk, or the words amount to a warranty or promise that the motor-car will be used in a particular way only. That the solution of that question is not an easy one is apparent from the fact that Mr. Justice Salter thought that the words constituted a warranty when he came to the conclusion on the facts, on the construction of the warranty, that there had been no breach of it, and Mr. Justice MacKinnon thought that the words were description only. But the question is not an insoluble one. If it were, then I suppose the policy would be void for uncertainty. There can be, if the question is soluble, only one real answer to it, and, therefore, there can be in law only one construction of the words in question.

For the reasons that have been given by my Lords, I have come to the conclusion that the true construction of these words is that they are a description or a definition of the risk. That being so, then so far as this Court is concerned it must be taken that as a question of law that is the only construction, and that the arbitrator's award on the face of it is bad in point of law.

Lord Justice Bankes.—Our decision will be that the award is set aside with costs here and below.

[Solicitors—Messrs. A. E. Hewitt and Crane ; Messrs. J. T. Lewis and Woods, for Mr. Evan J. Hinds, Swansea.]

Judicial Committee of the Privy Council. (Viscount Dunedin, Lord Salvesen, and Sir John Wallis.) 1927. Mar. 28.

KRISHNAMURTHI AYYAR v. KRISHNAMURTHI AYYAR AND ANOTHER.*

India — Hindu law — Adoption — Minor — Ancestral property of adoptive father—Rights of inheritance — Consent by natural father to infringement—Whether binding on son.

By Hindu law, where a natural father during his son's minority consents to the adoption of the son by another upon the terms of an arrangement whereby the adoptive father by his will limits the rights which the adoptive son, if he had been a natural son of the adoptive father, would have had in the ancestral property, the provisions of the adoptive father's will which limit the son's rights, even if the arrangement as a whole was beneficial to the adoptive son, are not binding upon him on his attaining his majority, if these provisions go beyond a mere postponement of the son's interest to a life interest of the testator's widow.

This was an appeal by special leave from a decree of the High Court of Madras of February 8, 1924, affirming a decision of the Subordinate Judge of Mayavaram.

Mr. De Gruyther, K.C., and Mr. K. V. L. Narasimham appeared for the appellant ; Mr. Kenworthy Brown for the respondents.

Viscount Dunedin, delivering their Lordships' judgment, said :—Ramakrishna Ayyar was a Hindu gentleman in possession of ancestral lands extending to some 135 acres. He was not living joint with any relative, and he was childless. On March 23, 1910, he made a will by which he disposed of his property roughly as follows :—12 acres in charity ; 44 acres to his wife for her life ; 45 acres to the son of a distant connexion, whom he designated as being his adopted son, the appellant in the present suit, and the rest to persons who were connexions, but were in no case within the degrees entitled to maintenance, and who are the respondents in the present suit. After the death of the widow, part of the land which she held for life was to go to the appellant, and part to the respondents. On the same day the natural father of the appellant executed a deed in the following terms :—

"The deed of consent for adoption executed on the 23rd March, 1910, in favour of Ramakrishna Ayyar, son of Venkatachala Ayyar, Brahman, Saivite and Mirasidar, residing in Kunnam, Shiyali taluk by Natesa Ayyar, son of A. Ramaswami Ayyar, Brahman, Saivite and Mirasidar, residing in Kunnam village of the said taluk :—

"You have this day executed a will and have alienated your own properties. When you asked me to give you my son Krishnamurthi in adoption subject to the condition that he should take only such properties as were given him by the said will and be bound by the alienations made thereunder, I consented to it and admitted the alienations made in the said will, and, in pursuance of the arrangement that Krishnamurthi should take only such of the properties as were left to him thereunder, I have executed this deed of consent for adoption in support of my having this day given the said Krishnamurthi my son in adoption."

Immediately thereafter the adoption took place with all due ceremony.

Ramakrishna Ayyar died in April, 1911, and his wife in June, 1911. The present suit was raised in 1918 by the respondents to obtain possession of the properties left them by the will. It was directed against certain parties who were in possession and were alleged to be holding benami for the appellant and also against the appellant.

The persons who were holding as alleged eventually renounced all claim to the property. The appellant, through his guardian, alleged that the adoption had taken place before the date of the will, but it was found in fact, and is not now contested, that the will was executed *unico contextu* with the deed of consent by the natural father, and that both were executed in view of the adoption which took place subsequently with all due ceremony. It is also admitted that the natural father was a poor man and had two other sons at that time, and has had two subsequently. The sole question in the case is, therefore, whether the will, taken along with the deed of consent, is binding on the appellant so as to cut down what would have been his rights had he been a natural instead of an adopted son.

The learned Subordinate Judge held that the deed was binding in respect of the consent of the natural father ; he considered that an adoption, even on such terms, was obviously a beneficial arrangement for the appellant, and that the validity, as he phrases it, of such conditional adoption was settled for Madras by the cases in 12 Mad. 490 and 21 Mad. 10 and 27 Mad. 577. He accordingly decreed in favour of the respondents. His view was confirmed by the learned Judges of the High Court. They also considered that so soon as it was shown that the arrange-

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

ment as a whole was beneficial to the adopted son, and that but for the arrangement the adoption would not have taken place, the natural father could give a consent which validated the arrangement as against the adopted son if, when he came to be of age, he sought not to acquiesce therein.

This is most clearly explained by one of the learned Judges :—

"I am of opinion that where an adoption is made by a Hindu who at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by will binds the adopted son in all cases where such an agreement would be for his benefit, and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted.

"If the adopting father would not make the adoption but for the conditions agreed to by the natural father, and if in spite of these conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant, as he gets properties of large value which he would not have got but for the adoption, and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the will and the adoption being conditional on the said disposition."

This view is really based on the case of *Visalakshi Ammal v. Sivaramien* (I.L.R. 27 Mad. 577), which will be presently examined. The appellant has appealed to the King in Council.

The question is a very important one of general interest. There is a very large body of authority in decided cases which touches it, but it is not concluded by any judgment of this Board. The argument for the appellant is simple enough. An adopted son, from the moment of adoption, occupies the place of a natural son. A natural son, in the case of ancestral property, becomes a co-sharer with his father, with the rights of survivorship and of partition as to the whole ancestral property. This is an incident of Hindu law arising from status. No consent by his natural father could affect that position. His power is limited to the giving or withholding of giving his son in adoption, but, if he gives, his power ends.

The present will purports to infringe the son's rights in three particulars :—(1) The gift to charity ; (2) the gift to persons outside the family ; and (3) the postponement of the son's own right in certain lands till his father's death, and in others till his mother's death.

The argument for the respondents is that, in any view, the law has by custom been relaxed, and that the general proposition which is stated in the view of the High Court is based on authoritative decision and is now the law.

As in several of the decisions to be examined there has been the suggestion that the matter has been decided by this Board, it may be well at once to mention cases where the question has been approached.

The case of *Ramasawmi Aiyan v. Vencataramaiyan* (L.R. 6 Ind. Ap., 196) was as follows :—There was a widow, and there was a son who had been adopted by the husband in his lifetime. During the lifetime of that son two-thirds of the ancestral property was alienated ; the son then died, and the widow, who had been given power to adopt by the deceased husband, then adopted another son. At the time of the adoption the natural father entered into an agreement that the adopted son should not challenge the alienation which had been made. When that son came of age he entered into an agreement which the Board held was a ratification of the agreement made by his natural father. The general question is dealt with at page 208 :—

"How far the natural father can by agreement before the adoption renounce all or part of his son's rights so as to bind that son when he becomes of age is also a question not altogether unattended with difficulty, although the case of *Chitko Raghunath Rajadiksh v. Janaki* (11 Bombay H.C.R., 199) certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

It seems impossible to hold, as some seem to have held, that this is inferentially a judgment on the general question. The whole point there was that, however the general question stood, there was an agreement which was not void in the sense of being an agreement that was *funditus* null, *e.g.*, an agreement that marriage should be for a limited period, and that therefore, as there was ratification, there was no need to decide the general question.

The other case was that of *Bhaiya Rabidat Singh v. Maharani Indar Kunwar* (L.R. 16 Ind. Ap., 53). The facts were that a widow, with power to adopt, adopted a son and at the same time she obtained a document from the natural father consenting to her being in possession of the whole property during her lifetime. The suit was raised by the nearest relatives to declare the adoption invalid. The Board held that the adoption was duly performed and was recorded in a deed of adoption which made no mention of any condition. No other deed could, therefore, affect the adoption, but Lord Macnaghten, in the course of his judgment, said :—

"It is difficult to understand how a declaration by [the natural father], or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined."

It is clear that there is here no judgment on the point, for the judgment merely declared the adoption valid and did not determine any case between the widow and son, but Lord Macnaghten's dictum shows an obvious leaning to the view that an agreement by the natural father should not prejudice the right of the adopted son. It follows, as already said, that the question is not absolutely decided by any judgment of this Board.

Their Lordships will therefore turn to the numerous decisions in India. It will be convenient to take the Madras and Bombay decisions separately. But first it will be well to point out that there are distinctions to be drawn between the various cases that arise, though whether these distinctions create any difference in principle is another question. The distinctions to be drawn are these : First, whether the agreement, which is *ex hypothesi* always made by the natural father, and is also *ex hypothesi* an agreement but for which the adoption of the son would not have taken place, is made with the adoptive father, who is the unfettered owner of the whole property (the fact in the present case), or whether it is made with the

widow, who has got from her deceased husband a power of adoption, but who only herself possesses a widow's estate. Second, whether diminutions of the right of the adopted son go only to protect and define in quality the widow's estate, which ordinarily by adoption would be swept away, or whether they go farther and give part of the ancestral property to persons outside the family altogether.

It will be convenient to deal with the Bombay cases first, as they begin at the earlier date. *Vinayak Narayan Jog v. Govindra Chintaman Jog* (6 Bombay H.C., 224). In this case, by a will, the testator, who was a separated person, divided his property practically into two parts, and gave one to his widow absolutely and the other to his adopted son. The son was a nephew, and it was found that the whole arrangement was known to all members of the family. It was acquiesced in by the natural father of the boy. The High Court held that the provision for the adopted son was adequate and that the will could not be challenged by the adopted son. The judgment went on two grounds : First, that although an alienation of the whole estate would be bad and inconsistent with the duties cast upon an adopted son, still, if the provision was adequate, there was no reason why it should not stand. Second, that as the adopted son proposed to take what he could under the will, he could not, on the principle of approbate and reprobate, refuse to acknowledge its validity. It is to be observed that this second view scarcely does justice to the opposing argument. The son did not propose to take his half under the will ; he proposed to take the whole in right of his position as a son. There is, however, one other sentence which would seem to point to the right of the testator to make an adequate provision for the widow instead of allowing her life interest to be entirely destroyed by the adoption.

Chitko Raghunath Rajadiksh v. Janaki (11 Bombay H.C., 199). This was an adoption by a widow, subject to a stipulation that the widow should enjoy the whole property during her life, giving the boy maintenance. Held a good stipulation. Mr. Justice Haridas puts it partly on what may be called conditional adoption, a view which it is hard to agree to, and partly on approbate and reprobate. To the argument that it was a condition repugnant to Hindu law, he says that there is no text to that effect. Chief Justice Westropp, in *Radhabai v. Ganesh Tatya Gholap* (I.L.R. 3 Bombay, 7), *obiter,* takes these two cases as deciding the general point.

After this case in date comes the case before this Board in L.R. 6 Ind. Ap.

Accordingly, in *Ravji Vinayakrav Jaggannath Shankarsett v. Lakshmibai* (I.L.R. 11 Bombay, 381), it was sought to urge that this Board's decision had overturned the authority of the former cases, because their Lordships held that the general question was still open. The facts were practically the same as in the first case—*i.e.,* adoption by a widow and a contemporaneous agreement with the natural father that the widow should have full enjoyment for her life. There is a long and very careful judgment by Mr. Justice Farran. It is too long to quote in full, but may be summarized thus :—The early Bombay Shastris or Pundits were logical in holding the strict view. But custom and practice may modify the strict view. The possibility of such an agreement is in no way negatived by a direct text. Fair arrangements for protection of the widow's interests are commonly made and supported. He then prays in aid the judgment of this Board in L.R. 6 Ind. Ap., but here their Lordships think he is somewhat misled as to the sense in which the word "void" was used. Then, after saying that it is the general law that the guardian of an infant can bind the infant when the contract is made *bona fide* for his interest, he sums up the matter thus :—

"I cannot but think that this principle ought to guide the Court in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father ; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld. The reasoning in the judgment of the Court in the *Chitko* case (*supra*) goes far beyond this view, but the actual decision upon the facts is in accord with it."

Basava v. Lingangauda (I.L.R. 19 Bombay, 428). This was a case where the man who adopted a son conveyed by a deed of gift, which was referred to in the deed of adoption, part of the ancestral property to his daughters, and the natural father was a party to the deed of adoption. Held that the deed of gift was good and binding on the adopted son. The case is taken as plain, and not argued.

The next case is *Vyasacharya v. Venkubai* (I.L.R. 37 Bombay, 251). The facts were : Adoption by a widow and a gift of part of the property to her own daughters. Assented to by the natural father at the time of the adoption. Justices Beaman and Heaton referred to a Full Bench the general question : "Whether the terms of an agreement entered into between the natural and adoptive parent as conditions of the adoption are binding upon and can be enforced against the adopted son ?" but they added that, if that question was too wide, it ought to be considered in the light of the facts of the case. This was the view taken by the Full Bench, Chief Justice Scott and Justices Chandravarkar, Batchelor, and Rao. They held that "an agreement by which the adopting widow is to be allowed to retain her life estate, notwithstanding the adoption, differs in fact and in principle from an agreement under which a power is conferred on her which, as a widow enjoying the life estate, she could by no other means obtain." On the facts, therefore, they held the agreement not binding, holding, first, that the condition was unreasonable, taking the test proposed by Mr. Justice Farran, and, second, that it was covered by a case of *Venkappa v. Fakirgowda,* only reported in 8 Bombay L.R., 346, where a widow was given power to give the property to her own brother, and the condition was held to be bad.

Then came the case of *Balkrishna Motiram Gujar v. Shri Uttar Narayan Dev* (I.L.R. 43 Bombay, 542). This was a gift of an annual sum as a charge on the ancestral property for a charity, made by the adopting father and agreed to by the natural father at the time of the adoption. The gift was held bad. Mr. Justice Hayward, delivering the judgment, examined the cases and sums up thus :—

"It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu law. But no authorities have been quoted before us in favour of any other persons in such connexion or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments."

To sum up the Bombay cases. As a question of actual decision, the Courts have always upheld the

grant to the widow of her interest for life, and that whether the stipulation had been made by the husband while still alive, or by herself, it being always the case that the agreement was anterior to or contemporaneous with the adoption itself, and that the natural father concurred. But when the gift is to outsiders it has been held invalid, and that whether made by the widow or by the adopting father himself. The reasons given have varied. Some have put the deviation from strict principle on custom, some on the view of approbate and reprobate, and in one case upon the view that the father as guardian can bind an infant by any contract which is for his benefit.

To turn now to Madras.

Lakshmana Rau v. Lakshmi Ammal (I.L.R. 4 Mad., 160). There is at page 163 a general remark by Chief Justice Turner against the validity of conditions imposed by agreement with the natural father, but the remark is based on an erroneous view of the judgment of this Board in L.R. 6 Ind. Ap., and is really of no authority. The case itself turns on a speciality.

Lakshmi v. Subramanya (I.L.R. 12 Mad., 490). This was a case where the adoptive father stipulated that certain lands should be enjoyed by the widow for life. This was agreed to by the natural father. It was held binding. The reasons given by the learned Judges were dissimilar. Mr. Justice Muthusami Ayya held that this was just an arrangement for fixing maintenance. Mr. Justice Shephard held that the father, being at the moment undisputed owner of the property, could do what he liked with it, and that the effect of what he did was really to withdraw that portion of the ancestral property. He repudiated the idea of reasonableness being a test.

Narayanasami v. Ramasami (I.L.R. 14 Mad., 172). This was precisely the same case as the last and the same Judge, Mr. Justice Shephard, followed the last case, the other Judge simply following the decision and not going into the reasons.

Jagannadha v. Papamma (I.L.R. 16 Mad., 400). This was a case of adoption by a widow. The agreement was that the widow was to have half the property. Chief Justice Collins and Mr. Justice Handley held the agreement not binding. They rested on Lord Macnaghten's dictum in L.R. 16 Ap. and distinguished this from the case in 12 Mad. in their own Court, by which they were bound, on two grounds, that in that case the arrangement was by the father himself, whereas here it was by the widow.

Ganapati Ayyan v. Savithri Ammal (I.L.R. 21 Mad., 10). This was a disposition in charity by the adoptive father, who at the same time gave his widow power to adopt. She adopted ; the natural father acquiesced. Held binding. Mr. Justice Shephard held that it had been settled by 12 and 14 Madras. Mr. Justice Subramania Ayyar agreed.

Visalakshi Ammal v. Sivaramien (I.L.R. 27 Mad., 577). Adoption by a widow. Agreement come to by natural father that, in the event of disagreement between widow and adopted son, widow should enjoy half the property until her death. Referred to Full Bench. The order of reference drawn by Mr. Justice Subramania Ayyar contains a weighty argument in favour of what may be called the strict view. He argues :—

1. There is no reason against an adoptive father doing anything in a question with an adopted son which he could have done with a natural son.

2. If the adoption by a widow takes place after the death of the adoptive father, all the provisions of the adoptive father's will stand, because the will speaks at his death and takes out of the property whatever is dealt with before the adoption takes place.

3. But further than that the arrangement cannot go, because it is allowing the adoptive father, or the widow, to do something which is incompatible with the proper position of an adopted son.

4. It is just as impossible for the natural father to do, on behalf of the son to be adopted, anything as regards what is to happen after the adoption as it is for the adoptive father to have acted as to his rights before adoption.

5. Approbate and reprobate cannot apply, for that implies election, and there is no election open to the adopted son. If, on the contrary, it is looked on as a condition, this condition is repugnant and must be disregarded.

The result must be to hold the present case not binding.

But, before the Full Bench, Justices Benson, Davies, and Russell all concurred in thinking that L.R. 6 Ind. Ap. indicated that the natural father was not incapable of giving a consent. If that is the position, the only question that remains is, Is it fair and reasonable ?—that is to say, Is it for the minor's benefit ? Then take Mr. Justice Farran's test as to the power of the father. They point out that there is no authoritative text forbidding such an arrangement. They consider a fair and reasonable disposition not inconsistent with Hindu law, and therefore they upheld the arrangement.

To sum up the Madras cases. As regards decision, the general result has been to validate the arrangements so far as provision is made for the widow, just as in Bombay, but one case, *Jagannadha v. Papamma* (*supra*), is the other way, and the referring judgment of Mr. Justice Subramania Ayyar is also of that way of thinking. As regards reasons, again they vary, some going on the power of the adoptive father to do what he likes, some on fair and reasonable arrangements, and some on approbate and reprobate.

It will be apparent from this examination that it is not possible to reconcile all the decisions, and still less the reasons on which they have been based. Their Lordships will, therefore, examine the matter on principle. When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. There are two propositions so well settled that no authority need be cited. They are, first, that the natural father loses all power over the son from the moment when he is adopted, and, second, that the adopted son has in his new family precisely the same rights as a natural son, save only when the question is one that raises a competition between the natural and the adopted son. Can, then, the consent of the natural father who judges, and, *ex hypothesi*, rightly judges, that it is more expedient for the boy to be adopted, even though his rights are limited, than not to be adopted at all,

make any difference? The doubt expressed by Lord Macnaghten in L.R. 16 Ind. Ap. seems unanswerable. How can the consent of the natural father take any effect on the rights of the boy which only arise when his rights as a natural father are non-existent? But if the father cannot do it by virtue of any power in himself, can he do it as guardian of the infant so as to bind him? Mr. Justice Farran, who is an exponent of this view in the case in I.L.R. 11 Bombay, 381, was curiously misled by an undue veneration for Mr. Mayne. He quotes a sentence from Mr. Mayne's work on Hindu Law as follows:—

"He (the minor) will be bound by the act of his guardian when *bona fide* and for his interest and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age."

This quotation is from the third edition of Mayne's work, and as a universal proposition is obviously unsound. Accordingly, in the fourth edition, which was published soon after the date of the judgment in question, and in all subsequent editions, Mr. Mayne inserted between the words "guardian" and "when *bona fide*" the words "in the management of the estate," which turns an inaccurate proposition into an accurate one. But it is no longer of service to Mr. Justice Farran in the matter in hand, for assuredly the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person. Therefore, reverting again to Lord Macnaghten's dictum, it seems impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property in which he cannot have an interest until the time when the guardianship has ceased.

Next, can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional.

It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases, with the exception of the case of *Jagannadha v. Papamma* (*supra*), that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that, if a natural father consented to give his son in adoption, he would only do it if it were reasonable, *i.e.*, for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reasonable position, *i.e.*, not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

As soon, however, as the arrangements go beyond that, *i.e.*, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law. Their Lordships are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that, half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid. They would further say that the remark made by some learned Judges that there is no text prohibiting such arrangements seems to them to go exactly to the opposite effect. Inasmuch as what is sought to be done is admittedly contrary to the strict and natural view of the Hindu law as to the true position of the adopted son in his new family, it would seem more to the point to say that there is no text which sanctions any contrary arrangement.

Applying these views to the present case, it follows that their Lordships consider that the will here can have no effect, and that the appeal must be allowed and the suit dismissed. The appellant must have his costs before this Board and in the Courts below.

Their Lordships will humbly advise his Majesty accordingly.

[Solicitors—Mr. H. S. L. Polak; Messrs. Douglas Grant and Dold.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1927. Mar. 25.

BUSBY v. AVGHERINO.*

Tithes—City of London—Rate prescribed by statute—Exemption from prescribed rate—Premises for which less paid before Act—Onus of proof—37 Henry VIII., c. 12.

By the Act 37 Henry VIII., c. 12, and a decree made pursuant to it and having the force of a statute, the lessees of houses and all other hereditaments (with certain immaterial exceptions), situated in the City of London, are liable to pay a tithe of 2s. 9d. for every rent of 20s. by the year, "and so above the rent of 20s. by the year . . . by the rate aforesaid." The decree contained a proviso that in the case of premises in respect of which less sums had been accustomed to be paid for tithes before 1545, the date of the Act, the premises should be exempted from the prescribed rate. In an action by the owners of tithes against the occupiers of pre-

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqrs., Barristers-at-Law.

mises in the City for tithe at the rate prescribed by the statute,

Held, that the onus was on the defendants to prove that the tithe paid before 1545 in respect of the premises was less than the sum prescribed by the statute, but that they had discharged that onus, and the action failed.

Appeal from decision of Tomlin, J. (43 *The Times* L.R., 91) allowed.

This was an appeal by the defendants from a judgment of Mr. Justice Tomlin (43 *The Times* L.R., 91).

The plaintiffs in the action were the executors of the will of Mary Busby, who died on December 7, 1918, and, as such, they were the owners of all the rectorial or freehold tithes issuing out of or payable for or in respect of such parts of No. 15, Great St. Helen's, in the City of London, as were situated in the parish of St. Helen's, Bishopsgate.

The defendants had for various periods since March 25, 1921, held and occupied portions of No. 15, Great St. Helen's, all of which were situated in the parish of St. Helen's, Bishopsgate.

The tithes were payable under and by virtue of the statute 37 Henry VIII., c. 12, "An Act for tithes in London," and a decree made thereunder. By that decree the tithes were to be computed at the rate of 2s. 9d. upon every 20s., and at 1s. 4½d. upon every 10s. of the rent of the premises in respect of which the tithes were payable, but by clause 18 of the decree it was stated that, where less sums had been accustomed to be paid for tithes, those tithes should only be paid at the accustomed rate.

The plaintiffs claimed to recover as from March 25, 1921, tithes at the rate of 2s. 9d. for every 20s., or 1s. 4½d. for every 10s. of rent. The defendants alleged that the sum of 4s. 9d. a quarter, or 19s. per annum, was accustomed to be paid for tithes in respect of No. 15, Great St. Helen's at and before the date of the decree, and they admitted liability to that extent only and paid into Court the sum of £3 6s. 6d. to answer the tithes at that rate from March 25, 1921, to the commencement of the action.

Mr. Justice Tomlin held that the amount of tithe payable had been in doubt over a long period, arrangements having been made from time to time between the tithe owner and tithe payer; and that it was not possible to infer that, during periods when there was no evidence of payment, 19s. per annum was paid rather than some other sums, and still less possible to infer that the 19s. represented some sums, or apportioned parts of other sums aggregating 19s., which were themselves certain sums of less than 2s. 9d. in the pound accustomed to be paid in 1545.

The defendants appealed.

Mr. Preston, K.C., and Mr. Lionel L. Cohen appeared for the appellants; Mr. G. B. Hurst, K.C., and Mr. C. A. Collingwood for the respondents.

The Master of the Rolls, in the course of a considered judgment, said that the question to be determined was whether the defendants had proved that there was a customary payment of 19s. per annum within the meaning of the statute 37 Henry VIII., c. 12, so as to afford them the protection of the exemption under clause 18 of the decree.

It was clear that the onus of proof of the custom lay upon the appellants, who were the defendants in the action, and it was so held by Lord Eldon, Lord Chancellor, in *Warden and Minor Canons of St. Paul's v. Kettle* (2 V. and B. 1). If they failed to discharge it they were liable for the full 2s. 9d. in the pound.

It was necessary to examine the Act of 1545 carefully. It was passed for the purpose of putting an end to the controversies and quarrels which had been frequent between the "parsons, vicars, and curates" in the City of London and its citizens and inhabitants, and which an Act passed in 1535 had failed to appease. By the terms of the Act of 1545 the decree to be made by Archbishop Cranmer and six of the Privy Councillors and Judges named was to have the force of an Act of Parliament. The state and division of the properties was stabilized as it had been eight years before the decree. Clause 18 was as follows:—

"Provided also and it is decreed. That where less sum than after sixteen pence half-penny in the ten shillings rent, or less sum than two shillings ninepence in the twenty shillings rent hath been accustomed to be paid for tithes, then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed."

The presence of that proviso for exemption in the decree made it plain that it was contemplated that there were cases to which it would apply. Indeed, it was stated in *Bennet v. Tespass* (2 Gwillim's Tithe Cases, 633) that less sums than at the standard rate of 2s. 9d. in the pound had been paid by almost every parishioner to the parson, "and therewith they (the parsons) have been content." The Court in that case further held that, if there had been an agreement to pay tithes for eight years past before 1545 on a particular scale, such payments were to be treated as "accustomed" payments within the statute. From that it seemed that proof of an accustomed payment was not a matter of extreme difficulty.

There was in this case no evidence as to what was paid before or near the time when the Act was passed. The first record was an entry in an old parish account-book, dated 1632. On folio 124 there was a list of parishioners "who have paide five years Tythe beforehand beginning at Christmas Anno 1632," and among them was Thomas Jeninges, who paid tithe at the rate of 35s. a year—total £8 15s.—in respect of his house in Great St. Helens. In 1654 it appeared from an entry in the same book that Thomas Jeninges was paying 35s. a year. The entry was made from an exhibit in proceedings by Sir John Langham, the then owner of the tithes, against the parishioners of Great St. Helen's to compel them to set forth and discover the true rents of their houses, shops, &c.

A settlement of the proceedings was reached in 1662 upon the required information being forthcoming from each of the defendants. The tenement in respect of which this 35s. a year was paid was one of five houses which had subsequently been altered into six houses. It was accepted that upon that division being made the quota payable by Henry Durley, the successor of Jeninges and the undisputed predecessor of the defendants, was 19s.,—part of the 35s. The entry in the parish book brought the evidence of payment of the 19s. down to 1705.

There was proof from a record or table made in 1714 for the general use of the parish that the customary payment for the house was 4s. 9d. a quarter or 19s. per annum, and this record was treated as authoritative in 1795, when 100 copies of the original were printed by order of the vestry. The quarterly payment was then misprinted as 4s., which explained the discrepancy between the 19s. and the 16s. said to be payable at that time, but in 1822 the true figure of 19s. once more reappeared.

It was unnecessary to consider in detail the evidence

submitted as to the period subsequent to 1822, because there was relevant evidence of great weight over a long period of years before that date. The question was whether there was a customary payment in 1545, so as to bring the defendants within the protection of clause 18 of the decree.

There was, in his opinion, convincing proof that for 190 years, from 1632 to 1822, tithe was paid on the basis of a customary payment, and not on the basis of the rack rent. The right inference was that the customary payment had a true legal origin (*per* Lord Chief Baron Pollock in *Gibson v. Doeg*, 2 H. and N., 615). Such payment was made "as of right and not in wrong."

The Court was asked to accept the evidence of land tax assessments as incidentally proving the rental value of the premises out of which the tax was payable. As at present advised he (the Master of the Rolls) could not accept them as evidence of rental value. Such evidence, however, was not required.

He agreed with Mr. Justice Tomlin that there was no satisfactory evidence of the rental of No. 15, Great St. Helen's during those centuries, but he differed from him on the point that there was nothing against which to measure the rate of the annual payments actually proved and so test the nature of the payments made. If there were no customary payment, or none which answered the test, the full amount of 2s. 9d. in the pound was payable. There was no evidence that a demand for 2s. 9d. in the pound had ever been made successfully, but there was evidence of a customary payment of less amount over a period of 190 years.

The basis of the settlement and the decree of the Court of Exchequer in 1662, made by consent of all parties, was that the customary payment was less than what was due and payable by the decree of 1545 and satisfied clause 18 of that decree.

There was evidence, therefore, which afforded exemption to the defendants from the payment of 2s. 9d. in the pound and a defence to the plaintiffs' claim. The appeal must be allowed, and the order of Mr. Justice Tomlin must be discharged and the action dismissed, with costs.

Lord Justice Sargant said that he agreed with Mr. Justice Tomlin that the onus was cast on the defendants of establishing that in the year 1545 there was a customary payment for tithe in respect of their premises No. 15, Great St. Helens, of a certain sum less than 2s. 9d. in the pound, and that, unless they discharged that onus, the plaintiffs must succeed. It was admitted there was no direct evidence of any customary sum having been paid in that or any preceding years, but the defendants alleged there was evidence that during a series of subsequent periods between 1632 and 1822, payments for tithe had been made of a small invariable amount, and that such payments were consistent only with the premises having been liable only to a customary payment of less than 2s. 9d. in the pound. A question was raised at the hearing as to the admissibility of the parish tithe books as evidence to show the amounts paid for tithes and the premises in respect of which they were paid. But the learned Judge held they were admissible, and it was conceded in that Court that they were admissible.

His Lordship then referred to the evidence from the payment by Thomas Jeninges in 1632 down to the year 1822, the reduction to 4s. a quarter between 1796 and 1807 being explained by a printer's error. Down to that point the evidence was overwhelmingly in favour of the defendants, who had established a series of constant payments, consistent only with the supposition that the property was within the proviso in the 18th section of the decree made under the Act of Henry VIII. The facts were considerably stronger in favour of the defendants than they were in the somewhat similar case of *Foster v. Plumbers' Company* (44 S.J., 211). The inference from the subsequent constant payments was that in the year 1545 both conditions of the proviso were satisfied, and not only was there a customary payment in respect of the property which included No. 15, but also that the customary payment was less than 2s. 9d. in the pound.

As to the payments from the year 1822 onwards, to which the learned Judge attached considerable weight, he (his Lordship), with respect to the Judge, was unable to take the same view, and considered that no real importance was to be attached to them. The larger payments made from 1871 to 1918 were not payments by occupier to tithe-owner, but payments made by way of interest on the sum expended by the tithe-owners in the purchase of the tithe on No. 15 and another house No. 10, Great St. Helens, which appeared to have been made without any such investigation as had now taken place of the history of the matter. He agreed that the appeal should be allowed, with costs.

Lord Justice Lawrence's judgment (read by Lord Justice Sargant) was to the same effect and reviewed the evidence from the year 1632 down to the present time. He thought that Mr. Justice Tomlin had attached too much weight to the fluctuations in the amounts paid for tithe from time to time and had not taken sufficient account of the reasons which led to those fluctuations. In his (his Lordship's) opinion the alterations in the amounts paid had been satisfactorily explained. The payment of £2 between 1834 and 1871 was apparently the result of a compromise agreement between the tithe-owners and the then occupying tenant named Chapman. Probably the tithe-owner made a claim to 2s. 9d. in the pound, which was resisted by the tenant who, however, was unwilling to embark on what might prove to be heavy and costly litigation, and therefore agreed to pay £2 rather than go to law. What really happened in 1871 was left in doubt, but the payment made to the tithe-owners after that date could not help to solve the problem as to whether there was a customary payment for tithes in 1545.

The result of the evidence was that for nearly two centuries a fixed sum of 19s. per annum was paid for tithes by the occupiers of what was now No. 15, Great St. Helens. That fact took the defendant's case out of the region of conjecture, and led irresistibly to the inference that the 19s. was a customary payment within the meaning of the proviso in section 18 of the decree made under the statute of Henry VIII. For those reasons he thought the appeal ought to be allowed with costs, and the action dismissed with costs.

[Solicitors—Messrs. Waterhouse and Co.; Messrs. Peacock and Goddard.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1927. Mar. 10.

JEBARA v. OTTOMAN BANK.*

Sale of Goods—Goods sold to Turkish customers—Contracts still executory at outbreak of war—Delivery of goods to customers after outbreak of war—Payment received in piastres by seller's agents—Claim by seller against his agents for sterling—Agency of necessity—

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

Conversion—Damages—Treaty of Lausanne, 1923, Art. 84—Treaty of Peace (Turkey) Act, 1924 (14 Geo. V., c. 7)—Treaty of Peace (Turkey) Order, 1924.

The defendant bank, a Turkish subject, was at the outbreak of war between this country and Turkey holder of sight bills drawn in sterling for the purchase price of goods consigned by the plaintiff from Manchester to his customers in Beyrout which had arrived in Beyrout before the outbreak of war and were subsequently delivered to the purchasers against payment to the bank in piastres. At the conclusion of the war the defendant bank claimed to be entitled to pay to the plaintiff an amount in sterling which represented the then value of the piastres which they had received in payment for the goods. The plaintiff, on the other hand, claimed to be entitled to be paid the sterling amounts of the bills at sight. Alternatively he claimed damages for conversion.

Held, (1) that the effect of the outbreak of war was to dissolve both the mandate to deliver the goods which were in the custody of the defendant's branch at Beyrout to the plaintiff's customers in Turkey and to collect the face value of the sight bills; (2) that under the conditions in which they found themselves the Beyrout branch had not become agents of necessity; and (3) that as that branch had taken for a former principal's goods moneys which they had no right either to demand or to receive the defendant bank was liable to the plaintiff for damages for conversion.

This was an appeal by the defendant bank from a decision of Mr. Justice Rowlatt in an action brought against them by the plaintiff, a British subject, who carried on business in Manchester. For many years he had been in the habit of purchasing Manchester goods and consigning them to customers in Turkey. His practice was to draw a bill at sight for the amount in sterling representing the cost of the goods, plus his commission, and to hand the bill, with the bills of lading and invoices attached, to the Manchester branch of the defendant bank, which made him an advance on the goods and then sent the documents to their branch in Turkey, which collected the price from the customer in exchange for the goods. When the Manchester branch received advice that the price had been paid, they drew a cheque in favour of the plaintiff for the amount indicated on the face of the bill in sterling as being the price of the goods. At the date of the outbreak of war between this country and Turkey on November 5, 1914, the defendant bank held a number of bills at sight and the documents representing goods which had been entrusted by the plaintiff to the bank, and which had arrived at Beyrout before the outbreak of war, but had not been delivered to the customers. The bills were drawn in this form: "Please pay to our order value cheque on London the sum of £ . . . sterling, shipping documents attached to be given up upon payment." After the outbreak of war the Beyrout branch delivered the goods from their warehouses to the customers, taking payment in piastres. At the conclusion of the war the defendant bank claimed the right to pay to the plaintiff an amount in sterling which at the then current rate of exchange represented the value of the piastres which they had received in payment for the goods. Owing to the depreciation in the Turkish currency this represented a serious loss to the plaintiff, and he instituted the present action claiming to be entitled to be paid the sterling amounts of the bills. Alternatively he claimed damages for the conversion of the goods. Mr. Justice Rowlatt gave judgment for the plaintiff for the sterling value of the bills.

The defendant bank appealed.

Sir John Simon, K.C., the Hon. Geoffrey Lawrence, K.C., and Mr. D. B. Somervell appeared for the appellants; Mr. Cyril Atkinson, K.C., and Sir Cassie Holden for the respondent.

Lord Justice Bankes.—This is an appeal by the bank from a judgment of Mr. Justice Rowlatt in favour of the plaintiff for a sum of £4,366 10s. 5d.

The plaintiff carries on business in Manchester. For many years he has been in the habit of purchasing Manchester goods and consigning them to customers in Turkey. There was no evidence indicating what the exact relations between himself and his Turkish customers were, and it is not possible to say whether as between himself and them he was a mere agent with a lien on the goods for his outlay, or whether he was a purchaser re-selling the goods to them. It was proved that he paid for the goods, and the course of business as between himself and the bank was that he drew a bill at sight for the amount in sterling representing the cost of the goods, plus his commission. He then entrusted the bill, with the bills of lading and invoices attached, to the Manchester branch of the defendant bank, which made the plaintiff an advance on the goods and then sent the documents to their branch in Turkey, which collected the price from the customer in exchange for the goods. The bank in Manchester having received from their Turkish branch advice that the price had been paid, and that they had been credited in account by their Turkish branch for the full face value of the bill, drew their cheque in favour of the plaintiff for the amount indicated on the face of the bill in sterling as being the price of the goods. The way in which the branch of the bank in Turkey carried through their part of the business was to calculate the number of piastres necessary to make up the sterling price of the goods, and to demand and receive from the customer that number of piastres when he took delivery of the goods. So long as the business followed its usual course the risk of exchange, such as it was, fell upon the bank, and what the plaintiff expected to receive, and did receive, was the cheque of the Manchester branch of the defendant bank for the full amount in sterling appearing upon the face of the sight bill. It was the outbreak of war between this country and Turkey which caused the trouble. War was declared on November 5, 1914. At that date the bank held a number of bills at sight and the documents representing a quantity of goods entrusted by the plaintiff to the bank over the first seven months of that year. These goods had arrived at Beyrout before the outbreak of war and had not been delivered to the customers, but were in the warehouses of the branch at Beyrout ready for delivery. What the branch at Beyrout did with the goods was to deliver them to the customers as and when they demanded delivery, taking payment in piastres, either gold or paper, whichever was legal tender at the time. The rate of exchange adopted in order to arrive at the number of piastres payable by the customer was

necessarily a purely arbitrary one. At the conclusion of the war the bank claimed the right to pay over to the plaintiff an amount in sterling which at the then current rate of exchange represented the value of the gold and paper piastres which they had received in payment for the goods. Owing to the depreciation in the Turkish currency this represented a serious loss to the plaintiff, and he commenced this action claiming to be entitled to be paid the sterling amounts of the bills at sight which he had entrusted to the bank under the circumstances hereinbefore mentioned. His claim was formulated as a claim for a liquidated amount, or, alternatively, as a claim for damages for conversion.

In the Court below the arguments appear to have proceeded mainly upon the first head of claim, and the case presented was founded upon the peculiar form in which the bills at sight were drawn, namely : "Please pay to our order value cheque on London the sum of £ sterling, shipping documents attached to be given up upon payment."

An elaborate argument was addressed to this Court, and doubtless to the Court below, as to the meaning to be given to the words "value cheque on London," and as to the obligations attaching to the person presenting such a bill. It was urged that nothing short of the receipt of a cheque on London in exchange for the goods or the shipping documents would discharge that obligation. The cheque, it was said, might be that of the customer himself, or of someone having an account in London whose cheque the customer could procure, or the cheque of the branch of the defendant bank purchased by the customer for the purpose. It is not necessary, in my opinion, to decide what in strictness the obligation is ; but having regard to the long course of business between the plaintiff and the bank, in which the only cheque ever tendered to the plaintiff was the cheque of the Manchester branch, I question very much whether the plaintiff would have been satisfied with the cheque of anyone else.

The argument for the plaintiff then proceeded to suggest that the course of business between the Beyrout branch and the plaintiff's customers amounted in substance, though perhaps not in form, to a purchase by the customer from the Beyrout branch of a cheque on London ; and that as the bank had thus received a cheque on London they must account for it at its face value. I cannot draw the suggested inference from the facts. There is nothing, in my opinion, which warrants a conclusion that the dealings between the Beyrout branch and the plaintiff's customers were anything other than what, on the face of them, they appear to be, namely, a release of the goods by the Beyrout branch to the customers on payment by them to the branch of the amount of piastres which the bank demanded as the price of the goods.

Much reliance was placed by the respondent's counsel on the fact that in accordance with pre-war practice the Beyrout branch after receipt of the customers' piastres credited the Manchester branch in their books in currency with the face value of the sight bills. I fail to see the importance of this fact. It was a matter of internal arrangement between the two branches of the bank. In normal times, when communicated by the Beyrout branch to the Manchester branch it was an intimation by Beyrout to Manchester that Manchester could send their cheque to the plaintiff for the face value of the sight bills. The plaintiff knew nothing of the course of business between the two branches. In war time, when the one branch could not communicate with the other, the entries in the books of the Beyrout branch are, in my opinion, for the purposes of this case, of no value whatever. Had the result of this appeal depended upon whether I agreed with the reasons for his judgment given by the learned Judge, I should have felt bound to allow the appeal. There is, however, one aspect of the case which does not seem to have impressed the learned Judge, but which appears to me to be decisive, and that is the effect of the outbreak of war between this country and Turkey upon the contractual relations between the plaintiff and his customers in Turkey, and between the plaintiff and the Ottoman Bank. The contracts in each case were executory. As between the plaintiff and his customers the goods were undelivered, and unpaid for. As between the plaintiff and the bank the goods were in the custody of the bank at Beyrout, and the mandate to deliver them to the plaintiff's customers in Turkey and to collect the face value of the sight bills was unperformed. Under these circumstances I cannot doubt that the effect of the outbreak of war upon both sets of contracts was to dissolve them. From that moment the plaintiff's customers ceased to have any right to demand delivery of the goods, and the Beyrout branch could no longer claim to act under the mandate. What is the result of this state of things in the events which happened ? Simply this, that unless the bank can justify the action of their Beyrout branch in parting with the goods on some ground other than that they were acting upon a mandate which had ceased to exist, the bank have, by the action of their Beyrout branch, been guilty of a conversion of the plaintiff's goods for which they must be held liable in damages.

A case was made upon the pleadings, and was apparently relied upon in the Court below, as it was in this Court, that the Beyrout branch became under the conditions in which they found themselves agents of necessity, and that what they did in reference to the goods was, under the circumstances, reasonable and justifiable.

It does not seem necessary to discuss the somewhat difficult question what circumstances create an agency of necessity. The matter was considered by Mr. Justice Greer in 1923 in his judgment in *Ananiadi v. Imperial Ottoman Bank* (unreported), to which reference has been made. It was considered also by Mr. Justice McCardie in *Prager v. Blatspiel, Stamp and Heacock, Limited* (40 *The Times* L.R., 287 ; [1924] 1 K.B., 566).

I am content to dispose of this part of the bank's case on one or both of two grounds. In the first place, the Beyrout branch never purported to act as agents of necessity. The branch treated the bills at sight as representing subsisting contracts. They received payment of them. They parted with the goods to the plaintiff's customers because, apparently, they considered that they were entitled to them. The question whether they could do better by keeping the goods or whether they could get a better price for them does not appear to have been considered by the bank officials at the time when the goods were handed over or at any other time. In the second place, I think that the evidence given at the trial wholly fails to establish the alleged necessity.

There remains yet one question to be considered to which the appellants attached great importance, and that is as to the construction and effect of Article 84 of the Treaty of Peace with Turkey, which is in these terms : "The high contracting parties are in agreement in recognizing that debts which were payable before the war, or which became payable

during the war under contracts entered into before the war, and which remain unpaid owing to the war, must be settled and paid in accordance with the provisions of the contracts, in the currency agreed upon, at the rate current in its country of origin. Without prejudice to the provisions of the annexe to section II. of this part, it is agreed that where payments to be made under a pre-war contract are represented by sums collected during the war in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected in the currency in which they were collected. This provision shall not affect settlements inconsistent with the foregoing provisions arrived at by voluntary agreement between the parties before the coming into force of the present Treaty." Whatever the framers of that article may have intended to cover by the second clause, I do not consider that the language is comprehensive enough to cover a case like the present, where the Turkish subject has, without either contractual obligation or right, parted with the English subject's goods in exchange for a sum in piastres which the Turkish subject expressed himself willing to take for them. The clause would no doubt apply in the case of a sterling contract where a Turkish subject, acting as agent for a British subject, had parted with the latter's goods in Turkey on an agreed and authorized credit, and the period of credit had not expired at the outbreak of war. In such a case the Turkish subject could claim that he could only collect the contract price as and when he did.

In my opinion, it does not lie in the mouth of a Turkish subject who converts the British subject's goods and receives money for them to speak of collecting that money. "Collecting" appears to me to be an appropriate expression to use of an agent who is acting under a mandate, but wholly inappropriate where the agent takes moneys for a former principal's goods which he has no right either to demand or to receive.

For these reasons the appeal, in my opinion, fails. As the plaintiff's remedy in the view which I take sounds in damages, if the parties are not prepared to agree the amount for which the judgment shall be entered, judgment must be entered for the plaintiff, with costs, for damages to be assessed by an official referee unless the parties agree on a special referee. The respondent must have the costs of the appeal, and the costs of any inquiry as to damages will be in the discretion of the person taking the inquiry.

Lord Justice Scrutton.—This appeal raises questions of some difficulty as to the effects of war on a valid pre-war contract, questions not made easier by the scarcity of information on some questions of fact.

Mr. Jebara, a British subject resident in Manchester, was in the habit of procuring, to use a neutral word, Manchester goods for certain Turkish firms residing in Beyrout, then part of the Turkish Empire. There is no evidence to show whether he bought the goods so that the property passed to him, or whether the property passed at once to the Turkish firms. He certainly paid for the goods to the Manchester merchants; drew at sight for the price on the Turkish merchants; attached to the bill, the bills of lading for the goods—as to which we are not told who were described as shippers, or what endorsements were on them; and financed himself by obtaining an advance on the documentary bill from the Imperial Ottoman Bank, whose headquarters were in Turkey, through its branch in Manchester. The Manchester branch would then forward the bill to their Beyrout branch, who would surrender the documents against payment by the Beyrout merchants. It is not clear whether Jebara bought so that the property passed to him, and passed the property to the Beyrout merchants against payment, or whether he secured himself for his commission and advances by exercising a lien on the documents and the goods represented by them for his advances. The bank certainly had a lien on the documents and goods for their advances.

The action is by Jebara against the Ottoman Bank, amongst other things, for wrongful dealing after the war broke out between England and Turkey on November 5, 1914, with goods and bills which they received before the war.

The first question is, what was the original obligation of the Ottoman Bank to Jebara in respect of the bills which they undertook to collect for him. The bills are in an unusual home-made form, though they had been used in a course of business for some time. The bank paid so little attention to the wording that during nearly the whole of the action they were under the impression that the wording was quite different from the reality. The material words were "Please pay to our order value cheque on London the sum of" (say) "£160 sterling. Shipping documents attached to be given up upon payment to Candour Frères, Beyrout." What always happened in Manchester was that the Manchester bank having collected gave Jebara, who did not bank with them, a cheque in sterling for the amount of the bill less advances and commission. He had nothing to do with the exchange, and did not suffer from the risks; his cheque was in sterling, derived from the sterling amount of the bill. What happened in Beyrout was that the Beyrout branch of the bank received from the consignee Turkish money in coin, enough at the rate of exchange of the day to provide the necessary amount in sterling in London. Whether the legal effect of this was that the consignee bought, from the bank, exchange on London, representing a cheque on London in sterling, which he then gave to the bank in order to get the goods, or whether it was that the bank on account of Jebara was receiving piastres enough to produce the necessary cheque on London, it is not necessary to determine. I am satisfied from the course of business that the odd words on the bill were interpreted by the parties to mean that Jebara was to receive a cheque in sterling based on the sterling amount of the bill, and that he took no risk of exchange. It was the bank's business not to part with the documents unless they were prepared to pay such a sterling cheque; they took the risk of exchange. The letter of instructions to the bank appears on page 1 of the correspondence.

The series of bills in question in the action are dated between January 30, 1914, and July 27, 1914, all before the outbreak of the European War, one in January, two in February, four in March, two in April, three in May, two in June, and five in July. The goods represented all seem to have arrived in Beyrout before the outbreak of war with Turkey. For some reason not explained in the evidence the consignees did not purport to pay for them to the bank till very much later, two in November, 1914, seven in 1915, of which four were in November and December, seven in 1916, and three in 1917, the last date being June 27, 1917. During the later years the price of Manchester goods had gone up enormously, but the consignees only paid the price in the bills, at first in Turkish coin, but when the paper currency was introduced in Turkish paper. Of course, the bank could not remit to England after the

war broke out, and the dispute in this action started when at the end of the war the bank proposed to pay Jebara sterling for the paper piastres at the then rate of exchange, which would mean a very heavy loss to him.

The original contract before the war being between an English subject resident in England and a Turkish subject resident in Turkey, involving the transfer of goods to the Turkish subject and the payment of money to the English subject, was at the outbreak of war between England and Turkey still executory; neither goods nor money had passed. In my view, in the language of Mr. Justice Willes in *Esposito v. Bowden* (7 E. and B., 763), "the effect of the outbreak of war is to dissolve the contract and to absolve both parties from further performance of it," both by English and Turkish law. I need not refer to the numerous authorities in the House of Lords on the effect of war on a contract for sale of goods even where it contained suspensory clauses. It is enough to cite Lord Dunedin in *Ertel Bieber and Co. and Others v. Rio Tinto Company, Limited* (34 *The Times* L.R., 208; [1918] A.C., 260), where he says: "The proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial.' As to this I agree with the judgment of the Court of Appeal in the case of *Robson v. Premier Oil and Pipe Line Company* (31 *The Times* L.R., 420; [1915] 2 Ch., 124), where Lord Justice Pickford, delivering the judgment of the Court, Lord Cozens-Hardy, M.R., and himself and Lord Justice Warrington, said: 'The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.' That so expressed it is an incontrovertible proposition, admits, I think, upon the authorities, of no doubt."

The Englishman could not deliver goods to the enemy of England, nor could the Turk pay money to the enemy of Turkey. There could be no commercial intercourse between them. And with the contract of sale went the subsidiary contract of agency. The Ottoman Bank, a Turkish subject, could not remain in contractual relations with a British subject in carrying out a void contract of sale. It was illegal for it to benefit the Turk, or to remit to the Englishman. The proclamation of January 7, 1915, superseding an earlier proclamation, and the licence to the Ottoman Bank of November 30, 1914, fully support this view. The latter runs: "I hereby permit the Imperial Ottoman Bank to carry on banking business at all their establishments situated within the United Kingdom, subject to the following limitations. conditions and supervision: (1) No transactions shall take place, directly or indirectly, with the establishments of the said banks situated in enemy territory, or with any persons resident in enemy territory." The result in my view was, that on November 4, 1914, the contract of Jebara with the Turkish consignees, and his contract with the Ottoman Bank as to action by them in Syria, became null and void as involving intercourse with the enemy. The bank, however, did not take this view, and for some years after the outbreak of war continued to hand the goods to the consignees, and receive payment in piastres which they could not remit to England. I do not understand how, after two or three years' delay, the consignees were entitled to claim the goods. But, at any rate, I am satisfied that so far as the original contracts of sale and employment were concerned, they were made invalid by the outbreak of war and the bank could not rely on them as justification for their action; unless, therefore, they could justify handing over the goods in some other way they were liable for such handing over as a conversion.

It was argued that if the original contracts were void on the outbreak of war, the bank became agents of necessity and could justify their action in that way. I am not sure that it is not an answer to say that they never thought of themselves in that light, or considered whether it was necessary to act; they thought they were carrying out their contracts. But considerable difficulties arise on the question of agency of necessity in English law. Until recently it was treated as limited to certain classes of agents, of whom masters of ships were the most prominent. High authorities had doubted whether it could be extended. I refer to Lord Esher in *Gwilliam v. Twist and Another* (11 *The Times* L.R., 415; [1895] 2 Q.B., 84, at p. 87) and Baron Parke in *Hawtayne v. Bourne* (7 M. and W., 595), but especially to the careful judgment of Chief Justice Eyre in *Nicholson v. Chapman* (2 Hy. Bl., 254). Many of the authorities are collected in a recent judgment of Mr. Justice McCardie in *Prager's* case (40 *The Times* L.R., 287; [1924] 1 K.B., 566). He there finds the facts so as not to raise any question of action by an agent of necessity, but discusses what the law would be if he had found the facts differently. He takes the view that Judges should expand the common law to meet the needs of expanding society, and proceeds to expand the doctrine of agency of necessity without clearly defining the limits of any of its expansion. The difficulty may be seen by considering the case of the finder of perishable goods or chattels which need expenditure to preserve them. If the finder incurs such expenditure, can he recover it from the true owner, as his "agent of necessity"? Chief Justice Eyre raises this difficulty in the case above cited, and cites "The case of the Pointing Dog" (*Binstead v. Buck*, 2 Bl., 1117). The pointing dog was lost, and his finder fed him for 20 weeks and claimed the cost from his owner when he appeared, but the claim was treated as unarguable. The expansion desired by Mr. Justice McCardie becomes less difficult when the agency of necessity develops from an original and subsisting agency, and only applies itself to unforeseen events not provided for in the original contract, as is usually the case where a shipmaster is agent of necessity. But the position seems quite different when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals, and still more different when there is a pre-existing agency but it has become illegal and void by reason of war, and the same reason will apply to invalidate any implied agency of necessity. How can one imply a duty in an enemy to protect the property of his enemy? Will he not be violating his duty to his own country if he takes active steps to preserve an enemy's property? I do not feel strong enough to expand the common law to

this extent, and I do not see that Mr. Justice McCardie has considered the effect of illegality and invalidity by reason of war in his doctrine. The principal in *Prager's* case (*supra*) was a Rumanian, and Rumania was an ally of England, though it may be that the principal was in a part of Rumania occupied by the Germans, and was therefore to be treated as an enemy. Compare *Société Anonyme Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency (Limited)* (31 *The Times* L.R., 624; [1915] 2 Ch., 409). The decision of Mr. Justice Greer to which we were referred gives more trouble. It is not very clear how the goods in question in that case got to Turkey, but apparently before the war they had got into the hands of the Ottoman Bank at Constantinople as bailees for reward, though the bank there did not know for whom they were acting, and the question who put the goods in bailment with the Ottoman Bank is left in doubt. Then came the war, and the first part of the judgment of Mr. Justice Greer, with which I agree, is that the war invalidated all obligations of the Turkish bank to the English enemy. The bank had not advanced any money on the security of the documents or goods. But having held that the bank were under no obligation as to the goods the learned Judge says: "Now they (the bank) were in a position in which they were bound to do something, otherwise the goods would be entirely lost . . . and therefore they were in a position of agents of necessity." I do not follow the reasoning: if all prior obligations were invalidated by the outbreak of war, how could an implied obligation arise between enemies? How could the bank be "bound" to an enemy to do anything? How is an enemy bound to take steps to preserve the property of his enemy? So far as I understand the facts in that case, I doubt whether the latter part of the judgment of Mr. Justice Greer can be supported.

There remains a point raised under Article 84 of the Treaty of Lausanne, which is made part of English law by an Order in Council under an Act. The first part of the article seems to apply between vendor and purchaser, and speaks of debts which became payable during the war under contracts entered into before the war. The debts in the present case did not apparently become payable before the war, and they were certainly not payable during the war, for the war invalidated the contracts under which they might arise, and prevented any such sums from being payable. The second part of the article is difficult to understand; but I read it to relate to the same subject matter as in the first part, "debts payable before the war or which became payable during the war under pre-war contracts." If so, in the present case no such sums were payable before the war, or became payable during the war, for the war invalidated the contracts under which they would have been payable. If the article was intended to deal with cases like the present, the contracting parties seem to me to have failed completely to use language to express their intention.

Mr. Justice Rowlatt gave judgment for the sterling amount of the bills on considerations of contract, and did not apparently deal with the effects of war, or the construction of the Treaty. In my view, the true legal effect of what has happened is that the bank during the war converted the goods of the plaintiff, and when the plaintiff sues after the war must pay damages for conversion, to be ascertained by an inquiry unless the parties agree. The measure of damages was not argued before us, and I express no opinion on it.

The judgment of Mr. Justice Rowlatt in favour of the plaintiff should be varied in the way indicated, but as the defendants have substantially failed they must pay the costs of the appeal. The costs of the inquiry should be in the discretion of the tribunal taking the inquiry.

Lord Justice Atkin concurred.

[Solicitors—Messrs. Bischoff, Coxe, Bischoff and Thompson; Messrs. Pritchard, Englefield and Co., for Messrs. Brett and Co., Manchester.]

K.B. Div. (MacKinnon, J.) 1927. Mar. 31.

BEDE STEAM SHIPPING COMPANY, LIMITED v. BUNGE Y BORN, LIMITADA, S.A.*

Ship — Charterparty — Arbitration clause — Balance of freight — Short delivery — Charterers' admission of balance due for freight —Counterclaim for short delivery—Right of shipowners to recover admitted balance — Counterclaim barred by arbitration clause.

The plaintiffs chartered their ship to the defendants to carry grain, the charterparty providing that all disputes should be referred to arbitration and that the claimant's arbitrator must be "appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred." Before completion of discharge the defendants made various payments to the plaintiffs on account of freight, and on final discharge the plaintiffs claimed that £568 was still owing for freight. The defendants admitted that £416 was still owing for freight, but they set up a counterclaim for £581 for short delivery and refused to pay the £416 until their counterclaim was met. Neither party referred the matter to arbitration, and more than three months after final discharge the plaintiffs brought an action for £568 balance of freight and the defendants counterclaimed £581 for short delivery.

Held, that though the plaintiffs could not recover the £568 as the claim for it ought to have been taken to arbitration, yet they could recover the £416 about which there had never been any dispute, but that the counterclaim, as it was always in dispute, was barred by the arbitration clause.

The plaintiffs in this case claimed a sum of £568 odd as balance of freight on a cargo of grain carried under a charterparty from Buenos Aires to Spanish ports.

Mr. Porter, K.C., and Mr. McNair appeared for the plaintiffs; Mr. Le Quesne, K.C., and Mr. Somervell for the defendants.

The defendants counterclaimed for short delivery; and they also said that the claim was barred because it had not been brought within the time limited by an arbitration clause in the charterparty. The plaintiffs replied that if the arbitration clause applied it barred the counterclaim also.

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

Clause 39, the arbitration clause of the charter-party, was as follows :—

"All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred. . . ."

The defendants had admitted that £416 10s. 7d. was due from them in respect of freight, but they refused to pay that over until their counterclaim was met. It was ordered that the question whether the claim was barred by the arbitration clause should be tried as a preliminary point.

Mr. PORTER, in opening, submitted that so far as the £416 10s. 7d. was concerned there was no "dispute" within the meaning of clause 39, and no question of arbitration could arise. A counterclaim for short delivery did not affect a shipowner's right to sue for freight ; it was not a defence to the claim but was the subject of a cross-action (*Sheels v. Davies*, 4 Camp., 119). The counterclaim here, therefore, was an independent claim which the plaintiffs disputed, and as it was disputed it should have been referred to arbitration and it was now barred by the arbitration clause. On the other hand, a simple refusal to pay a sum which was admittedly due was not a "dispute" ; and an action to recover such a sum was not barred by this arbitration clause. This case was really covered by *Atlantic Shipping and Trading Company, Limited v. Dreyfus* (38 *The Times* L.R., 534 ; [1922] 2 A.C., 250).

On the facts, the defendants had actually waived any right which they might have had to rely on the arbitration clause (*Hughes v. Metropolitan Railway Company*, 2 App. Cas., 439, at p. 448).

Mr. LE QUESNE submitted that the plaintiffs were barred by the later words in clause 39 "any claim must be made . . . within three months." Also, there was a "dispute" between the parties as to the balance owing to the defendants ; the dispute was about freight due and about damages for short delivery. *Sheels v. Davies* (*supra*), relied on by Mr. Porter, had really been overruled by *Bankes v. Jarvis* (19 *The Times* L.R., 190 ; [1903] 1 K.B., 549) under the modern procedure.

On the facts, he submitted that the act of the defendants did not amount to waiver.

This arbitration clause had been considered in *Williams and Mordey v. W. H. Muller and Co. (London), Limited* (18 Lloyd's List, 50, at p. 52). If the defendants here had waived anything they had only waived the question of the time within which arbitration must be brought ; they had not waived the whole right to arbitration.

MR. JUSTICE MACKINNON, in the course of his judgment, read Clause 39, and said that the date of final discharge of the cargo was March 11, 1925. Before the discharge was completed various payments on account had been made to the plaintiffs, and they said that there was a balance of £568 odd due to them on final discharge. The defendants admitted that they owed a sum of £416 odd for freight, but counterclaimed £581 for short delivery.

The plaintiffs brought this action more than three months after the final discharge, and the defendants pleaded the arbitration clause. The plaintiffs contended that on the facts the defendants had waived the clause, but though the correspondence might have led the plaintiffs, if they ever thought of the matter, to suppose that the arbitration clause would not be insisted on, the defendants never said anything definite, and in his view they never, in fact, abandoned the point. So the point of waiver failed.

The other aspect of the case was more important and more difficult. The plaintiffs' claim for £568 was in dispute from the first, and in his view it was a dispute within Clause 39. The plaintiffs therefore should have had it settled by arbitration, and their claim to recover the £568 in this action was barred. But then the plaintiffs said that at least £416, part of the £568, was admitted by the defendants to be due, and that as there never had been any dispute about that the clause did not affect it.

Mr. Le Quesne contended broadly that whenever a creditor was claiming money which was due and the debtor would not pay there was a "dispute" between them. That was a proposition with which he could not possibly agree. A mere failure or refusal to pay money which was admittedly due was not a dispute within the meaning of the clause. The position was similar to that dealt with in the judgment of Mr. Justice Rowlatt in *London and North-Western Railway Company v. Jones* ([1915] 2 K.B., 35, at p. 40).

The plaintiffs now contended that though they could not enforce their claim for £568 because they ought to have taken it to arbitration they could at least recover the £416 about which there never had been any dispute, and that the result was that they were only barred from recovering the difference between those two sums.

The question was a difficult one, but on the whole he thought that the plaintiffs were right. The position as to the counterclaim was quite different. That sum was always in dispute, and the defendants should have gone to arbitration about it, and in this Court their claim was barred by clause 39.

There would, therefore, be a declaration that the plaintiffs were entitled to recover £416 and no more ; and that the counterclaim was dismissed, with costs.

[Solicitors—Messrs. William A. Crump and Son ; Messrs. Coward, Chance and Co.]

K.B. Div. (Rowlatt, J.) } 1927. Mar. 31.

PAGE v. LIVERPOOL VICTORIA FRIENDLY SOCIETY AND OTHERS.*

Contract—Agent of friendly society—Alteration of rules — Amendment providing for compulsory retirement — Whether binding on agent appointed before amendment.

The plaintiff was appointed an agent of the defendants, a friendly society, whose rules, though subject to alteration, provided at that time for the retention of agents in office so long as their conduct was satisfactory. After the plaintiff reached the age of 65 the defendants altered their rules by providing that agents should be compulsorily retired at the age of 65, and in accordance with the amended rules the

* Reported by G. G. BEAGLEY, Esq., Barrister-at-Law.

defendants terminated the plaintiff's employment. In an action for a declaration that the defendants were not entitled to do so,

Held, that as the rules, on the face of them, were alterable, the plaintiff was not entitled to the declaration claimed, and the action failed.

This was an action by Mr. Walter Wright Page, of Nicholl-road, Harlesden, against the Liverpool Victoria Friendly Society and the trustees thereof for a declaration that the defendant society was not entitled by virtue of its rules or otherwise to dismiss him from his position as one of its managers.

The plaintiff, who was now 69 years old, had been employed as the society's agent or manager for Willesden since December, 1896, until he was compulsorily retired in October, 1925, solely in consequence of a new rule of the society that officers should be so retired with pension at the age of 65. His reputation with the society stood very high and, although according to the computations of the society he was entitled to a pension of only £8 per week, the society had increased it to £8 10s.

At the time of the plaintiff's appointment the rules stated that agents should remain in office so long as their conduct was satisfactory to the managing committee. The rules had been altered from time to time, but on the occasion of each alteration provision was made that "the existing . . . officers . . . shall hold their offices as of their appointment under any former rules."

On March 31, 1925, the society amended its rules by adding a clause that all the servants, excepting the collecting staff, should be compulsorily retired at the age of 65 as and from October 1, 1925, subject to the grant of what, in the opinion of the committee of management, was an adequate pension. The plaintiff was 65 on February 2, 1923.

By a letter dated May 30, 1925, the society terminated the employment of the plaintiff and dismissed him from October 1, 1925. The plaintiff claimed that he was not bound by the new and amended rules, and that the terms of his engagement were not and could not be altered by the making of the amendments by the society, and did not on their true construction enable the society compulsorily to retire him.

The defendants contended that the employment was governed by the rules of the society which were from time to time in force; that it was an implied term of the agreement that the rules could and might be amended, altered, or rescinded at any time; and that the plaintiff's employment terminated in accordance with the provisions of the rules. The defendants further pleaded that the plaintiff never questioned the rule or in any way contended or suggested that the society had wrongfully terminated his employment until shortly before the issue of the writ. On the contrary, they said that the plaintiff voluntarily relinquished his office.

Mr. Rayner Goddard, K.C., and Mr. James Wylie appeared for the plaintiff; Mr. Maugham, K.C., Mr. Artemus Jones, K.C., and Mr. B. Long appeared for the defendants.

His Lordship, in giving judgment, said that the action was misconceived. As the case had been put to him it was intended to assert that the plaintiff had a freehold, or what was equivalent to a freehold, for the term of his natural life, although possibly by illness or other cause he might have to allow the work to be done by a deputy. It was very unusual to declare the creation of an office of freehold by contract. But the plaintiff based his case upon the rules of the society. He said that he could show a contract by the rule under which managers held their appointments. But that rule formed part of a series of rules, and from time to time those rules were amended.

It had been argued that the rules could not be altered to the prejudice of the plaintiff. That was an old fallacy. If one took an office under a rule one had to allow for the rule being altered in any way that was lawful for the alteration of the rule. In this case, the rules, on the face of them, were subject to alteration, and therefore the rule under which the plaintiff claimed this tenure was alterable.

The plaintiff had been an extremely successful officer and no one questioned his ability. A rather fine point was raised—namely, that the rule relating to compulsory retirement at the age of 65 could not relate to the plaintiff because he was 65 before the new rule was made. Such an interpretation of the rule was one he could not accept. The action failed and must be dismissed, with costs.

Upon the application of Mr. Goddard a stay of execution on payment of costs was granted.

[Solicitors—Messrs. Pierron and Morley; Messrs. J. Tickle and Co.]

K.B. Div. (Acton and Talbot, JJ.) 1927. Mar. 24.

COHEN v. GOLD.*

Landlord and Tenant—Restrictions—Decontrol—Landlord coming into possession—Rent and Mortgage Interest (Restrictions) Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

By s. 2 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1923, "Where the landlord of a dwelling-house to which the principal Act [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

Held, that in order that a dwelling-house may become decontrolled under the above provision it must have been let separately up to the time when the landlord comes into possession, and the landlord must come into possession of it as landlord.

This was the plaintiff's appeal from a judgment given at the Shoreditch County Court in favour of the defendant, who was the tenant of a dwelling-house within the Rent Restriction Acts. The plaintiff had contended that he was the landlord in actual possession at the time of the passing of the Rent and Mortgage Interest (Restrictions) Act, 1923. The case involved the interpretation of section 2 (1) of that Act, which provided:—

"Where the landlord of a dwelling-house to which the principal Act [the Increase of Rent and Mortgage

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

Mr. L. Green appeared for the appellant. The respondent did not appear and was not represented.

Mr. GREEN stated that the premises in question, 114, King Edward-road, South Hackney, had been let in 1871 for a term of 68 years. In June, 1913, the appellant, Mr. Abraham Cohen, had bought the remainder of the term and for the purposes of this action he was the landlord of the entire house. He had personally lived there and had occupied the whole house, with the exception of the top floor, which had some years ago been let to the respondent, Mr. Harry Gold. That tenancy was not material to the present case.

In May, 1925, however, Mr. Cohen let three rooms on the ground floor to the respondent, and he subsequently brought the action for possession of those rooms on the ground that they were decontrolled. The county court Judge gave judgment in favour of the defendant, and it appeared that his reason for so doing was that he was not satisfied that the appellant was a landlord in actual possession of those three rooms at the time of the letting to Mr. Gold.

Counsel submitted that the rooms in question were decontrolled under section 2 (1) of the Act of 1923. The appellant was in actual possession of the three rooms at the time of the letting, which was subsequent to the passing of the Act of 1923. The Act did not require that he should be in possession as landlord or in possession of them as a separate dwelling-house. He referred to *Dunbar v. Smith* (42 *The Times* L.R., 196 ; [1926] 1 K.B., 360).

MR. JUSTICE TALBOT.—This is an appeal from a judgment of the learned Judge of the Shoreditch County Court in favour of the defendant in an action in which the plaintiff claimed possession of three rooms on the ground floor of No. 114, King Edward-road, South Hackney. The learned county court Judge in his note tells us that he held that the plaintiff was not at the time of the letting in actual possession as landlord of the three rooms now occupied by the defendant, and that therefore the dwelling-house was not decontrolled.

A letting of the top floor of the house to the defendant about four and a half years ago may be excluded as not material to the present case. The material facts were that until about May, 1925, the plaintiff, who is now in the position of landlord of these rooms, had occupied the whole of the house (excluding the top floor) together with other members of his family. About May, 1925, he let the three rooms on the ground floor to the defendant as a separate dwelling-house on a weekly tenancy. The argument which was apparently relied on in the County Court and which was addressed to us here was that inasmuch as the plaintiff, who is now in the position of landlord to the defendant of the three rooms in question, was in fact in personal occupation of a dwelling-house which included these three rooms at the passing of the Rent and Mortgage Interest (Restrictions) Act, 1923, he is entitled to rely on section 2, subsection 1, of that Act. [His Lordship read the subsection, and continued] : When Mr. Cohen, who is now the landlord of the dwelling-house consisting of these three rooms, was in actual occupation, the three rooms did not constitute a dwelling-house, but only part of one, in that they had not been let separately and there was no landlord or tenant of them. The county court Judge held that the plaintiff was not as landlord in actual possession of the three rooms, and that therefore the dwelling-house was not decontrolled. It is for the appellant to show that he was wrong in law. The question is whether the physical occupation of the house that included these three rooms was the possession of the dwelling-house constituted by these three rooms within section 2, subsection 1, of the Rent and Mortgage Interest (Restrictions) Act, 1923.

Not only has the argument on behalf of the appellant failed to convince me that the learned county court Judge was wrong in law, but I am definitely of opinion that he was right. I think it clear that the Act does not apply to a case such as this, in which the possession by the person who is now in fact the landlord was not at the material time the possession of a dwelling-house let separately or possession by a landlord. The plaintiff was not, in my opinion, in possession of the whole of this dwelling-house at the passing of the Act of 1923 ; and, that being so, he has not established his claim to the decontrol of this dwelling-house.

I will add a reference to the case of *Dunbar v. Smith* (42 *The Times* L.R., 196 ; [1926] 1 K.B., 360), which perhaps on a first glance might appear to have some bearing on this case. When closely examined, however, I think it has none, because the point of this case did not and could not arise there. In *Dunbar v. Smith* (*supra*) there were three floors of a house, using the word "house" in the sense of an entire structure, each of which had been separately let for several years before the Rent Restrictions Act came into force. The landlord came into possession of one floor after the passing of the Act of 1923. The county court Judge held that that was not a coming into possession within section 2, subsection 1, of that Act, on the ground that although the possession was that of a dwelling-house within the meaning of the Rent Restriction Acts, it was not the possession of the whole of a house, using the word in the sense of an entire structure. The Divisional Court held that that view was wrong, and that the word "dwelling-house" in section 2, subsection 1, of the Act of 1923 has the same meaning as elsewhere in the Acts ; that is to say, that a house let as a separate dwelling, whether the whole or part of an entire structure, is a dwelling-house for the purpose of the Acts, and that the landlord having come into possession of a dwelling-house in that sense was entitled to rely on section 2, subsection 1, of the Act of 1923. The point which arose there, and which does not arise in this case, was that the landlord, after the passing of the Act of 1923, came into possession of that which was already a dwelling-house within the meaning of the Acts and of which he was already landlord when he came into possession.

For the reasons I have stated, I am of opinion that the county court Judge came to a right conclusion in law, and that this appeal should be dismissed.

MR. JUSTICE ACTON.—I am of the same opinion. Section 2 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1923, relates to the exclusion of dwelling-houses from the application of the principal Act in certain cases. I think it was made abundantly clear in the course of the argument that the facts of this particular case could not be brought within any of the cases in which dwelling-houses are excluded,

If the words of the subsection and the proviso thereto are carefully considered line by line, it seems to me that the county court Judge really could not have arrived at any conclusion other than that at which he did arrive. I agree, therefore, that this appeal should be dismissed.

[Solicitor—Mr. E. W. Simons.]

K.B. Div. (Rowlatt, J.) } 1927. Apr. 1.

ATTORNEY-GENERAL v. PAINE.*

Insurance (Unemployment) — Contributions—Employer's failure to pay—Jurisdiction of justices—Limitation of 12 months' arrears—Claim to recover previous arrears—Effect of justices' order—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 22 (3) (6).

Though under s. 22 of the Unemployment Insurance Act, 1920, the jurisdiction of the justices, on a conviction for failure to pay contributions under the Act, is limited to 12 months' arrears, yet, if the jurisdiction of the justices is evoked under that section and they make an order for payment of the 12 months' arrears, the sum paid under the order is to be treated as a payment in satisfaction of all arrears in respect of the same employee, and no further proceedings can be taken in any Court to recover the arrears for any period preceding the 12 months.

This was an information by which the Attorney-General claimed from Mr. Ernest James Paine, of Market-place, Wisbech, Cambridge, the sum of £5 0s. 2d., being the balance of arrears of contributions alleged to be payable under the provisions of the Unemployment Insurance Acts, 1920 to 1926, in respect of G. Denmark and A. G. Leahy, persons employed by Mr. Paine for various periods between April 14, 1924, and February 6, 1926.

The full amount of unpaid contributions in respect of those two men was £10 15s. 11d., but on April 22, 1926, the respondent was convicted on two informations for non-payment of contributions in respect of them and was ordered, after due notice, to pay, and had paid, the sum of £5 3s. 1d., being a sum equal to the amount of the contributions unpaid for 12 months preceding the informations. Credit was also given for stamps irregularly affixed to the value of 12s. 8d.

The respondent contended that the payment of the amount ordered by the justices was a satisfaction of his liability by virtue of section 22 (3) of the Unemployment Insurance Act, 1920, which provides :—

"Where an employer has been convicted under the foregoing provisions of this section of the offence of failing or neglecting to pay any contribution under this Act, he shall be liable to pay to the unemployment fund a sum equal to the amount which he has so failed or neglected to pay, and on such a conviction, if notice of the intention to do so has been served with the summons or warrant, evidence may be given of the failure or neglect on the part of the employer to pay other contributions in respect of the same person during the year preceding the date when the information was so laid, and on proof of such failure or neglect the employer shall be liable to pay to the unemployment fund a sum equal to the total of all the contributions which he is so proved to have failed or neglected to pay.

"Any sum paid by an employer under the foregoing provision shall be treated as a payment in satisfaction of the unpaid contributions. . . .

"Sub-section (6) :—Nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings, and all such sums shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt."

Mr. C. W. Lilley appeared for the informant ; Mr. Linton Thorp for the respondent.

Mr. Lilley contended that the payment under sub-section (3) was merely a satisfaction of the contributions for the 12 months which the Court of Summary Jurisdiction had power to deal with, and that sub-section (6) left the Minister's remedy in respect of earlier unpaid contributions by ordinary civil proceedings untouched.

Mr. Thorp submitted that sub-section (3) was clearly intended to afford complete satisfaction of the liability. The words were "the unpaid contributions," not "the said unpaid contributions." It was a penal statute and must be strictly construed. The Court would incline against a construction imposing a liability to repeated proceedings.

Mr. Justice Rowlatt, in giving judgment, said that the question was whether the respondent could be sued in respect of further unpaid contributions which could not be recovered before the magistrates. The only contributions which could be recovered before the magistrates were contributions in respect of the same employed person. He did not think the case touched contributions in respect of other employed persons. There was no question of "the unpaid contributions" mentioned in section 22 (3) referring to other persons.

The scheme of the Act was that where there had been a conviction there could be a fine ; the amount of the unpaid contribution could be ordered to be paid also ; and, by giving notice, other unpaid contributions up to a year could be included in the order. The question was whether, when that procedure had been followed, any other proceedings in debt could be taken. He did not know whether it was said that before the magistrates notice could be given as to six months' contributions and then civil proceedings be taken for the rest, or whether Mr. Lilley would admit that any proceedings before the magistrates would conclude the matter so far as the twelve months were concerned and would confine his contention to the right to sue for previous arrears.

In his view the respondent was entitled to succeed. If the civil jurisdiction of the magistrates was invoked, then that was the only civil remedy and the Minister must be content with the fact that he was limited to 12 months' arrears. He thought that that would be the result even without the last paragraph of sub-section (3).

The Court did not favour an interpretation which would divide the debt up so that the respondent could be harassed with two proceedings for the same debt. If the magistrates were not asked to exercise their civil jurisdiction, then the whole could be sued for ; if they were, then the civil jurisdiction was exhausted.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Subsection (6) did not touch the matter. It merely meant that no words in that section were to be construed as preventing the Minister from taking a civil remedy, and was directed to excluding the well-known doctrine that, where a liability was created and a special remedy was given for its enforcement, the ordinary remedies were ousted.

Subsection (6) was inserted merely to say that, though the Minister might go before the magistrates, he might refrain from doing so and proceed in the ordinary civil courts. It did not say that he could go to a criminal court and collect as much as he could get there and then collect some more of the same debt in a civil court.

For those reasons there must be judgment for the respondent, with costs.

[Solicitors—The Solicitor to the Ministry of Labour; Messrs. Withers, Bensons and Co., for Messrs. Metcalfe, Copeman and Pettefar, Wisbech.]

K.B. Div. } 1927.
(Acton and Talbot, JJ.) } Mar. 15.

LAWRENCE v. HAYES.*

Practice—Assignment of chose in action—Set-off available against assignor—Judgment obtained against assignor—Action by assignee—Whether set-off still available to defendant—Merger.

In an action by a plaintiff who sued as assignee of the vendor of a business to recover instalments of the purchase money owing by the defendant as purchaser, the defendant claimed the right to set off the amount to which he was entitled as against the vendor for damages for certain breaches of warranty by the vendor under the same contract of sale. After the assignment, but before notice of it had been given to the defendant, the defendant had proceeded to obtain first an interlocutory, and subsequently a final judgment against the assignor (the vendor). The plaintiff contended that the defendant could no longer rely on the set-off, on the ground that there had been a merger of the original liability of the assignor in the judgment.

Held, that the doctrine of merger did not apply, as neither were the parties to this action the same as the parties to the judgment, nor was the remedy of the same kind, since what had been a weapon of offence in the hand of the defendant against the assignor was merely a weapon of defence as regards the plaintiff's claim. The defendant, therefore, was entitled to avail himself of the set-off as against the assignee in the same manner in which he could have used it against the assignor.

Price v. Moulton (10 C.B., 561) and *Young v. Kitchin* (3 Ex.D., 127) applied.

This was an appeal from a judgment of the Judge of the Bishop's Stortford County Court, who had held that, in an action by the plaintiff, as assignee of the vendor of a business, for instalments of purchase money owing, the defendant could avail himself of the right to set off the amount in which the vendor (the assignor) was liable to him for damages for breaches of warranty under the same contract of sale.

The plaintiff appealed.

The facts appear in detail in the judgments.

Mr. G. B. Hurst, K.C., and Mr. J. N. Gray appeared for the appellant; Serjeant Sullivan, K.C., and Mr. F. S. Laskey for the respondent.

Mr. Justice Acton.—This is an appeal from a decision of the Judge of the Bishop's Stortford County Court, who gave judgment for the defendant, with costs. The facts were lengthy and somewhat complicated, but they ultimately resolved themselves into these material facts. The plaintiff sued as assignee of one Launder to recover a sum of £78 13s. 8d., being instalments admittedly due to Launder as instalments on the sale of a business by Launder to the defendant in February, 1923, and of that debt the plaintiff took an assignment dated October 3, 1923. In the action which was brought by the plaintiff claiming those instalments in arrear the question arose whether the defendant was entitled to set off against or deduct from the amounts, which would otherwise be due and owing from him to the plaintiff, an amount representing the amount of unliquidated damages to which he was entitled for breaches of warranty contained in the same contract out of which there arose his indebtedness to Launder. The business which Launder sold to the defendant was the business of a tobacconist, and was sold for an agreed price of £750—£350 in cash and the balance of £400 to be paid by monthly instalments, with 6 per cent. interest thereupon. It appears that on the same day that this transaction was entered into between the parties the plaintiff, Lawrence, sold to Launder a bungalow for £650, of which £250 was paid by Launder to the plaintiff, and the balance was to be paid at £10 a month. On October 3, 1923, a deed was executed by Launder assigning all his remaining benefit under the agreement of sale with the defendant Hayes to the plaintiff, but although that assignment was executed then, no notice, or at all events no effective notice, was given until two letters were written, the first on February 27, 1924, from the agent of the plaintiff to the defendant, and the second on May 22, 1924, from the plaintiff's solicitors to the defendant. The defendant's set-off arose in this way. Soon after the business had been assigned to him the defendant claimed that Launder had not fulfilled or performed his agreement of sale, but was in breach in respect of two matters—namely, that, firstly, certain chattels which had been sold subject to a charge had not been relieved of that charge by Launder, and, secondly, that a cash register assigned to the defendant by the agreement was in fact not paid for and was not Launder's property, but the property of other persons and in Launder's possession under an agreement pursuant to which he was liable to pay instalments, of which there were a number in arrear. Before, therefore, the property in the cash register could be acquired by the defendant, if it was ever to be acquired by him, he would be under a liability to pay still further instalments.

There was then a discussion as to whether the register should be returned to the suppliers and an allowance made upon it, or whether the defendant should acquire the property in the cash register by satisfying the owners and completing payment of the instalments. Launder offered an allowance to the defendant at a valuation, and it appears that the

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

defendant was prepared to accept some such terms, but disputes arose as to whether the sum was to be fixed by valuation or otherwise, and on October 17, 1923, the proprietors of the cash register, the National Cash Register Company, obtained judgment against Launder for a sum of £45 due for arrears on this cash register. In January, 1924, the National Cash Register Company issued a plaint against Hayes (the defendant) for the return of the register. This matter, however, was disposed of ultimately by agreement. In January, 1924, in these circumstances, an action was launched by the defendant against Launder for unliquidated damages, for breach of warranty in that, in addition to the claims arising in regard to the chattels that had not been freed from the charge, Launder had no title to the cash register and accordingly had committed a breach of the implied warranty by him as seller.

On February 4, 1924, the defendant obtained an interlocutory judgment against Launder by default, and on February 26 a Master in Chambers assessed the damages at the sum of £116 odd, and for that amount judgment was given against Launder at the suit of the present defendant, with costs.

Up to that date, as I have already stated, no effective notice had been given of this assignment, but on the very next day—namely, February 27, the first of the notices to which our attention has been drawn in this case was given. That notice, and the subsequent notice in May, having been given to the defendant, the plaintiff then launched an action in the High Court for the sum with which we are concerned now, £78 13s. 8d., being seven monthly instalments of £10 due to the plaintiff as assignee under the agreement of February 15, 1923, and interest upon those instalments at 6 per cent. As an answer to that claim, in the first instance, an affidavit was sworn in opposition to judgment, but in the result the matter was remitted to the Bishop's Stortford County Court. The substantial question which arose was whether in the circumstances which I have detailed the defendant had or had not the right to set off against or deduct from the claim of the plaintiff as assignee in the present action the amount of the liability of Launder to the defendant for damages for breach of warranty contained in the same agreement out of which the indebtedness of the defendant to the plaintiff arose.

The point which was relied upon in argument in this Court was that the defendant could not rely upon any such set-off because, the defendant having recovered an interlocutory judgment and subsequently a final judgment against Launder, there was a merger of the original liability of Launder for damages in the judgment which the defendant had obtained against him. It was admitted that, if the defendant had not in fact pursued his remedy against Launder but had for the first time formulated and insisted upon his claim to unliquidated damages in the present action, he would have been entitled to do so, and subject to his proof of the appropriate facts there could have been no answer in law to the claim which he sought to set up as a set-off against or as a deduction from the claim raised by the plaintiff.

It is not surprising that that admission should be made, because apart from any cases which have been referred to before us in the course of the argument the case of *Young v. Kitchin* (3 Ex.D., 127) quite clearly establishes that that is an incontrovertible proposition of law. The head note to that case is as follows: "The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counterclaim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor: *Held*, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly."

That case was referred to, and referred to with approval, in the case of *Government of Newfoundland v. Newfoundland Railway Company* (4 *The Times* L.R., 292; 13 App. Cas., 199) in the Privy Council, to which reference was made in the argument. There remains therefore upon the argument as addressed to us the sole question, whether that which would indisputably have been the right of the defendant in the present action is barred by the mere fact that before he had any notice of this assignment he had obtained a judgment crystallizing the liability of Launder to him in respect of these damages for breach of warranty arising as I have stated. If that were the result it would appear, at all events, to be a somewhat startling result, but still the argument has to be considered. To my mind the argument that a merger can operate in these circumstances as against the defendant for the benefit of the plaintiff is based upon an entirely erroneous hypothesis. As was said with regard to merger by Mr. Justice Maule in *Price v. Moulton* (10 C.B., 561, at p. 574): "The policy of the law is that there shall not be two subsisting remedies, one upon the covenant and another upon the simple contract by the same person against the same person for the same demand." The words to be emphasized or italicized are the concluding words, but if for the word "covenant" in that sentence the word "judgment" be substituted, and for the words "debt upon the simple contract" be substituted the words "liability in unliquidated damages," the sentence is made to fit the facts in this particular case, and the policy of the law was quite clearly enunciated by Mr. Justice Maule. In the present case it is apparent that in the first place the persons concerned are not the same as the persons concerned in the judgment; the plaintiff in this action had nothing whatever to do with the judgment. In the second place, the remedy is not of the same kind. As against Launder one might say that it was a weapon of offence; as against the plaintiff it could only be made, as *Young v. Kitchin* (*supra*) shows, a weapon of defence, and the only relevant inquiry into the amount of unliquidated damages in which Launder is liable to the defendant is in regard to the question of the plaintiff's claim, and no further; for if upon investigation it is proved that the amount recovered in damages overtops the amount of the plaintiff's claim, all that surplus is of no matter whatever. It is perhaps always likely to make matters clear if one puts questions of this kind as a pleader would put them when pleading. I suppose a pleader would put them in some such way as this: The statement of claim would be that the plaintiff claims as assignee of one Launder instalments of a debt accrued due and payable by the defendant to Launder, which was by Launder assigned by an absolute assignment in writing to the plaintiff, of which assignment notice was duly given by the plaintiff to the defendant. The defence would be that, subject to set-off and counterclaim, the defendant admits the debt, but he says

that he has a claim against Launder for unliquidated damages arising out of the same contract as that under which his indebtedness to Launder arises, and claims the right to set off against or deduct from the amount of the plaintiff's claim an amount of those damages equivalent to the whole or to a part of the amount of the plaintiff's claim ; and, of course, proper particulars would be given. To that counterclaim the pleader acting for the plaintiff has to find a defence, and according to the argument we have heard the defence would be to the following effect : That by way of defence to the set-off and counterclaim, the defendant had, before notice of the assignment of the debt due from him to Launder was given, obtained a judgment against Launder for the recovery of unliquidated damages, the whole or a part of which he now seeks to set off against or deduct from the amount of the plaintiff's claim, and that the effect of that judgment was that there was a merger of Launder's liability in damages in the judgment debt.

On that the question arises which is really the question in this case, whether that would not be a demurrable defence to a counterclaim ; in other words, whether it would not be bad in law and one which could not in any view of it be sustained.

In my opinion it is not an available defence in these circumstances. Nobody has ever disputed that there was a merger as between Launder and the defendant or that there was as between them a consequent estoppel which arose from the judgment. Although it is entirely unnecessary to decide that point, it seems to me, as Serjeant Sullivan has contended, that it would be open to the plaintiff in these circumstances to say something to this effect : It is all very well for you to say that you have got judgment against Launder, but if you are seeking for a different kind of purpose to exercise a different kind of remedy against a different person, that different person may call upon you to prove the necessary facts to show that in fact you have a claim to unliquidated damages to an amount equivalent to or overtopping my claim against you. If that question had arisen in any form, it would no doubt have been dealt with in the counterclaim, and we might have had to consider it and express some view upon it in this Court, but no such course was taken. The case admittedly proceeded from beginning to end upon the basis that the figure of the amount for which the defendant recovered judgment against Launder substantially represents the true figure of the amount of damages which the defendant had in fact suffered at the hands of Launder by reason of his breaches of warranty. The position in the county court was also apparently as follows : the plaintiff went so far as to address to the Judge an argument to this effect, that although a judgment had been obtained by the defendant against Launder, and was, of course, binding between those parties, nevertheless it was open to the plaintiff to say that the damages in respect of which that judgment had been obtained were in fact unliquidated, and that as far as they were unliquidated damages they could not in law be a set-off against the plaintiff's claim.

Everybody, including Mr. Gray, to whose ability we are indebted in the present case, agreed that the argument which was addressed to the learned Judge was entirely untenable, but the material fact for the purposes of our decision is that the argument was put forward, and, therefore, that the case proceeded to decision upon the basis that nobody sought to dispute the substantial correctness of the figure representing the indebtedness of Launder to the defendant in respect of these unliquidated damages, and that it was the plaintiff himself who sought to go behind the judgment, if I may so perhaps somewhat loosely express it, and to argue that, on looking behind that judgment to the nature of the claim upon which it was founded, that claim was one which could not be set up against him. In these circumstances it seems to me to be unnecessary to consider the matter any further. The dilemma in which the plaintiff is, in these circumstances, is this : that if he desired to question in substance the amount of the damages, recoverable by the defendant against Launder, he should have taken steps, at all events, to raise the question. He did no such thing, and, on the other hand, he allowed the case to proceed upon the basis that so far as the amount was concerned he did not seek to raise any question at all.

On the other hand, if it be said that the defendant sought to rely upon the judgment as a judgment binding against the plaintiff, one can only say that the evidence seems to be all the other way, and that it seems reasonably clear that the case was never put upon that basis, but upon the basis which I have indicated.

In the result, therefore, I arrive at the conclusion that so far as the question of merger is concerned, it cannot be relied upon by the plaintiff as a defence to the set-off and counterclaim which was raised against him in the present action. In the result, therefore, the appeal ought to be dismissed.

Mr. Justice Talbot.—I am of the same opinion. The appellant here, who was the plaintiff in the county court, is the assignee of a man named Launder under a contract which Launder made with the defendant for the sale to the defendant of a tobacconist's business. The county court Judge has allowed, as against the plaintiff's claim for sums due under the contract of sale from the defendant to Launder, a set-off of a sum which is in fact the amount of a judgment recovered by the defendant against Launder in an action in the High Court for damages for breach of warranty of title of part of the stock and furniture which he purported to sell. The present defendant claimed in that action, and in default of appearance established, that part of the stock and furniture was not Launder's at all, in the one case being subject to a hire-purchase agreement under which the property had not yet passed to him, and in the other case having been mortgaged by him by a bill of sale.

The judgment obtained by the defendant against Launder was obtained after the assignment to the plaintiff but before notice of it to the defendant. It is admitted that this claim of the defendant was of such a nature that it would in equity have been set off as against the assignee's claim. That admission could not be avoided in view of the cases of *Young v. Kitchin* (3 Ex.D., 127) and *Government of Newfoundland v. Newfoundland Railway Company* (4 *The Times* L.R., 292 ; 13 App. Cas., 199) which have been referred to.

The matter is regulated by section 25, subsection 6, of the Supreme Court of Judicature Act, 1873, which contains the words in qualification of the rights of the assignee of a debt, "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed" ; and that, as explained by Baron Cleasby in *Young v. Kitchin* (*supra*), means, as indeed is obvious, "subject to all equities which would be enforced"

(which would have *been* enforced would be more verbally correct) "in a court of equity."

The whole case as argued before us, upon that admission, is this. It is said that there being this claim which would be matter of set-off in equity and under the Supreme Court of Judicature Act, 1873, that right of the defendant has been lost because he has obtained a judgment giving binding effect as between him and Launder to that claim, and that that judgment is in itself not matter of set-off under the principles of equity and under that Act and has extinguished or superseded or merged the right which was a matter of set-off before it was obtained. It was argued that what appeared to be a very unattractive piece of mere technicality had a foundation in substance because whereas the amount to be set off in respect of an unliquidated claim would have to be ascertained by some inquiry in the action between the assignee and the defendant, as is apparently recognized at the end of the judgment in the *Newfoundland* case (*supra*), and in such an inquiry the assignee would have the right to appear and take part—indeed, would be a party—on the other hand, the judgment might be obtained without his knowledge and in his absence. That was the argument, and on the strength of it, as well as of the technical argument which was adduced to support it, we are invited to lay it down as law that if a claim against an assignor which would be proper matter of set-off against the assignee has, after the assignment but before notice of it, been translated into a judgment, the right of set-off has gone. No authority for such a proposition has been brought to our notice, and it appears to me to be quite contrary to the principles upon which, before the Supreme Court of Judicature Act, 1873, courts of equity dealt with this matter. They are very clearly stated in a passage which has been very frequently quoted as declaring the law on this matter from the judgment of Lord Justice James in the case of *Roxburghe v. Cox* (17 Ch.D., 520, at p. 526). He says: "An assignee of a chose in action . . . takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception."

Here this judgment was obtained before notice of the assignment. Moreover, it is, I entirely agree, plain that the merger of the defendant's cause of action against the assignor under the judgment operates only as between the parties to that action; it cannot deprive the defendant as against the assignee of any right of set-off which could have been founded on the cause of action itself.

With regard to the other argument on behalf of the appellant, I desire to reserve my opinion as to exactly how far it was open to the plaintiff to challenge the accuracy of the judgment in point of amount. It is quite clear that as a matter of estoppel, the assignee is not estopped by the judgment obtained by the defendant against the assignor, but I do not feel sure that a court of equity would not allow the set-off of such a judgment debt as this due from the assignor before notice of the assignment as such, I mean as a judgment debt; and it may be that such a judgment could only be challenged by the assignee on the ground of collusion or fraud. It is quite unnecessary to decide that question in the present case, because here it appears that either the plaintiff made no attempt to challenge the accuracy of the judgment, or, if he did, the Court decided against him on that point, and if it did decide against him on that point, that would be a decision of fact as to which there is no appeal to this Court.

In my opinion, on the facts as found by the county court Judge, the allowance of the set-off was perfectly right in law, and I agree, therefore, that this appeal should be dismissed with costs.

[Solicitors—Messrs. Field, Roscoe and Co., for Messrs. William Gee and Sons, Bishop's Stortford; Messrs. Beardall and Co.]

K.B. Div. (Branson, J.) 1927. Mar. 28.

O'CEDAR, LIMITED v. SLOUGH TRADING COMPANY, LIMITED.*

Landlord and Tenant—Fire insurance—Demise by plaintiffs' lessors of adjoining premises for business causing increase of premium on the plaintiffs' premises—Claim against lessors.

The defendants, the owners of premises, demised them to the plaintiffs, who covenanted (*inter alia*) "not to do or suffer anything which may render any increased or extra premium payable for the insurance of the said demised premises or other premises adjacent thereto against fire or which may make void or voidable any policy for such insurance." The plaintiffs also covenanted to pay for the insurance of the premises. Subsequently the plaintiffs surrendered a part of the premises to the defendants, who then demised the surrendered part to a woodworker, with the result that the plaintiffs' payments in respect of premiums for insurance against fire were greatly increased.

Held, that neither on the basis of an implied correlative obligation nor on the basis of a derogation from their grant were the defendants liable to indemnify the plaintiffs in respect of the increased premiums.

The plaintiffs in this action sought to recover from the defendants the difference between the premiums which the plaintiffs had to pay for the insurance of their premises and stock against fire before and after the demise by the defendants, their landlords, of adjoining premises to a worker in wood. The facts fully appear from the judgment.

Mr. Alexander Grant, K.C., and the Hon. H. Fletcher Moulton appeared for the plaintiffs; Mr. F. K. Archer, K.C., and Mr. St. John Field for the defendants.

Mr. Justice Branson.—This is an action for damages brought in the following circumstances: The defendants are the owners of the Slough Trading Estate at Slough, and their business is to let buildings upon that estate to persons prepared to rent them for the purpose of using them for factories and the like. The plaintiffs, whose name was originally the Channell Chemical Company, Limited, are manufacturers of mops and polishes. By indenture dated May 31, 1922, the defendants demised to the plaintiffs a part of No. 8 building on the said estate for a term of 21 years at a rent of £3,700 per annum. The plaintiffs also agreed to pay "as additional rent" an amount equal to that which the defendants might

* Reported by J. W. Hall, Esq., Barrister-at-Law.

expend in effecting or maintaining the insurance of the demised premises against fire, and such amount was made recoverable by distress. Of the other material clauses in the lease Clause 8 says : "The lessees will not carry on or permit upon the said demised premises any noxious or offensive trade or business or do or suffer any other thing which may render any increased or extra premium payable for the insurance of the said demised premises or other premises adjacent thereto against fire or which may make void or voidable any policy for such insurance"—and goes on to prevent that prohibition from preventing the plaintiffs from carrying on the business of making mops and polishes. Then Clause 16 provides that "in case the said premises or any part thereof shall at any time be destroyed or so damaged by fire as to be unfit for occupation or use and shall not be rebuilt or reinstated by the lessors within twelve calendar months," then the rent is to abate. Clause 19 contains a covenant by the lessors, that they will adequately insure and keep insured the said demised premises against fire, and will rebuild or reinstate, and a covenant for quiet enjoyment. By a further indenture dated June 22, 1922, the defendants demised to the plaintiffs the rest of the building No. 8 on the same terms. At the outset the defendants, who had a general policy covering all their buildings at a flat rate of 2s. 6d. per cent., allowed the plaintiffs the benefit of that rate, but at the end of 1922 they decided to discontinue this method of dealing with the matter and sought to make the plaintiffs pay 10s. per cent. To this the plaintiffs objected, and on January 6, 1923, the defendants agreed that if the plaintiffs could effect an insurance upon the building at a less rate they might do so as agents for the defendants. This was done, the plaintiffs effecting an insurance with the Prudential Assurance Company, Limited, on the building and on the plaintiffs' plant therein at a rate of 2s. 6d. per cent. At that time the plaintiffs did not use the machinery in the building for making packing cases. At a subsequent period, however, they began to use it for making their own packing cases, with the result that the rate was raised to 3s. on the building and 3s. 6d. on the contents, at which rate it remained until the happening of the events which give rise to the present claim. Meantime, on May 2, 1924, by deed of surrender of that date, the plaintiffs surrendered to the defendants a portion, about one-third, of building No. 8. This deed contained a covenant by the plaintiffs to build a party wall to separate the surrendered portion from that retained by them, and a wall was built accordingly. On March 24, 1925, the defendants let the surrendered portion of building No. 8 to one Davies, a woodworker and maker of aeronautical parts and motor bodies. The terms of this lease were in all material respects the same as those of the lease to the plaintiffs. On September 1, 1925, it having come to the knowledge of the Prudential Assurance Company that the surrendered portion of the premises had been let as a woodworking factory, they raised the rate for insurance to one guinea per cent. for the remainder of the currency of the policy and refused to renew it. After considerable trouble the plaintiffs succeeded in effecting other insurances at a rate averaging 18s. 9d. An effort was made by the defendants to combat the suggestion that this rise in the premiums demanded from the plaintiffs was due to the letting of the surrendered portion of the premises as a woodworking factory. But the evidence satisfied me that if these premises had not been let for such a purpose the plaintiffs would have been able to continue insuring their premises at 3s. 6d.

The present action is brought by the plaintiffs to recover the difference between the 3s. and the 3s. 6d. per cent. which they used to pay and the 18s. 9d. which they now have to pay and will have to pay in the future so long as Davies uses the premises demised to him for the purposes for which they were demised. Mr. Grant puts his case in two ways : (1) He says that when the defendants put the plaintiffs under an obligation to do nothing which might render any increased or extra premiums payable for fire insurance upon the demised building or buildings adjacent thereto they impliedly came under a correlative obligation not to do anything on their part which would render an increased premium payable for fire insurance upon the demised premises. For this proposition he relies upon *Barnes v. City of London Real Property Company* (34 *The Times* L.R., 361 ; [1918] 2 Ch., 18). In my opinion that case has nothing to do with the present one. There the decision was that the reservation of a rent for the purpose of providing a housekeeper implied a correlative obligation on the part of the landlords to give an equivalent for that for which the rent was reserved. It was said by way of illustration that if there was a reservation of rent in favour of a lessor for the purpose of effecting insurance against fire on the property there must be an obligation on his part to employ the money paid him for insurance in effecting the insurance. Apart from the fact that in this case the correlative obligation to effect the insurance is express, that is a very different thing from saying, as I am asked to say here, that when a lessor puts his lessee under an obligation not to use the demised premises in a particular way he thereby becomes bound to his lessee not to use the remainder of his land in the way in question. I know of no authority for such a proposition, nor does it seem to me that it can possibly be sound. Secondly, it is said that the defendants' action, resulting as it has in making it necessary for the plaintiffs to pay vastly increased premiums in order to carry out their obligation to insure the premises, is a breach of the covenant to be implied in the lease that the lessors will not derogate from their own grant. This renders it necessary for me to consider the extent and application of the principle upon which Mr. Grant relies. The principle has been stated on various occasions. It is clear that when premises are let for a particular purpose the lessor must not do anything which would frustrate the purpose for which they were let, see *per* Lord Loreburn in *Lyttelton Times Company Limited v. Warners Limited* (23 *The Times* L.R., 751 ; [1907] A.C., 476, at p. 481) ; and this is the case although that which is done by the lessor, and which results in the frustration, may have no physical effect upon the demised premises. (*Harmer v. Jumbil (Nigeria) Tin Areas, Limited,* 37 *The Times* L.R., 91 ; [1921] 1 Ch., 200.) If there had been evidence to show that the action of the defendants had rendered it impossible in a commercial sense to insure these buildings at all, which as a matter of fact could only be the case if the adjoining premises had been let for some wholly unusual and unexpected purpose, different considerations might well apply.

In the case before me, however, the purpose for which the premises were demised to the plaintiffs has not been frustrated by what has been done by the defendants. The plaintiffs can still conduct their business as they were able to do before the surrendered premises were let to Davies. The premium they have to pay is still much less than ordinary commercial businesses of some kinds have to pay. For instance, woodworking factories working for the trade often

pay as much as 50s. per cent., and most woodworkers not less than 21s. But the advent of Davies has resulted in its costing the plaintiffs £600 or £700 a year more than it used to do to fulfil their covenant to pay for the insurance of the premises. It therefore becomes material to consider whether the principle that a lessor may not derogate from his grant extends beyond cases in which the purpose of the grant is frustrated to cases in which that purpose can still be achieved albeit at a greater expense or with less convenience. That it does not extend to prevent any interference at all with the enjoyment of the property demised is beyond doubt. This appears from *Robinson v. Kilvert* (41 Ch.D., 88) and *Browne v. Flower* ([1911] 1 Ch., 219). There must be a substantial interference with the use of the premises for the purposes for which they were demised. I was invited by Mr. Archer to hold that mere interference, although it may be substantial, is not enough, but that the principle applies only in cases in which that which has been done frustrates the purpose for which the premises were demised to the lessee. This appears to me to be contrary to the decision of Mr. Justice Stirling in *Aldin v. Latimer Clark, Muirhead and Co.* (10 *The Times* L.R., 452 ; [1894] 2 Ch., 437), where a substantial interference with the purpose for which the premises had been demised was held to entitle the lessee to damages although it was not suggested that that purpose had been frustrated. *Aldin v. Latimer Clark, Muirhead and Co.* (*supra*) and *Browne v. Flower* (*supra*) were treated by the Court of Appeal in *Harmer v. Jumbil* (*Nigeria*) *Tin Areas, Limited* (*supra*) as stating the principle correctly. I see no reason in logic or fairness for limiting the application of the principle to cases in which there has been a complete frustration of the purpose for which the premises were demised. The fact remains, however, that, as was said by Lord Justice Younger in *Harmer v. Jumbil* (*Nigeria*) *Tin Areas, Limited* (*supra*), the obligation laid upon the grantor is not unqualified. It must in every case be construed fairly, even strictly, if not narrowly. It must be such as in view of the circumstances was within the reasonable contemplation of the parties at the time when the transaction was entered into. It is convenient at this stage to deal with Mr. Archer's contention that the principle that a grantor must not derogate from his own grant has no application at all to the present case, by reason of the fact that the premises let to Davies were originally granted to the plaintiffs and were then surrendered to the defendants, so that in respect of these premises the plaintiffs and not the defendants are the grantors. In the view which I take of the case it is not material for me to decide this point. I content myself with saying that it might well constitute a difficulty in the way of the plaintiffs, because if the defendants' contract not to derogate from their grant is to be implied upon the original lease it could not apply to these premises which were included in the original lease, and the surrender contains no new grant by the defendants to the plaintiffs of the premises not surrendered.

Now I proceed, for the purposes of my judgment, upon the assumption that there is nothing in this point, and that the position created by the original lease and the surrender is as it would have been had the original lease contained only those premises now held by the plaintiffs and had the premises now let to Davies been then left in the hands of the defendants. In my judgment even so the principle involved by the plaintiffs does not assist them in this case. The contention is that by doing upon the adjoining land something which is not in itself unreasonable or unbusinesslike, which has not affected the demised premises physically in any way, and which has not rendered it less easy or less legal to carry on upon them the business for which they were demised, but which has had the effect of adding substantially to the expense of carrying on that business there, the defendants have derogated from their grant. I should be extending its application into a region quite different from that in which it has hitherto been applied if I were to hold that it applies to anything which is done by a lessor upon adjoining land, and which, whilst not otherwise affecting the demised premises or their use in any way, merely makes it more expensive for the lessee to carry on his business in the demised premises than it was before. I do not think such a case comes within that principle at all. It might as well be said that if the defendants had begun to pay higher wages in the adjoining factories on their land, and thereby raised the price of labour in the neighbourhood, the plaintiffs would have had an action for damages upon this principle. And many other instances might be cited, for it is difficult to place any limit upon the application of the principle, if it extends to such a case as the present. Mr. Grant relies upon the inclusion in the lease of the covenant by the plaintiffs not to do anything on the demised premises which might make it more expensive to insure the adjoining premises as indicating that a similar covenant on the part of the defendants should be implied as having been within the contemplation of the parties. To my mind it leads rather to the opposite conclusion. The fact that something done on one set of premises might affect the rate of insurance payable upon adjoining ones was obviously present in the minds of both the parties—a covenant by one party in relation thereto was inserted and none by the other. I cannot think that it was within the reasonable contemplation of the parties that the defendants were putting themselves under such an obligation to the plaintiffs as that contended for in this case.

The action fails and must be dismissed, with costs.

[Solicitors—Messrs. Richardson Sowerby, Holden and Co. ; Messrs. Kenneth Brown, Baker, Baker.]

Court of Appeal.
(Bankes and Sargant, L.JJ., and Avory, J.)
1927. Mar. 15.

IN RE ROPNER SHIPPING COMPANY, LIMITED, AND CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, LIMITED.*

Shipping — Charterparty—Demurrage—Owners bunkering ship during demurrage time—Claim for demurrage during non-working hours of bunkering days.

Where, after a chartered ship had come on demurrage, the owners withdrew her from her loading position into a position in which they could put bunkers into her, demurrage was held not to run against the charterers during the bunkering days.

Budgett and Co. v. Binnington and Co. (7 *The Times* L.R., 15 ; [1891] 1 Q.B., 35), and *Cantiere Navale Triestina v. Handelsvertretung der Russ. Soz. Föd. Soviet Republik Naphtha*

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

Export (41 *The Times* L.R., 355 ; [1925] 2 K.B., 172) distinguished.

This was an appeal from a judgment of Mr. Justice Roche upon a special case stated by an arbitrator.

By a charterparty dated October 15, 1925, made between the Ropner Shipping Company, the shipowners, and the Cleeves Western Valleys Anthracite Collieries, Limited, the charterers, it was agreed that the steamer Levenpool should proceed to the King's Dock, Swansea, and there load a cargo of coal for carriage to Vancouver. The charterparty provided (*inter alia*) : (3) the cargo to be loaded in 150 running hours (excluding bunkering time, Sundays, and certain holidays), and if detained longer the charterers to pay demurrage at a fixed rate for every running hour. With this exception the charter contained no provision relating to bunkering.

Working hours at Swansea were from 6 a.m. to 10 p.m. on weekdays, other than Saturdays, on which the hours were from 6 a.m. to noon. No work was done on Sundays.

The shipowners claimed 92¾ hours demurrage, amounting to £92 16s. 8d. Loading hours began to run at 9 a.m. on November 10, 1925. The 150 hours running time for loading expired at 9 a.m. on November 18, 1925, and the Levenpool then came on demurrage. After the 150 hours running time had expired, but before the loading had been completed, the shipowners moved the ship from the position in which she had been taking cargo to a position where she could take in bunkers, and she was engaged in bunkering during parts of six days, during the whole of which time, with the exception of a few hours of loading which intervened between two of the last stages of the bunkering, the steamer was withdrawn from the occupation of the loading of cargo. The shipowners contended that demurrage ran continuously from the expiry of the 150 running hours until the completion of the loading. But as a concession, they made no claim in respect of the time when bunkering was actually proceeding. Their claim was consequently limited to the non-working hours of the bunkering days, or, what were referred to as the night hours of the bunkering days.

The charterers contended that during the whole of the time during which the vessel was used solely for bunkering, and was not shifted back so as to be available for loading cargo, she was not at their disposal, and therefore that they were not liable for demurrage during that period.

The umpire rejected the charterers' contention, upheld that of the owners, and awarded that the charterers were liable to pay demurrage in respect of the night hours of the bunkering days.

Mr. Justice Roche held that as there was no finding that bunkering was necessary for the safety of the ship or for the prosecution of the loading, and no finding that cargo was not available for loading during the bunkering days, the charterers were entitled to have the vessel available for loading during the whole of the demurrage time, and the shipowners could not claim to break into that time for the purpose of the bunkering, and they were not entitled to claim demurrage during the non-working hours of the bunkering days.

The shipowners appealed.

Mr. Le Quesne, K.C., and Mr. W. L. McNair appeared for the appellants ; Mr. Jowitt, K.C., and Mr. James Dickinson for the respondents.

Lord Justice Bankes, in giving judgment, said :— This is an appeal from a judgment of Mr. Justice Roche upon a special case stated by an arbitrator. It raises what is undoubtedly, in reference to this class of charterparty, an important question, and, to some extent, an interesting question. I wish, if I can, to make my judgment quite plain in reference to the facts upon which I consider I have to pass judgment, and to make it quite plain on the points which I do decide and the points which I do not decide or do not desire to decide. Now, the claim was for demurrage in respect of the detention of a vessel beyond her lay days. It is not in dispute that there was a breach on the part of the charterers of the obligation to load within the given lay days, and it is not in dispute that the vessel then came on demurrage under a charter which provided not for a fixed demurrage time but for payment at a fixed rate in respect of the time for which the vessel was on demurrage. The dispute arose in reference to the time which was occupied in bunkering the vessel while she was on demurrage, the shipowners alleging that they were entitled to payment at the demurrage rate for the whole of the period during which the vessel was being bunkered ; that is to say, not only the working hours during which the bunkering was proceeding, but the whole period covered by the time during which the vessel was being bunkered. The charterers, on the other hand, contended that the shipowners were not entitled to any demurrage in respect of that particular period of time.

Now, the matter went to arbitration, and the arbitrator stated a special case. The arbitrator set out in his special case the contentions on the one side and the other. The contentions as made by the shipowners before the arbitrator are, in my opinion, confined to contentions of law, the contention being in substance that because the vessel had come on demurrage, the shipowners being occupied merely in bunkering, demurrage was as a matter of law necessarily payable during the whole of the bunkering period. The contention of the charterers, on the other hand, was that they ought not to pay demurrage at all in respect of any part of the time during which the vessel, in their own language, was used solely for bunkering. I do not think that before the arbitrator it was said on behalf of the shipowners, "the time occupied by bunkering was a time selected as a convenient time because there was no cargo available at the time for loading and we, therefore, occupied the time, which would otherwise have been wasted time, in bunkering ; and that being so, it is not open to you, the charterers, to contend that you are relieved from your obligation to pay at the demurrage rate for the whole of that period." I do not understand that any such case was made before the arbitrator, and I do not think the arbitrator has dealt with the matter on that footing ; he has dealt with it on the footing that the issue was, on the one side, that it was immaterial whether the cargo was available or not, and that as a matter of law the charterers were liable for demurrage, and on the other side was, that it was not so, because the vessel was used solely for bunkering. That was the case submitted to the Court by the arbitrator. I think that was the case submitted to the arbitrator and that is the only case with which Mr. Justice Roche had, or we have, to deal with.

Now, the charterparty was one which provided a fixed time for loading—150 running hours—and there was a provision that, if bunkering took place during the running hours, the bunkering time was not to count. There was no other provision at all with regard to bunkering. Therefore, the position was this : the shipowners might have selected part of the running time for bunkering ; they might have decided

that they would bunker during the running time, and, if they did, the exception clause would apply. They might have decided to wait to bunker until the cargo was completely loaded, in which case no question of the kind which we have to decide would have arisen; or they might have decided, as they did decide, to bunker after the running hours had expired but before the cargo was completely loaded. He, therefore, had the option of selecting one or more of those three periods. Of course, if they are right in their contention, the middle of the three periods is the most favourable for them because they would then be able to carry out the bunkering of the vessel, which in this case occupied a considerable time, and claim demurrage at the charterparty rate for the whole of that time. But, *prima facie*, that does not seem to be reasonable, although, of course, it may be the law.

One has also to bear in mind, in reference to the authorities which have been cited, the facts in those cases upon which the decisions were arrived at. Now three cases have been cited to us, two of them proceeding purely upon the same principle and the other proceeding on the same principle but on rather different facts. Both in the case of *Cantiere Navale Triestina v. Russ. Soz. Föd. Soviet Republik Naphtha Export* (41 *The Times* L.R., 355; [1925] 2 K.B., 172) and in the case of *Budgett and Co. v. Binnington and Co.* (7 *The Times* L.R., 15; [1891] 1 Q.B., 35) the point was this. There being a contract time either for loading or for unloading, the charterers were relieved from the obligation so undertaken by them simply because, for some reason or another, they were not able to occupy the whole of that time in either loading or unloading. It was said in those cases that in order to excuse themselves the charterers must show that the particular facts on which they relied, as preventing the loading or unloading, were facts which came into existence because of some wrongful act on the part of the shipowners—it was not sufficient that the ship was not at their disposal, provided that it was not at their disposal for some cause other than a wrongful act of the shipowners. The other case, the case of *Houlder v. Weir* (21 *The Times* L.R., 503; [1905] 2 K.B., 267) was a decision of Mr. Justice Channell, and proceeded on the same principle, but there the facts were facts which involved an act of the shipowners themselves—not an act such as a strike, as there was in the case of *Budgett and Co. v. Binnington and Co.* (*supra*), or an act of a superior force or Government, as in the *Cantiere Navale Triestina* case (*supra*). It was, in the case of *Houlder v. Weir* (*supra*), the act of the shipowners themselves, and there Mr. Justice Channell, who decided the case, had regard to the special facts of that case, which were that the act of the shipowners, which prevented the charterers from fulfilling their part of the contract, was an act which was necessary to be done in order to secure the safety of the ship and cargo and to be done at that particular time.

Now, here I will not say what my decision would have been if the case had been presented to the arbitrator that this bunkering, at the time when it took place, was either done at that particular time in order to trim the vessel, or for something of that kind, or done because at that time there was no cargo available. Nothing of that kind, in my opinion, arises here. We have to deal simply with the case that the shipowners selected this particular time in which to do the bunkering for no reason at all except that it was the most convenient time for them to do it. In those circumstances, what is the law? In my opinion, the general rule laid down in Lord Justice Scrutton's book on charterparties which has been referred to, "When once a vessel is on demurrage no exception will operate to prevent demurrage continuing to be payable," has no application to this particular case, nor have the decisions which I have referred to in the *Cantiere Navale Triestina* case (*supra*) or in the case of *Budgett and Co. v. Binnington and Co.* (*supra*), because what we have to deal with is a case where it is admitted by the shipowners that they were in default.

The only question is whether under contract between the charterers and the shipowners, not contained in the charterparty, the charterers are under an obligation to pay on demurrage damages, if I may use that expression, in respect of the particular period selected by the shipowners to occupy the ship entirely for their own purposes—namely, bunkering. In my opinion, this being a claim for demurrage, damages payable to the shipowners in respect of the detention of the vessel by the charterers, it does not lie in the mouth of the shipowners to say that the vessel was being detained in the way suggested during the time when they, for their own convenience, were bunkering the vessel—and that that detention covers the whole period, not merely the working hours during which the bunkering was actually taking place, but the whole period referred to in the arbitrator's award—namely, the period from the time when the bunkering commenced, until the time when the bunkering finished. I think that is, in substance, entirely in agreement with the view of Mr. Justice Roche on that point, and I think his judgment was entirely right.

A great point has been made by Mr. Le Quesne as to the onus of proof. I do not think that that arises here, having regard to the case which was submitted by the arbitrator, and submitted by him because of the case which was fought before him. I treat this case as one in which we are asked to decide what the position in law is where the vessel has been used by the shipowners for their own purposes and for no special reason other than that it was convenient for them during the period when she was on demurrage, and where because she was being so used she was no longer available for the charterers to load. For those reasons, I think the appeal fails and must be dismissed, with costs.

Lord Justice Sargant.—I am of the same opinion. The short point, and the only point, which I think was decided by the arbitrator was this: demurrage having begun to run, when the cargo had not been entirely loaded, the shipowners, for their own convenience, shifted the position of the vessel from a point where it was adapted to receive cargo, to a point where it was adapted only to receive bunker coal, and proceeded during a number of days to bunker the vessel, rendering it in fact impossible during that period for the charterers to continue the loading of the cargo. Yet the shipowners are alleging that demurrage is payable by the charterers during the whole of the period during which the shipowners were using the vessel for their own purposes, and were rendering the vessel unavailable for the purposes of the charterers. To my mind that is extremely bold, to say the least of it, and I do not think it is justified. It appears to me, in order that demurrage may be payable the shipowners must at least do nothing to prevent the vessel from being available and at the disposal of the charterers for the purpose of completing the loading of the cargo. That, to my mind, disposes of the case entirely.

We have had a very ingenious argument by Mr. Le Quesne on the question whether the charterers

should not have shown, not only that the vessel was rendered unavailable for loading, but also that they had cargo ready to load upon the vessel. On that point I agree with the view which has been expressed by Mr. Justice Roche. It seems to me when it is once shown that the vessel had been placed in a position, by the act of the shipowners, which rendered it unavailable for the charterers' purposes in loading cargo, that then it would be for the shipowners claiming demurrage to show that the charterers had not in fact cargo available for loading, during the period while the shipowners were using the vessel for their own purposes, in bunkering, but that I do not think was really a point which was ever before the arbitrator or raised between the parties. I think the question that was raised and was decided was the simple question which I stated at the beginning of my judgment.

MR. JUSTICE AVORY.—I agree, and have nothing to add.

[Solicitors—Messrs. Botterell and Roche ; Messrs. Kinch and Richardson, for Messrs. Allen Pratt and Geldard, Cardiff.]

House of Lords.
(Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Carson, and Lord Blanesburgh.)

1927.
Apr. 4.

CLARE AND HEYWORTH v. BETTS.*

Revenue—Income-tax—Schedule D—Profits of trade—Three years' average not applicable—Period over which average to be taken—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Cases I. and II., Rule 1 (2).

The appellant firm began a new business on March 1, 1919, and made up their first account on December 31, 1919. On March 1, 1920, they sold the business to the appellant company, which decided to make up its accounts to March 31 in each year and accordingly made up an account for three months ending March 31, 1920. It was agreed that the assessment to income-tax, Schedule D, for the year ending April 5, 1920, ought to be apportioned between the firm and the company.

Held, that under Rule 1 (2) of the rules applicable to Cases I. and II. of Schedule D the liability to income-tax for the year ending April 5, 1920, should be based on a fair and just average, for a year, of the profits from March 1, 1919, to April 5, 1919, without bringing in any profits of the year of charge at all.

Decision of the Court of Appeal (42 *The Times* L.R., 479 ; [1926] 2 K.B., 289) reversed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 479 ; [1926] 2 K.B., 289), reversing an order of Mr. Justice Rowlatt (41 *The Times* L.R., 561 ; [1925] 2 K.B., 402), on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question for determination was as to the correct mode of computing the profits of a trade set up within three years of the year of assessment. The question depended upon the true construction of Rule 1 (2) of the rules applicable to Cases I. and II. of Schedule D. of the Income Tax Act, 1918.

The rule applicable to Case I. provided that the tax should extend to every trade carried on in the United Kingdom or elsewhere (subject to certain immaterial exceptions) "and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up or on the 5th day of April preceding the year of assessment."

Rule 1 (2) of the rules applicable to Cases I. and II. was as follows :—

"Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment the computation shall be made according to the rules applicable to Case VI."

The trade of the appellants, which was that of textile manufacturers, was begun on March 1, 1919. The first accounts of the trade were made up for a period of ten months, beginning on March 1, 1919, and ending on December 31, 1919, and they disclosed a profit of £1,000.

For the first year of charge of the trade—namely, the income-tax year, April 6, 1918, to April 5, 1919, the profits were taken to be £117, and an assessment for that year was made accordingly. The figure of £117 was arrived at by taking a due proportion of the above-mentioned profit of £1,000 for the 36 days during which the trade had been carried on in that year. No question arose on the appeal with regard to the assessment for 1918-19, and it had not been disputed by the appellants. A second set of accounts of the trade had been made up for the three months beginning on January 1, 1920, and, the period being one of great prosperity, the profits shown by the accounts amounted to £12,150.

The date, December 31, 1919, up to which the first accounts were taken and which resulted in the above-mentioned period of ten months, was adopted for purposes of excess profits duty and in view of the expected termination of that impost. The date, March 31, 1920, up to which the second accounts were taken, resulting in the above-mentioned period of three months, was adopted because it had been decided that for the future the financial year of the business should terminate on that date.

Assessments were made for the income-tax year 1919-20 (being the second year of the trade) in respect of the profits of the trade by the additional commissioners for the East Morley Division of the West Riding of Yorkshire, and the appellants appealed to the Special Commissioners against the assessments under section 148 of the Income Tax Act, 1918. The method employed in making those assessments was to combine the profits for the 13 months, March 1, 1919, to March 31, 1920—namely, £13,150—and to assess twelve-thirteenths of that total, with the result that £12,138 was charged to tax for that year.

It was contended for the appellants that upon the true construction of Rule 1 (2) of the rules applicable to Cases I. and II. of Schedule D the proper figure at which the profits should be taken for the year 1919-20 was £1,200, being twelve-tenths of the amount of £1,000 shown in the above-mentioned accounts for the ten months from March 1, 1919, to December 31, 1919, and that the accounts for the later period of three months from January 1, 1920, to March 31,

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

1920, showing a figure of profits of £12,150, should be disregarded.

It was contended on behalf of the inspector of taxes that under the rule in question both the said accounts should be taken into consideration for the purpose of arriving at the figure of profits for the year of charge 1919-20, and that in effect the figures of the two accounts for the respective periods of ten and three months ought to be combined, so as to produce a figure of £13,150 for the 13 months March 1, 1919, to March 31, 1920, and that twelve-thirteenths of that figure—namely, £12,138—ought to be taken as the profits for the year of charge April 6, 1919, to April 5, 1920.

In the course of the year of charge the ownership of the trade had changed, the business which previously had been carried on by a partnership firm trading as Clare and Heyworth being transferred on March 1, 1920, to Clare and Heyworth, Limited, but it was conceded that that change of ownership of the trade did not affect the question raised in the appeal with regard to the amount at which the profits of the trade for the year of charge were to be taken.

Of the assessments appealed against, two were made upon the firm and one upon the company, but no question arose as to the person to be assessed.

The Special Commissioners decided that the appellants' liability should be based on the accounts to December 31, 1919, without regard to the accounts to March 31, 1920, and they reduced the assessment to £1,200.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners on the ground that the *terminus ad quem* of the period over which the average was to be calculated in the case of such recently established businesses was the beginning of the year of charge—namely, in this case April 5, 1919, and that, although the accounts for the ten months up to December 31, 1919, might be looked at, as being evidence of the amount of that average, the accounts for the first three months of 1920 could not be taken into consideration. His decision was reversed by the Court of Appeal by a majority (the Master of the Rolls and Lord Justice Sargant, Lord Justice Scrutton dissenting).

Sir John Simon, K.C., and Mr. Cyril King appeared for the appellants; and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the respondent.

Their Lordships reversed the decision of the Court of Appeal and restored the judgment of Mr. Justice Rowlatt.

Viscount Sumner.—My Lords: This appeal raises the question how the Income Tax Act, 1918, computes taxable profits, where a trade has been first set up a few weeks before the commencement of the year of charge. The Crown affirms and the subject denies that, in such a case, the Inland Revenue is at liberty to bring into the computation the profits of so much of the year of charge itself as will make up a complete twelvemonth and even, if circumstances require it the profits of the whole of the year of charge. The subject contends that except in the case of a trade set up within the year of assessment, the profits must be computed without bringing in any profits of the year of charge at all.

The appellants, Clare and Heyworth, started a trade and then sold it to Clare and Heyworth, Limited. Both are joined in this appeal because the firm was assessed in respect of one year and the company in respect of the next, but nothing now turns on the distinction between them, for the partners in the firm hold the shares in the company. It is also admitted by the appellants that the business is for assessment purposes one continuous business.

The dates are as follow. The firm began business on March 1, 1919. The company was incorporated on February 16, 1920, and on March 1, 1920, it adopted the agreement for the purchase of the firm's business. Since then the company has carried on the business begun by the firm.

In 1922 and 1923 assessments were made on the firm and on the company for the year April 6, 1919, to April 5, 1920. The practical importance of the dispute turns on the liability to tax in respect of a sharp increase of profit made in the three months from January 1 to March 31, 1920. When the assessment for the year 1919-1920 came to be made, the question arose whether this profit could be included in the computation of the tax for that year under Schedule D.

The appellant firm was assessed for the year 1918-19 in respect of the period March 1, 1919, to April 5, 1919, in the sum of £117. This was ascertained as follows. The firm made up a balance-sheet to December 31, 1919, for the ten months from March 1, 1919, which showed £1,000 profit. The sum of £117 was computed as the proportional part of this profit for the period from March 1 to April 5, 1919. The date, December 31, 1919, was selected for the purposes of excess profits duty. This has not been adopted by the company as the date at which to make up its annual balance-sheets. The date selected in subsequent years has been March 31.

For the year 1919-1920 the appellants (who have to apportion between themselves whatever tax may be payable) have contended that the assessment on the company ought to be on the profits actually made between March 1, 1919, and April 5, 1919, expanded to an entire twelvemonth by a process of "averaging," thus representing for income-tax purposes the profits of the following year of charge. The Inland Revenue contends that the statutory mode of computation allows the profits actually made after April 5, 1919, during the year of charge to be brought in, thus including the three months of exceptional prosperity in 1920. Whether the part of the year of charge thus to be included is only such part as would make up a complete twelve months, when added to the period from March 1 to April 5, 1919, or is extended to the whole of the year of charge in a similar case, constituted an alternative contention.

The Special Commissioners adopted the subjects' contention and their conclusion was affirmed by Mr. Justice Rowlatt. His decision was reversed in the Court of Appeal, Lord Justice Scrutton dissenting. The only authorities on the point were both decided in the Court of Session—namely, *S.S. Glensloy Company v. Lethem* ([1914] S.C., 549) and *Burntisland Shipping Company v. Weldhen* ([1923] S.C., 449).

It is to the actual wording of the relevant cases and rules under Schedule D that one must first turn, and these are the rule applicable to Case I. and the first rule, subsection (2), of those applicable to Cases I. and II. These must be read together, the latter being in the nature of a proviso on the former, and for this purpose the rule applicable only to Case II., which comes between them in the Act, may be ignored. With great respect to Lord Justice Sargant, I am unable to adopt the principle on which his judgment is so largely founded—namely, that these rules should be treated as entirely independent enactments.

By the rule applicable to Case I. the tax (that is, the tax under Schedule D charged under Case I. "in respect of any trade not contained in any other schedule") "shall be computed on the full amount

of the . . . profits . . . upon a fair and just average of three years " ending in this case, where the accounts of the trade had not been usually made up to any date, on April 5, 1919. As, however, there were not three years of trading before that date, it becomes necessary to proceed to the words of Rule 1 (2) of the rules applicable to Cases I. and II.—namely, " where the trade . . . has been set up . . . within the said period of three years " (*i.e.*, before the eve of the year of charge) " the computation shall be made on the average of the profits . . . for one year from the period of the first setting up of the same."

If these words mean on the average of the profits for one year from the first setting up, if and when the date of the setting up was as much as one year from the commencement of the year of charge, then they do not apply to this case. If so, however, the rule itself does not apply to this case at all, for the following words only relegate the computation of the profits to another case, viz., Case VI., where the trade has been set up within the year of assessment, and thus no rule deals with the case of a trade set up within three years of the beginning of the year of charge but not so much as a complete year before it.

On such a construction what at first sight appears to have been a complete formula for computing tax in all the possible cases, dividing them into cases where the trade has been, and the cases where it has not been, set up before the commencement of the year of charge, contains an obvious gap, in which the present case falls and remains unprovided for. Does the formula really leave such a gap, or does it, truly construed, cover this case as well as the other ?

My Lords, the words in Rule 1 (2) of the rules applicable to Cases I. and II.—" within the said period of three years "—refer to the rule applicable to Case I. and virtually incorporate them as follows : " three years ending on . . . the fifth day of April preceding the year of assessment." If these words be written into the later rule, clearly the present case falls within them in point of time. The question then is whether or not it is nevertheless taken out of them again, because the words following are inapplicable to it, viz., " on the average of the profits . . . for one year from the period of the first setting up of the same." It is not " profits made during one year, &c.," nor would there be any occasion to employ the device of an average, if the only reference is to a case where the trade has been set up for a year or more and the amount of the last year's profits can be taken and taxed as the profits of the next year, namely, the year of charge. What is contemplated is a computation, which, by means of an average, will get at profits for a year as well as one which will proceed on a computation of " profits for a year," that is, of annual profits, extracted out of a period of a year or more by the process of averaging the profits of that more extended period.

The language of the rule in the present Consolidation Act differs from that in which it is expressed in the Act of 1842. It previously ran : " provided always that in cases where the trade . . . shall have been set up . . . within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." This, though archaic and cumbrous, at any rate as a proviso to the case of trades set up three years or more before the year of charge, covers both the remaining cases of setting up trade before the commencement of the year of charge, viz., a setting up more and a setting up less than one year before it, and the same formula is used for both. Presumably a Consolidation Act introduces no changes except of words and arrangement. If this change in words, or rather the change made in their order by transposing the words " for one year," nevertheless made a change in the meaning on ordinary principles of construction, it would be necessary to give effect to it, but on consideration I do not think that it does.

No real assistance seems to be derivable from the rules applicable to other schedules than D, or to other forms of taxable property than profits and gains. I think that counsel for the Inland Revenue was warranted in saying that, if the Act does not confine the computation to a period ending just before the commencement of the year of charge by the express language in which the rule is couched, then nothing is prescribed as to the method by which the computation in the present case is to be made, and it must be made on such facts as are available. This would permit recourse to the profits made in the year of charge or part of it. The symmetry of the general scheme might be thereby impaired, but the method of computation in question must necessarily be a matter for express prescription, and not an inference from other cases, in which it is expressly prescribed, to the present, as to which it is not. In any case, the so-called scheme, which substitutes a notional year's profits, taken before the year of charge, for the actual profits made in the year of charge, is departed from, symmetry or no symmetry, when the business is set up in the year of charge. If the scheme is inapplicable in one case, why not in two ? The Act leaves it there. I should agree with this, if I did not think that on the proper construction of the material rule the present computation falls within it.

So far as authority goes the *Burntisland* case (*supra*) supports the view which I have felt constrained to take. The Lord President and Lord Cullen have given clear and terse explanations of the method prescribed, which I respectfully adopt. The contrary construction, adopted in the earlier *Glensloy* case (*supra*) is weakened by the misapprehension, into which the Court seems to have fallen there, as to the connexion of the words " balance of profits or gains " with some balance-sheet of the taxpayer's, supposedly drawn up for a period of a year ending during the year of charge. I think that the appeal should be allowed and that the judgment of Mr. Justice Rowlatt, which affirmed the Special Commissioners' decision, should be restored on the grounds above mentioned. There may have been other points arising out of the assessment which, had the amount at stake been greater, would have been successfully disputed. These have not been raised before your Lordships and accordingly no opinion upon them is involved in this conclusion. I move your Lordships accordingly.

I am desired to add that my noble and learned friend, Lord Carson, concurs in this opinion and motion.

Lord Atkinson.—My Lords : This is an appeal from an order of his Majesty's Court of Appeal (Lord Hanworth, M.R., and Lords Justices Scrutton and Sargant), dated April 26, 1926, reversing an order of Mr. Justice Rowlatt dated June 18, 1925, affirming the decision of the Commissioners for the Special Purposes of the Income Tax Acts (hereinafter referred to as " the Commissioners ") upon a case stated by the Commissioners for the opinion of the King's Bench Division of the High Court of Justice, pursuant to section 149 of the Income Tax Act, 1918.

The question for decision in the case turns upon the construction of the relevant provisions of the Income Tax Act, 1918, and resolves itself into this,

whether in computing the trading profits of the appellants for assessment under Case I. of Schedule D of the Income Tax Act, 1918, for the year ending April 5, 1920 (the appellants' second year of assessment) the trading profits made in that year should be taken into account in arriving at the measure of the liability to be taxed. No question of figures arises in the case.

Profits of trade are subjected to income-tax under Case I. of Schedule D, the relevant statutory provisions being contained in the Income Tax Act of 1918.

Those portions of the Schedule run as follows :—

"1. Tax under this Schedule shall be charged in respect of—

"(*a*) The annual profits or gains arising or accruing . . .

"(ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere" ;

. . .

"in each case for every twenty shillings of the annual amount of the profits or gains."

"2. Tax under this Schedule shall be charged under the following cases respectively ; that is to say,—

"Case I.—Tax in respect of any trade not contained in any other Schedule ; . . . and subject to and in accordance with the rules applicable to the said cases respectively."

The rule applicable to Case I. runs as follows :—"The tax shall extend to every trade carried on in the United Kingdom or elsewhere other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Schedule A. and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up." This is the main and general provision of the Act. From its terms it is clear that the materials upon which the assessment is to be made are the average of the profits and the gains made in the three years immediately preceding the year of assessment. The profits and gains made in any particular portion of the year of assessment are apparently not to be taken into account in making this assessment. That would seem to be clear.

Provision is made in Rule 1 (2) of the rules applicable to Cases I. and II. for cases where a trade, profession, employment, or vocation is set up and commenced within this period of three years. The rule in clear and explicit language enacts that the computation shall in that case be made on the average of the profits and gains for one year from the period of the first setting up of the same. This portion of the rule is very inappropriately worded. It apparently refers only to the profits and gains for one year, the first year of the trading, but an average, properly speaking, can only be made when one has two or more things to compare. What the provision may fairly be construed to mean, I think, is that the rate of profit made in the first year of trading may be taken to have continued to be reached during the period from the end of the first year in which the trade is carried on up to the first day of the year of assessment. For instance, if the profits made in the first year of trading were on an average of the 52 weeks £10 per week, the profits for the second year of trading may be taken as £10 a week. The rate of profit can be ascertained by taking an average on the 52 weeks of the first year. There is nothing unreasonable or unfair to a trader in holding that during the time which elapses between the end of the year in which he commenced to trade and the first day of the subsequent year of assessment he will be assumed to continue to make profits at the same rate at which he made them during the first year of his trading. This would appear, to me, at all events, clear, that the general rule is not to be departed from, and that profits made during any portion of the year of assessment are not to be taken into account in cases such as this. Where the trade has been set up within the year of assessment neither the general rule nor the last-mentioned method of calculation can apply, and accordingly a special provision is made for it. That provision is contained in the last 2½ lines of Rule 1 (2), Cases I. and II., and runs thus : "Where it (*i.e.*, the trade, &c.) has been set up and commenced within the year of assessment the computation shall be made according to the rules applicable to Case VI." On turning to those rules one finds that by the second of them it is provided that the computation shall be made either on the full amount of the profits made during the year of assessment, or according to an average for such a period being greater or less than one year, as the case may require, and as may be directed by the Commissioners ; and Rule 3 provides that every such statement shall be made to the best of the knowledge and belief of the person in receipt of or entitled to the profits and gains.

The three cases are thus provided for. First, where the trade has been carried on during the full period of three years anterior to the first day of the year of assessment ; second, where the trade has been first started within those three years ; and third, where the trade has been set up within the year of assessment ; but I have searched in vain to discover any case in which the period of three years, on the profits of which the trader may be assessed, may comprise a certain period lying without the year of assessment and a certain period within it. I do not believe that such a hybrid period is ever recognized, by the legislation on the subject of income-tax, as a period the profits made in which are to be subjected to taxation. The House has no power to come to the aid of the Legislature and insert such a period as a unit of computation where the Legislature has failed to do so.

The facts of this case are as follows :—The appellant firm set up and commenced a new business on March 1, 1919. They took stock and made up the first account of their business on December 31 in the same year 1919. Why they did this is irrelevant. The profits of the business for this period of ten months amounted, according to this account—the accuracy of which is not challenged—to £1,000. On February 6, 1920, that is, before the first day of the year of assessment, they agreed to sell their business, its goodwill and assets, as and from January 1, 1920, to the appellant company, which latter was incorporated on February 16, 1920, and on March 1 adopted the agreement for sale of February 6 previous. The members of the appellant firm were the sole members of the appellant company. The appellant company have since continued to carry on the business by them so acquired. From motives wise or unwise they made up an account of their business from January 1, 1920, to March 31, 1920. For this period their profits—it is not disputed—amounted to £12,150. The appellant firm was assessed on February 3, 1923, for the year 1918-1919 to income-tax in respect of the profits of its trade from March 1, 1919, to April 5, 1919, in the sum of

£117, being a due proportion of the sum of £1,000 shown by its accounts to have been its profits for the ten months ending December 31, 1919.

The Special Commissioners decided that the liability of the appellants should be based on the accounts to December 31, 1919, without regard to the accounts up to March 31, 1920, and reduced the figure contended for by the respondent to £1,200. As I understand the judgment of Mr. Justice Rowlatt, he held in accordance with the decisions in the two Scottish cases, namely the *Glensloy* case ([1914] S.C., 549) and the *Burntisland* case ([1923] S.C., 449), as to the period over which the profits were to be calculated in such a case as this, that though no terminus *ad quem* is distinctly named in Rule 1 of the rules applicable to Cases I. and II. of Schedule D, yet according to the principle underlying the general provision of the statute that terminus must be the first day of the year of assessment. If so, I entirely concur with him. As I understand the judgment of the Court of Appeal, the profits of the appellants are to be computed over a period extending beyond the first day of the year of assessment and extending to the end of the 13 months, that is, to the end of the first trading year of the appellants' trading, which would necessarily include a portion of the year of assessment. With all respect, I am quite unable to concur in that conclusion. Lord Justice Scrutton, who dissented from the majority ([1926] 2 K.B., at p. 307) is reported to have expressed himself thus : "Yet considering that Parliament contemplates a shorter period than three years as the foundation of the average, and I think contemplates that the foundation of the average is a period of fact, not estimate, I have with considerable hesitation come to the conclusion that the Commissioners and Mr. Justice Rowlatt have taken a correct view of the case, and that the period from which the average is derived terminates at the commencement of the year of assessment, or, possibly, on the date preceding that year to which the accounts of the trader are usually made up, if such a date exists." I concur with the learned Lord Justice in the conclusion at which he has arrived, and, as I have failed to find a single instance in the whole Income Tax Code in which, where the trader's trading commenced outside the year of assessment, that year or any portion of it has been included in the period for which the trader's profits are to be measured and assessed, I concur in the learned Lord Justice's conclusion without the hesitation to which he gives expression. I think the appeal should be allowed and the judgment of Mr. Justice Rowlatt should be restored and approved.

Lord Wrenbury.—My Lords : The language of section 100 of the Act of 1842 was, "the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." The language of the Act of 1918 is, "the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same." I agree with Lord Sumner in thinking that the transposition of the words "for one year" in a Consolidation Act does not make a change in the meaning.

The language of the Act of 1918 can be read as if it were, "the computation shall be made on the average of the profits or gains (for one year) from the period of the first setting up of the same." The "one year" is the year of assessment. The "period of the first setting up of the same" must, I think, mean "the period from the date of the first setting up of the same." Even then the date is not named at which "the period" is to end. This must, I think, be the date referred to in the Schedule D rule applicable to Case I. That is to say, a date not later than the first day of the year of assessment. This "period" may be more or less than a year.

Further, the words "profits or gains" are followed not by the preposition "of" but by the preposition "for," a word which is appropriate if it is to be read in the connexion, "the computation shall be made for, &c.," which was the sequence of the words in the Act of 1842.

Neither the Act of 1842 nor the Act of 1918 specifies the items of which the average is to be ascertained. It is impossible to have an average unless two or more sums are under consideration. An average of the profits for a period is not intelligible unless the period is to be in some way considered as consisting of several parts. This consideration is reached if the meaning is that the average of the weekly or monthly profits over the number of weeks or the number of months that have elapsed during "the period" is the average to be computed, and that this average sum is to be attributed to the whole of the "one year," *i.e.*, the year of assessment. I think this is the meaning. I agree with Lord Sumner's judgment and think that the appeal should be allowed.

Lord Blanesburgh.—My Lords : For convenience of reference and at the risk of repetition I will begin by setting out Rule 1 (2) of the rules applicable to Cases I. and II. under Schedule D with the words placed in the order in which it is agreed that for the purpose of construing the rule they may properly stand.

"Where the trade . . . has been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment the computation shall be made according to the rules applicable to Case VI."

My Lords, on this sub-rule I venture to observe as follows :—

First of all, it is sufficiently clear that the expression "the profits or gains from the period of the first setting up of the same" are the equivalent of "the profits or gains arising or accruing during the period commencing with the first setting up of the same." In other words, except that the profits are those arising during a different period, the operation of averaging and its purpose and result are the same under this sub-rule as is the operation directed by Case I.

Secondly. The "period" of which the profits are to be averaged is identified by reference to another period referred to in the sub-rule as "the said period of three years," and the reference is made in a form which to my mind connotes inevitably that it is a shorter period than the period so referred to.

Thirdly. It is a period which commences after the other period has, in point of time, begun. It commences "within" that period. These considerations together strike me as almost necessarily, and without more, leading to the conclusion that the two periods are treated as ending at the same date. But when to them is added this further consideration that the shorter period in question must *commence* before the year of assessment—a condition shown by the later part of the sub-rule and one not only consistent with but confirmatory of the view that it does not continue after that date—this conclusion becomes inevitable if it be found that the same characteristic applies to the said period of three years itself. Now that this is

so appears from the description of that period given in Case I. to which this sub-rule is, as I entirely agree, in the nature of a proviso. That period is there described as one of three years

"ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

In the present case, I cannot doubt that the "period" ended on April 5, 1919, and, as it seems to me, the profits of this trade for the year April 6, 1919, to April 5, 1920, must be computed on a fair and just average, for a year, of the profits or gains which arose or accrued between March 1, 1919, when the trade was first set up, and April 5, 1919.

My Lords, I think that much of the difficulty which has beset this particular case is attributable to the final importance wrongly, as I believe, attached to the balance-sheet made up to December 31, 1919—a date which, in itself, has no relevance on the question at issue. I think the difficulty is further due to the fact that the light cast upon the whole of sub-rule 2 by the reference in it to "the said period of three years" has not been fully utilized.

I am in entire agreement with the rest of your Lordships as to the effect to be attributed to that sub-rule and as to the proper result of this appeal.

[Solicitors—Mr. F. B. Brook, for Messrs. A. V. Hammond and Co., Bradford; the Solicitor of Inland Revenue.]

Court of Appeal.
(Bankes and Sargant, L.JJ., and Avory, J.)
1927. Mar. 22.

PUTSMAN v. TAYLOR.*

Restraint of Trade—Agreement by servant not to compete with employer after termination of employment—Limits of time and area—Protection of employer's trade interests—Validity.

The defendant was employed by the plaintiff, a tailor, as manager and cutter, for 12 months certain, the employment being thereafter terminable by one week's notice on either side, under a written agreement which provided (*inter alia*) that "after a determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or . . . be employed in any capacity by any person, firm or company carrying on a business similar to that of the employer in Snow-hill, Birmingham, or within a half-mile radius of Aston Cross, Birmingham, or Bristol-road, Birmingham."

Held, that the limit of area, as well as the limit of time, applied to all the promises, and therefore it was not necessary to consider any question of severability; and that having regard to the fact that the defendant was an experienced cutter and was well known in certain districts of Birmingham, and to the necessary opportunities that he had of influencing customers, the covenant was not unreasonable to protect the employer's trade interests, and was not invalid as being in undue restraint of trade.

Decision of the Divisional Court (43 *The Times* L.R., 153; [1927] 1 K.B., 637) affirmed.

This was an appeal by the defendant from a judgment of the Divisional Court (43 *The Times* L.R., 153; [1927] 1 K.B., 637) granting an injunction to restrain the defendant, a former servant of the plaintiff, from competing in business with him (the plaintiff) after the termination of the service.

The plaintiff was a tailor carrying on business in Birmingham at three places—namely, Snow-hill, Bristol-road, and Aston Cross. The defendant was formerly in the employ of Dresdens, a brother-in-law of the plaintiff, who carried on business as a tailor quite near to the plaintiff and was a trade rival. One Joe Putsman, a brother of the plaintiff, also carried on business as a tailor at 73, Snow-hill, and was a trade rival of the plaintiff.

The defendant left the employ of Dresdens and entered the service of the plaintiff in March, 1925. The contract of service was in writing and was dated March 24, 1925. The employment was for 12 months certain, and after that was terminable by one week's notice on either side. The plaintiff promised to employ the defendant, to pay him £4 a week and a commission, and to allow him two weeks' holiday in a year at half wages. The defendant promised to serve the plaintiff as manager and cutter at Snow-hill, "or at such other place or places where the employer's business shall be carried on and as the employer may require," to serve with diligence and fidelity, to keep his employer's secrets, to keep and render accounts, not to compete or to be engaged in any other business, and not to compete after the determination of the service.

By clause 11 of the contract it was agreed as follows: "After a determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or be employed by Dresdens, tailors, or be employed in any capacity by any person, firm, or company carrying on a business similar to that of the employer in Snow-hill, Birmingham, or within a half-mile radius of Aston Cross, Birmingham, or Bristol-road, Birmingham."

Under this contract the defendant managed the plaintiff's business at Snow-hill, Birmingham, for 15 months. On Thursday, June 10, 1926, he went to the plaintiff's brother, Joe Putsman, and arranged with him to leave the plaintiff's service and enter that of Joe Putsman on the following Monday. On Saturday, June 12, the defendant paid the plaintiff £4 in lieu of a week's notice and left his service. On Monday, June 14, he entered the service of Joe Putsman, who exhibited a photograph of the defendant in his shop window with a notice that he had secured the defendant's services.

The plaintiff took proceedings in the County Court, claiming an injunction in the terms of clause 11 of the service agreement. He further submitted that, if clause 11 should be held to be too wide to be enforceable as a whole, he was entitled to an injunction restraining the defendant for a period of five years from the determination of the agreement from being employed in any capacity by any person, firm, or company in a business similar to that of the plaintiff in Snow-hill, Birmingham.

The County Court Judge rejected the claim to an

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

injunction in the terms of the whole clause. He held that the promise not to take service for five years with any tailor in Snow-hill was a promise which might properly be enforced as a separate promise if it were a valid promise, but he held that such a promise was invalid as being in undue restraint of trade.

On appeal, the Divisional Court held that the promise not to take service with any tailor in Snow-hill could be severed from the other promises and enforced, and that in view of the facts that the employment was highly confidential, that the service was for 12 months at least, and that the limit in space was very narrow, the time limit of five years was not such as to render that promise invalid as being in undue restraint of trade. They accordingly allowed the appeal.

The defendant appealed.

Mr. Bosanquet, K.C., and Mr. C. R. Williams appeared for the appellant; and Mr. R. A. Willes for the respondent.

Lord Justice Bankes.—In my opinion this appeal fails. Both the two learned Judges who decided this case in the Divisional Court gave very elaborate and very careful, and I think very accurate, judgments; but it really is not necessary, in my opinion, to go into the question with which they mainly dealt, and that is: What is the law at the present moment in reference to the severability of covenants in a case of this class? And the reason why I think it is not necessary is because I agree with the view which was indicated by Mr. Justice Talbot as his opinion in reference to the construction of the covenant. Mr. Justice Talbot, after referring to the case of *British Reinforced Concrete Engineering Company, Limited v. Schelff* ([1921] 2 Ch., 563), said (43 *The Times* L.R., at p. 157; [1927] 1 K.B., at p. 647): "The contract there was very different from that in the present case, and the decision that it was not severable clearly does not make the contract now sued on not severable. Moreover, I am of opinion that on the true construction of this agreement the contract not to carry on business is limited in space to the three areas specified. No doubt the words are capable of the other construction, but, if they are to be treated as ambiguous, it is right to give them the more limited of the possible meanings." Then he goes on to deal with the principle applicable to such a case.

It seems to me on consideration of this covenant that although the person responsible for it cannot be very proud of the drafting of it, yet it is, I think, reasonably plain that attaching a reasonable and fair meaning to the words used and putting a construction upon them which does not render them, for all practical purposes, absurd, one comes to the conclusion that just as the whole of the covenant must be governed by the period of five years by which it is introduced so also must it be governed by the area clause at the end, and both the opening words, the period of five years, and the concluding words, the area words, govern the whole covenant. If that is so, it is not necessary to go into the question of severability; the question is whether, taking the covenant as a whole, it is a reasonable protection for which the employer was entitled to stipulate. The County Court Judge has said that it was not, and he applies a process of reasoning to a principle which, with respect to him, I do not think is applicable to this particular case, and I agree with what the learned Judges in the Divisional Court said in reference to that. It seems to me that it is not possible to apply the same reasoning to a case where an experienced person is employed because of his already acquired experience, which his personal contact with the customers must necessarily give, in the same way as one would in the case of a person who comes into the business quite young and inexperienced and in the course of his employment gains business experience and knowledge, and who is not brought into touch with the customers so as to be in a position to influence them. It is not possible to apply the same test to those two classes of case. Here, this man is an experienced cutter, a man apparently well known in Birmingham or, at any rate, certain districts of Birmingham. He has got a *clientèle* and he is well known as a man of experience and ability, and he is engaged upon the terms that at the conclusion of the agreement he is not, for a period of five years and within quite a limited distance from his employer's three places of business, either to engage in business himself or to go into the business of a particular firm of tailors by whom he had previously been employed, or be employed within that area, and for that time, in any capacity with any person carrying on a business similar to the plaintiff's. It seems to me, having regard to the man's experience and the necessary opportunities he had of influencing customers, that that is not at all an unreasonable provision, or one which the law ought not to recognize as being in restraint of trade.

Mr. Bosanquet has taken two other points. He contends that "after a determination of this agreement" is to be read as including the case of a breach by the employer, so as to put him in a position to take advantage of his own wrong. Again, I do not agree with that, and I do not think it is a possible construction of this clause in the agreement, because it refers to "a determination of this agreement," and I think that means a contractual determination, a determination for any of the reasons indicated in the agreement itself, and "for any cause whatsoever" merely means for any of the causes indicated in the agreement itself. For these reasons, in my opinion, the appeal must fail and fail with the usual consequences in a poor person's case, which is, I believe, that nobody gets any costs.

Lord Justice Sargant.—I am of the same opinion. As regards the construction of the covenant, I think it is to be noted that it is limited both as regards time and as regards space. As regards time, the words of limitation seem to me to be quite clearly carried on over the whole range of the covenant. That being so, ought the words as regards space to be carried back so as to apply to everything in the covenant from the beginning onwards? I do not say that the grammar is particularly excellent or the expression very good, but I think the words are quite capable of having the words as to space carried back to the beginning; and I think that, unless one does so, one gets into a really almost absurd interpretation of the covenant. I think the fact that the limit as to time is to be carried forward right through forms a strong indication that the limit as to space ought to be carried right back and that both and not only one of them should apply to the whole range of the intermediate words in the covenant. If that is so, then we have this: a limit to Snow-hill and a limit to two areas which, if the centre point of the area were a point, not merely a road, would amount to something under three-quarters of a square mile each. The fact that a road is mentioned and not a point might, of course, considerably enlarge that area, but still the area seems to me to be not at all an unreasonable one. One has to bear in mind here that the person who is being employed is a person who has a considerable connexion and is employed

as a manager, and as a manager he necessarily must come largely into contact with the customers, must know their names, their residences, their peculiarities as to dress, and so on; and I cannot see that any help is to be derived by the defendant from the fact that he brought a *clientèle* of his own to the employers, because the employer is entitled to protect himself against his customers' being taken by the defendant, and if, in the course of providing against that, the words do also provide necessarily almost (because I do not see how a distinction could be drawn) against the defendant's also taking the clients whom he has himself brought to the business, so much the worse for the defendant. I cannot find in any case, and I have had occasion to consider these cases a good many times, that any stress has been laid by the Court upon the circumstance that the defendant was bringing into the stock of the business some connexion of his own. I agree, therefore, that the appeal should be dismissed.

MR. JUSTICE AVORY.—I agree; I have nothing to add.

[Solicitors—Messrs. Stibbard, Gibson and Co.; Messrs. Sharpe, Pritchard and Co., for Messrs. James, Barton and Kentish, Birmingham.]

K.B. Div. (MacKinnon, J.) } 1927. Apr. 6.

R. F. BROWN AND CO., LIMITED v. T. AND J. HARRISON.*

Contract—Carriage by sea—Responsibility of carrier—Fault of his agents or servants—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV., r. 2 (*q*).

By Art. IV., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . . (*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

The plaintiffs shipped a case of cotton goods on the defendants' steamer at Liverpool for carriage to Tampico and delivery there. Without the fault or privity of the defendants, and in spite of the vigilance of the ship's officers, the goods were stolen by the stevedores' men, who were engaged by the ship's agents to discharge the cargo at Vera Cruz, where the ship called before going to Tampico. In an action for non-delivery,

Held, that if the stevedores' men were servants of the defendants to effect discharge their stealing of the cargo was not an act in the management of the ship, and therefore the defendants were not protected by rule 2 (*a*); and that in rule 2 (*q*) the words "or without" must be read as "and without," and therefore, although the defendants themselves were free from blame, yet, since the stevedores were the defendants' servants or agents, and since the defendants, in order to succeed, had to prove that both they themselves and their servants or agents were free from blame, the plaintiffs were entitled to recover.

The plaintiffs in this action claimed £30 14s. 7d. for the non-delivery of a case of cotton goods sent from Liverpool to Tampico, Mexico, on a steamship managed by the defendants. Another case in the list was concerned with the non-delivery by the defendants of goods consigned to Vera Cruz, Mexico. The same points were raised in each case, and they were tried together.

Mr. Miller, K.C., and Sir Robert Aske appeared for the plaintiffs; Mr. Clement Davies, K.C., and Mr. Procter for the defendants.

It was stated by counsel that many other similar claims were pending and that the two actions now before the Court were to be treated as test cases governing the whole.

In January, 1925, the plaintiffs shipped a case of cotton goods at Liverpool on the defendants' steamer Spectator under a bill of lading dated January 15, 1925, issued by the defendants and acknowledging the receipt of the goods in good order and condition, and agreeing to carry them to Tampico and there deliver them. When delivered the case was broken and the goods had entirely disappeared.

Alternatively, the plaintiffs said that the defendants had received the goods to carry them for reward and had negligently lost them.

By their defence the defendants put in a general denial and pleaded, further, that the goods, if lost in fact, were lost owing to theft and/or pilferage on the part of Mexican labourers and/or custom house officers at Tampico without the fault, privity or neglect of the defendants, their servants or agents, and that the loss was therefore covered by an exceptions clause in the bill of lading which relieved the defendants from liability for "loss . . . caused by or arising from . . . robbers, thieves of whatever kind, whether on land or afloat or in the service of the carriers or not."

The defendants also pleaded that they were not liable because the plaintiffs had not given notice in writing of the loss as required by Article III., rule 6, of the Schedule to the Carriage of Goods by Sea Act, 1924, and they also relied on the provisions of Article IV., rule 2 (*a*) to (*q*), of that Schedule.

MR. MILLER, in opening, said that though the pleadings put everything in issue the parties had made admissions to one another which left only two important matters for decision, (1) the effect of Article III., rule 6, of the Schedule, and (2) the effect of Article IV., rule 2 (*a*) to (*q*). The really important matter was the effect of subsection (*q*), which was in the following terms:—

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

It was not suggested that there had been actual fault or privity of the carriers themselves, and the defendants contended that on the true construction of the subsection that was enough to relieve them of liability. The plaintiffs contended that though the words in the first part of the subsection were "without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier," the subsection must be read as a whole and the use of the words "neither" and "nor" in the latter part showed that the word "or," before the word "without," should be read as "and." The defendants must therefore prove that not only they personally, but also their agents and servants, had been free from default.

The Court could construe the word "or" as "and" if it was necessary to do so in order to carry out the real intention of the Legislature—*Metropolitan Board of Works v. Steed Brothers* (8 Q.B.D., 445); *Walker v. York Corporation* (22 *The Times* L.R., 456; [1906] 1 K.B., 724); *Royal Exchange Assurance Corporation v. Kingsley Navigation Company* ([1923] A.C., 235, at p. 245).

Mr. Clement Davies called evidence to show that every precaution had been taken to guard against theft. The thefts, said counsel, had been committed by the local stevedore's men, and the Custom house men were in league with them and no police assistance was obtainable. The ship's officers and the cadets watched as carefully as possible to see that no robberies took place, but they felt that they could not rely much on the crew to help them. There was great difficulty at Mexican ports generally. When the hatch was opened at Tampico the case of goods now in question was found to have been broken into, and this must have been done at the previous port of call, Vera Cruz. The stevedores' men carried knives and were very hostile in their attitude; they used to drop heavy packages on light packages in order to burst open the latter and steal the contents. When complaint was made to the Custom house officials they only laughed.

Counsel submitted that the defendants had done everything that could possibly be done in the circumstances, and that the loss did not occur through any fault or neglect of their agents or servants. It had occurred by some cause other than those enumerated in subsections (*a*) to (*p*). The theft was committed by the stevedores' men, who were engaged by the ship's agents at Tampico, and the fault of agents did not include the fault of agents of the ship's agents.

There was no ground for saying that in subsection (*q*) the word "or" must be read as "and." The shipowner was to be free from liability in both cases if he was not negligent himself and if his servants were not negligent. The Act had been fully discussed, it had been agreed between shipowners and freighters, and the words used must have been deliberately used. The Court was entitled to alter a word in an Act only if it was impossible to make sense of the Act otherwise, and here the words were perfectly intelligible. If the word "or" was to be altered now it could be altered only by an amending Act—*Machu v. London and South Western Railway Company* (2 Ex. 415, at p. 425).

Further, if it was held against the defendants that the stevedores' men were in fact agents of the defendants, and that theft by those men was a fault or neglect within the meaning of the subsection (*Marriott v. Yeoward*, 25 *The Times* L.R., 755; [1909] 2 K.B., 987), discharge of cargo was still an act in the management of the ship and the defendants were protected by rule 2 (*a*) from liability for any act, neglect or default of their servants in the management of the ship. Management included the safeguarding of the cargo from the time of loading to the time of discharge.

In the course of the argument the defendants abandoned their other defences and relied only on rule 2 of Article IV. of the Schedule to the Act.

Mr. Miller replied. Management did not include felonious acts by the defendants' servants. In contracting to carry the goods to Mexico the defendants must have known that serious difficulties were likely to arise in discharging and they should have taken some extra precautions.

Mr. Justice MacKinnon, in giving judgment, said that the questions in each of the two cases were the same and the facts were similar. There could be no doubt that the goods were stolen by the Mexican labourers employed by the stevedores to discharge the cargo, and the question was whether rule 2 relieved the defendants from their *prima facie* duty to deliver.

The defendants relied, first, on subsection (*q*). They had proved that there was no actual fault or privity of the owners or managers of the ship. Was that enough to establish immunity? Or must the word "or" before the word "without" in the earlier part of subsection (*q*) be read as "and" so that the defendants must establish both their own innocence and that of their agents or servants?

In a previous case, *Heyn v. Ocean Steamship Company* (43 *The Times* L.R., 358), the same question had been raised before him, but there it was not necessary to decide it. In this case, however, the point was definitely taken, and he must deal with it.

If the subsection had ended before the word "but" it would not have been possible to read "and" for "or," whatever opinion one might have had as to the policy and intention of the Legislature. But the subsection continued, and in the latter part used the words "neither" and "nor," with the result that there was a clear inconsistency between the two halves of the subsection. To make the whole consistent one must either read "and" for "or" in the first part or alter the wording of the second part.

The case of *Walker v. York Corporation* (22 *The Times* L.R., 456; [1906] 1 K.B., 724) showed that to obtain consistency it was legitimate for him to read "and" instead of "or," and to do so would give a less surprising result than to alter the latter part of the subsection. He therefore held that "and" must be read instead of "or" in the early part of the subsection, and that the defendants must prove that both they themselves and their agents or servants were free from blame.

He was satisfied that the ship's officers did their duty as well as they could in the very difficult circumstances. It was known that the Mexican labourers would loot the cargo whenever they got a chance, and nothing short of a man to watch every labourer all the time would have been enough to ensure safety. But though the officers did their duty he thought that the stevedores themselves were the servants or agents of the defendants, and if, therefore, the defendants could only rely on subsection (*q*) they must fail.

It was said, however, that they were protected by subsection (*a*), because the act of the stevedores' men in stealing the cargo was an act of the defendants' servants in the management of the ship. He should despair of ever finding a satisfactory definition of the

word "management." It was so vague that it was almost impossible to say whether any act constituted management, but he was not satisfied that if the stevedores' men were servants of the defendants to effect discharge their stealing of the cargo was an act of management of the ship. That point also failed. There must be judgment for the plaintiffs, with costs.

[Solicitors—Messrs. Thain Davidson and Co.; Messrs. Pritchard, Englefield and Co., for Messrs. Simpson, North, Harley, and Co., Liverpool.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. Apr. 6.

HART v. RIVERSDALE MILL COMPANY, LIMITED.*

Master and Servant — Truck Acts — Lancashire cotton trade — "Standard list" of wages — Deductions for bad work — Truck Act, 1831 (1 and 2 Will. IV., c. 37), ss. 3, 23—Truck Act, 1896 (59 and 60 Vict., c. 44), ss. 2, 9.

Section 3 of the Truck Act, 1831, provides for the payment in current coin of the realm of "the entire amount of the wages earned by or payable to any artificer . . . in respect of any labour." Section 23 permits an employer to make, and contract to make, reasonable deductions from wages in respect of certain specified matters. Section 2 of the Truck Act, 1896, prohibits an employer from making, except under certain conditions, "any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman for or in respect of bad or negligent work or injury to the materials or other property of the employer. . . ." Section 9 provides for the exemption from the provisions of the Act by order of the Secretary of State of persons engaged in certain trades, either generally or within a particular area. By order dated March 3, 1897, the Secretary of State exempted from the provisions of the Act persons engaged in the weaving of cotton in Lancashire.

The appellant, a weaver of cotton in Lancashire employed by the respondents, was negligent in performing certain work and, in accordance with a custom which had long existed in the Lancashire trade, the employers deducted a reasonable sum from the "standard list" rates of wages which had been agreed between the employers' and workers' organizations, as the remuneration for good, merchantable cloth, and paid her the balance as her wages.

Held, that this deduction was not illegal as being in contravention of the provisions of the Truck Acts, since the implied contract between the parties was that the appellant should be paid according to the "standard list" subject to a fair deduction for bad work, and the deduction was made from the standard list to ascertain the wages earned and was not made from the wages earned.

Decision of the Divisional Court (43 *The Times* L.R., 73; [1927] 1 K.B., 624) affirmed.

This was an appeal from a decision of a Divisional Court of the King's Bench Division (43 *The Times* L.R., 73; [1927] 1 K.B., 624), which raised a question of great importance as to the legality of the customary method of paying piece-workers in the textile trades—namely, whether deductions could lawfully be made for bad or careless work. The question came before the Bolton justices, who stated a case for the opinion of the High Court.

The appellant, a woman textile piece-worker named Nellie Hart, preferred in the Bolton police court against the respondents, her employers, the Riversdale Mill Company, Limited, a claim under the Employers and Workmen Act, 1875, for the sum of 6d., being the balance of wages alleged to be due to her and to have been unlawfully deducted by the employers, who counterclaimed for 1s. in respect of damages suffered by them through the negligence of the appellant.

It was admitted that the appellant was negligent, and that the 1s. claimed by the employers was a fair claim for the damage done to the employers' cloth through her negligence.

The case stated found that it was the duty of the appellant to weave a good merchantable cloth by performing her work without negligence and in a careful manner; that she was to be paid for her work according to a standard list, an implied condition of which was that the prices in the list should apply to good merchantable cloth produced by the observance by the appellant of her duty as a weaver. There was a practice to pay more than the standard price, if the materials provided by the employer were defective, as payment for extra work due to defective material. But if the workmanship of a weaver was bad or negligent, there was, and had been for many years, a custom to pay a sum less than the sum contained in the standard list—namely, the standard list price less compensation assessed by the employer of a reasonable amount in respect of the loss suffered by him through damage to his cloth. It was admitted for the purpose of the case that the deduction of 6d. was fair and reasonable and less than the actual loss caused to the employers.

The employers contended that section 3 of the Truck Act, 1831, which made deductions from standard wages illegal, had nothing to do with a deduction for bad work; that the amount of wages "earned by" and the amount "payable to" a workman were not necessarily the same thing, but that in this case the amount shown in the standard list was not "earned" because some of the work was bad, and that that amount was subject to a deduction for bad work. Nor was it "payable" to the weaver, because the amount to be paid was the net wage after the deduction, which formed no part of the wages. They further contended that the effect of the Order made by the Home Secretary on March 3, 1897, exempting the cotton weaving industry from the operation of the Truck Act, 1896, was to leave the industry free to make contracts permitting deductions in respect of bad work.

On the part of the appellant it was contended that the claim was based upon section 3 of the Truck Act, 1831, and that the Truck Act, 1896, had no application to the case.

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqrs., Barristers-at-Law.

The justices were of opinion that the standard list was the rate of wages applicable and held that the employers had illegally deducted 6d. by way of fine from the wages of the appellant, and gave judgment for her for 6d. On the employers' counterclaim the justices gave judgment in their favour for 1s.

The employers appealed.

The Divisional Court by a majority (Mr. Justice Avory and Mr. Justice Salter—the Lord Chief Justice dissenting) allowed the employers' appeal.

Miss Hart appealed by leave of the Court.

Mr. Eastham, K.C., and Mr. Neville Laski appeared for the appellant.

Sir John Simon, K.C., Mr. Cyril Atkinson, K.C., and Mr. Harold Derbyshire for the respondents (the employers) were not called upon to argue.

The Master of the Rolls, in giving judgment, said that he agreed with the majority in the Divisional Court. He would be sorry to weaken in any way the effect of the Truck Act, 1831, which said in section 3 that

"The entire amount of the wages earned by or payable to any artificer . . . in respect of any labour by him done . . . shall be actually paid to such artificer in the current coin of this realm. . . ."

But the facts as found in the case stated must be considered and the Court was bound by those findings. In those findings was the fact that the right to make certain deductions had always been part of the weaver's contract of service. There had always been a scale allowing for deductions and additions, and, though it was also found that the weavers as a class had always objected to the deductions, yet the custom had gone on for very many years.

In the standard list of prices payable to the piece workers there was not only provision for deductions in the case of unsatisfactory work, but there was also a provision that if the materials provided by the employer were not good he was to pay the piece workers on a higher scale. Further, as those provisions were bound to lead to disputes, there was a provision for settling them. From the standard list, and from the facts as found, it seemed therefore clear that deductions were a recognized custom, and that on the other hand there was also to be compensation in the form of increased pay for having to work with bad material.

The point was made that by deducting the 6d. the employers had not paid the "entire amount" to the artificer, but, if a calculation could be made which allowed a deduction for bad work and an increase for bad material, it was impossible to say until that calculation had been made what the wages earned really were, and, therefore, what the "entire amount" might be.

In *Chawner v. Cummings* (8 Q.B., 311, at p. 323) Lord Denman said :—

"Now it is to be observed that *payment* otherwise than in money is alone prohibited. Deductions or charges are nowhere mentioned or alluded to before the 23rd section, hereafter to be considered. Then are these deductions in the nature of payment at all ? It seems to us to be the mode of calculating the amount of wages and nothing more. Whether the arrangement took place at the beginning or end of the work makes no difference, because it is stated that the deductions were made according to the usage of the trade, and that the plaintiff knew it, and was dealt with accordingly. The plaintiff, therefore, must be presumed to have contracted upon the usual and well-known terms, and his wages so ascertained have been actually received by him in the current coin of the realm."

Those words seemed to be clearly applicable to the present case. In *Archer v. James* (2 B. and S., 61) the *Chawner* case (*supra*) was questioned, but for all that it still stood as an authority.

In *Williams v. North's Navigation Collieries* (1889), *Limited,* Lord Davey said (22 *The Times* L.R., 372 ; [1906] A.C., 136, at p. 143) :—

"*Archer v. James* (*supra*) was a similar case and was decided in the first instance on the authority of *Chawner v. Cummings* (*supra*). In the Exchequer Chamber three Judges held that *Chawner v. Cummings* (*supra*) was wrongly decided, and three other Judges on the other hand approved the decision, and held that the deductions in question in the case before them were in the same category and were elements only in calculating the real amount of the workman's wages."

That last sentence of Lord Davey put the point very shortly. Was this deduction a sum of which the appellant could lawfully be deprived in calculating the "real amount" of her wages, or was it a sum deducted after her proper wages had been ascertained? In the latter case it would be a sum which the employers had chosen to deduct from the sum which they were bound to pay in its entirety. To him (the Master of the Rolls) it seemed that it was the former. *Chawner v. Cummings* (*supra*) applied to the present decision, whereas *Williams's* case (*supra*) did not.

It seemed to him that the 6d. was not a deduction from the appellant's wages due to her as an "entire amount," and that the employers had not offended against the Truck Act, 1831. Rather, the deduction seemed to be a loss suffered by the appellant in a calculation which, when made, would determine the sum which she ought to receive as wages. The appeal would be dismissed.

Lord Justice Scrutton said that, giving the best attention he could to the case, he thought that the views expressed by the majority in the Divisional Court must prevail. The question was : Was this a case where the wages of the worker, being calculated on a certain understanding, were found to be 6d. less than might have been the case under other circumstances, or was it a case where a worker, having agreed to do work for a named sum, ought to receive that sum, and the 6d. knocked off had the effect of diminishing a sum properly payable ? As far as the findings of fact were concerned, the present Court was bound by them, and to him (Lord Justice Scrutton) they indicated that the present case was one of contract, and not of breach of contract. They showed that the deductions in question had been going on for many years, and had been taken into account in fixing the standard rates. The wages depended upon the quality of the work. It was a matter of contract that wages should be so much less if the work were not up to standard, and so much more if the material supplied made work difficult, and it was doubtless to be construed as a term of the contract that the deductions should be reasonable. True it was that the workers had always objected to the deductions on principle, but there was a contract of a kind which included them, and it was not affected by those objections.

It was said by the appellant that though there might have been a custom to make these deductions, yet these deductions were illegal under the Truck Act, 1831. In *Chawner v. Cummings* (8 Q.B., 311), however, it was said that these deductions were "the mode of calculating the amount of wages and nothing more." In *Archer v. James* (2 B. and S., 61) the question again came up. The Court below decided

for the employers, and the Court of Exchequer Chamber was equally divided, which meant in fact that the Court of Exchequer Chamber decided the question in the same sense; a decision which was binding upon the present Court. Counsel for the appellant had argued that all deductions from wages were illegal, but in the Employers and Workmen Act, 1875, section 11, it was enacted that "In the case of a child, young person, or woman . . . any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work," and that was a statutory recognition that there were cases in which a deduction might properly be made from wages.

Counsel for the appellant referred to sections 1 and 2 of the Truck Act, 1896, and said that these sections gave power to the employer to make deductions in certain cases only, and that implied that he could not do so under the Act of 1831 at all. But that contention was destroyed by section 8, which said that "Nothing in this Act shall make lawful any contract or payment which is illegal under the Truck Acts, 1831 and 1887 . . . ," showing that the right must have existed before. For those reasons, and on the findings in the case, he (Lord Justice Scrutton) thought that the contract fixed the terms of settlement between the parties. The price ultimately fixed was the weaving price, and the so-called "deduction" was made before the wages were fixed, and not afterwards.

Lord Justice Sargant said that he was of the same opinion, and as the ground had been completely covered by the judgments delivered it was not necessary for him to add anything except that the provisions of the Truck Act, 1896, referred to by Lord Justice Scrutton seemed to be the decisive factor.

[Solicitors—Messrs. Patersons, Snow and Co., for Messrs. Fielding and Fernihough, Bolton, for the appellant; Messrs. Gregory, Rowcliffe and Co., for Messrs. John Taylor and Co., Manchester, for the respondents.]

K.B. Div. (MacKinnon, J.) 1927. Apr. 7.

OSE GESELLSCHAFT, &c. v. JEWISH COLONIAL TRUST.*

Bankers — Negligence — Transmission of money abroad — Cheque sent by registered letter — No insurance — Failure to reach payee — Forgery of indorsement—Clearance of cheque —Non-liability of bank.

The plaintiffs, being customers of the defendants, who were bankers in London, instructed them to transmit a sum of money to a person in Rumania, and the defendants sent a cheque by registered post to him personally. The cheque never reached him, but someone apparently put on it a forged indorsement of his name, and it was eventually cleared through a bank in Poland, and the defendants debited the plaintiffs with the amount. In an action for negligence the plaintiffs alleged that the defendants should have sent the cheque by a letter which was insured in addition to being registered.

Held, that as the loss of a cheque was a rare occurrence, and as the standard of the defendants' duty should not be measured by a consideration of all the precautions which subsequent events might suggest, the action failed.

The plaintiffs in this action sued for a sum of £227 8s. as money held by the defendants to their use or, alternatively, as damages for negligence and breach of duty.

Mr. Conway, K.C., and Mr. Woolf appeared for the plaintiffs; Mr. Wilfrid Lewis for the defendants.

The plaintiffs were a German society formed to raise funds from the charitable and to give help to poor Jews resident in Eastern Europe. The defendants were a company carrying on the business of bankers in London.

In December, 1923, the plaintiffs were customers of the defendants. On December 2 they wrote to the defendants instructing them to send a sum of £227 8s. to a Dr. Jakir Ose at Chisinau, in Rumania. The defendants accordingly sent him a cheque by registered post. The plaintiffs said that the cheque never reached him, but was stolen by someone in transit; that a forged indorsement in the name of Jakir Ose was put on the cheque; and that it was eventually cleared through a bank in Poland. The defendants debited the plaintiffs with the sum in their account.

The plaintiffs now contended that in sending out the money in an ordinary registered letter the defendants had failed in their duty. They said that the proper course would have been for the defendants to instruct their correspondent bankers in Rumania to hand the money to Jakir Ose; or, if they preferred to send the money out by cheque, they should have sent it by an insured letter in accordance with the regulations contained on p. 29 and pp. 566 and 567 of the British Postal Guide for July, 1923, which was the guide then in force, and in accordance with the law of Rumania at that time in force.

By their defence the defendants denied that they were under a duty to do anything more than send a cheque in a registered letter. They also pleaded that whatever their duty might otherwise have been the course of business between themselves and the plaintiffs justified them in acting as they did.

Mr. Lewis submitted, first, that the plaintiffs must prove that Jakir Ose never in fact received the money. Secondly, the British Postal Guide regulations referred to were only intended to give information as to the law in force in Rumania and were in no sense law themselves. Thirdly, the Rumanian law was probably only intended to prohibit the export of securities from that country and was not concerned with money going in. Even if it did refer to money going into the country it only amounted to advising what would be the most prudent course and did not make it illegal to send a cheque uninsured. There was therefore no negligence on the part of the defendants.

Evidence was called on both sides.

Mr. Justice MacKinnon, in giving judgment, said that the plaintiffs were a charitable institution in Germany and the defendants were bankers in London, and at the material time their relations were those of banker and customer. The plaintiffs, on December 2, 1923, wrote to the defendants to transmit £227 8s. to Jakir Ose in Rumania, and the defendants sent a cheque by registered letter to him personally. It never

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

reached him and the plaintiffs now sued the defendants for alleged breach of duty in failing to carry out their mandate and for negligence in not carrying out their duty with reasonable care and diligence. The plaintiffs contended that the defendants should either have transmitted the money by communicating with their local correspondents and getting them to pay Jakir Ose, or, if they preferred to use the method of sending a cheque, that they should have insured it besides registering it. They added that the Rumanian law made the duty to insure additionally clear.

It was easy to be wise after the event and it was clear now that it would have been safer to have transmitted the money through a banking correspondent, but it appeared that the practice was only to pay through a correspondent when the transmitting bank had sufficient funds to meet the payment standing to their credit with the correspondent.

Out of many transactions that was the first occasion on which trouble had arisen through the sending of a cheque, and the plaintiffs had been notified that that cheque was being sent and they raised no objection. The evidence showed that the defendants had sent scores of cheques for the plaintiffs to places all over Eastern Europe and no trouble had resulted before. In his view, therefore, the plaintiffs had entirely failed to make out that by sending a cheque instead of paying through a correspondent the defendants had failed to use reasonable care.

Then it was said that the letter ought to have been insured as well as registered, especially in view of the Rumanian law. On the evidence he concluded that all that the Rumanian law amounted to was this: that if one sent paper money or securities to Rumania by registered letter one did it at one's own risk. No doubt that was an element to take into consideration in deciding whether it was reasonable and prudent to insure. The defendants did insure in cases where they were sending bank notes, but not where they were sending cheques.

It was clear that the loss of a cheque was a rare occurrence and he did not think that it would be right to measure the standard of duty of the defendants by a consideration of all the precautions which in the light of after events would have given a safer course. There must therefore be judgment for the defendants, with costs.

[Solicitors—Messrs. Emanuel, Round and Nathan; Mr. Albert M. Oppenheimer.]

Court of Appeal. } 1927.
(Lord Hanworth, M.R., and Scrutton, L.J.) } Apr. 8.

JOSEF INWALD ACTIENGESELLSCHAFT v. PFEIFFER.*

Treaty of Peace—Debt incurred before outbreak of war—Austrian creditor—Norwegian debtor—Action by creditor incompetent—Treaty of Peace Order, s. 7.

The defendant, a Norwegian subject, living in England, incurred a debt to the plaintiffs, an Austrian company, before the outbreak of war. After the Treaty of Peace the plaintiffs sued the defendant for the amount. The Judge in chambers made an order striking out the claim, on the ground that the only right to sue for the debt was in the Administrator of Austrian property. The plaintiffs appealed. It was admitted on their behalf that any money recovered by them would be subject to the provisions of the Peace Treaty and the charge thereby created.

Held (*per* Lord Hanworth, M.R., Scrutton, L.J., dissenting), that although the claim was against a neutral subject, yet, as s. 7 of the Treaty of Peace Order made the debt payable to the Administrator and transferred to him all the rights of the creditors, the plaintiffs had no right to bring the action.

As the two members of the Court differed, the order of the Judge in chambers stood.

This was an appeal by the plaintiffs, an Austrian company, who had brought an action on a specially indorsed writ claiming £494 for goods sold and delivered to the defendant, who was a Norwegian subject living in England. The debt was incurred in 1914 before the outbreak of war. The defendant contended that the only right to sue for it was vested in the Administrator of Austrian property, and he applied that the claim should be struck out. The Master in Chambers made an order striking out the claim and his decision was affirmed by Mr. Justice Shearman.

The plaintiffs appealed.

Sir Walter Greaves-Lord, K.C., and Mr. Scobell Armstrong appeared for the appellants; Mr. Aronson for the respondent; and Mr. H. M. Giveen for the Administrator of Austrian property.

Sir Walter Greaves-Lord said that under the Treaty of Peace Order there was an express prohibition of legal proceedings between the nationals of the two parties, and a charge was created on all the property rights and interests in the British Empire belonging to nationals of the former Austrian Empire.

But the debt now in question was not an "enemy debt": it was a debt due at the outbreak of war from a neutral subject resident in England to an Austrian company. The right to sue for that debt was suspended, not destroyed, by the war, and was revived on the making of the Peace Treaty.

It was admitted the Administrator could sue for and recover the debt, but he had refused to do so, except upon receiving a deposit of £50, a guarantee of a further £500, and the full costs of all proceedings, with an indemnity against further costs which might be incurred. The plaintiffs could not submit to those terms, and, to prevent the Statute of Limitations from running out, issued a writ against the defendant and made the Administrator a second defendant for the purpose of enforcing his charge. A summons for directions had been taken out under which the plaintiffs asked leave to file a statement of claim to supersede the specially indorsed writ, and that question now stood over.

The defendant's attitude was that the plaintiffs could not sue at all, but that, even if they could sue, they could not deal with any property recovered without committing a breach of the provisions of the Peace Treaty. The existence of a charge on the debt assumed that, subject to the charge, the property was a right of action vested in the plaintiff.

Mr. Aronson and Mr. Giveen addressed the Court.

The Master of the Rolls, in giving judgment, said that the appeal must be dismissed. Having

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

stated the facts, he said that the case raised difficult and complex questions, but he had come to the conclusion that the order made by Mr. Justice Shearman was right. It was not contested by Sir Walter Greaves-Lord that any money recovered by the plaintiffs would be subject to the provisions of the Peace Treaty and the charge thereby created.

His LORDSHIP then read Article 249 (*b*) of the Peace Treaty creating the charge and giving the right to the Allied Powers to retain and liquidate all property in their territory belonging to nationals of the former Austrian Empire. The property in question, though the claim was against a neutral subject, was none the less subject to the charge, for if it were recovered it would become the property of an Austrian national in this country (Article 250, paragraph 4 of the annex thereto). The Treaty of Peace Order provided for the carrying into effect of such charge and gave the Administrator wide powers to enforce it.

By section 7, paragraph (*x*) (*ee*) :—

"Where the property right or interest subject to the charge consists of any sum of money due to a national of the former Austrian Empire (not being an enemy debt within the meaning of Article 248 of the Treaty) it shall be payable to the Administrator, and the Administrator shall have power to enforce the payment thereof, and for that purpose shall have all such rights and powers as if he were the creditor."

Moreover, the plaintiffs could not transfer or otherwise deal with any of the money recoverable in the action. The plaintiffs, therefore, were not able to take any proceedings to recover the money, because if they did the defendant would plead that any money so recoverable could only be payable to the Administrator. The effect of sub-paragraph (*ee*) was practically the same as that of (*f*), which empowered the Board of Trade to make a vesting order vesting any property subject to the charge in the Administrator.

The effect of the Order was to transfer all the rights of the creditor to the Administrator, who had a discretion as to the terms on which he would take proceedings. It was clear that here he might be involved in litigation of a complex character. It might be said, though he (his Lordship) did not think so, that there was some apparent hardship in the case, but that was a matter of the Treaty alone, which might have been right or might have been wrong.

The expression "charge" was not quite the proper term to use if it was thereby suggested that there was some kind of equity of redemption. It was not contemplated by the Treaty that the ex-enemy national had any equity of redemption; his sole right was a claim to be compensated by his own Government.

The terms of the Peace Treaty and the Peace Treaty Order were far too strong to enable the plaintiffs to contend that they had any right to bring the action. Any right of the plaintiffs to be enforced against the defendant was to be at the suit of the Administrator. The action was therefore wrongly constituted, the order of Mr. Justice Shearman was right, and the appeal must be dismissed, with costs.

LORD JUSTICE SCRUTTON, having stated certain of the facts, said that if the case had been left to him sitting alone he would have taken a different view and allowed the appeal, but the Master of the Rolls, who had had far more experience of Peace Treaties than he had, did not agree, and he would be content to say that there being a difference of opinion the order made below should stand. In the circumstances he did not desire to go at length into the reasons, which he had suggested during the argument, for his difference of opinion, as they might only have the effect of encouraging expensive litigation. The appeal would be dismissed.

[Solicitors—Messrs. Neve, Beck, Son and Co.; Messrs. Cardew Smith and Ross; the Solicitor to the Clearing House.]

K.B. Div. (Branson, J.) } 1927. Apr. 8.

COLE AND ANOTHER v. MERTON PARK (WIMBLEDON) GOLF CLUB, LIMITED.*

Club—Proprietary golf club—Rights of members — Extraordinary general meeting — No notice to women members—Validity of resolution—Rules of club — Women members not full members.

The plaintiffs were the captain and the secretary of the women's section of a golf club, of which the defendant company were the proprietors. At an extraordinary general meeting of the members a resolution was passed deleting from the rules of the club a provision for the election of a women's committee to manage the affairs of the women's section. No woman member of the club received notice of that meeting, as none of the women members held any shares in the company. In an action for a declaration that the resolution was invalid,

Held, that under the rules women members were not full members and were not entitled to receive notices of general meetings, and therefore the action failed.

This was an action in which Miss Thyrza Helen Cole, of The Green, Wimbledon, S.W., and Mrs. Violet Tummons Myhill, of Minsterworth, Cottenham Park-road, Wimbledon, who had been elected the captain and the secretary of the women's section of the Merton Park Golf Club, claimed from the defendants, the proprietors of the club, a declaration that a resolution passed at an extraordinary general meeting of the club on February 12, 1927, was invalid.

In the alternative, they claimed that that resolution was not retrospective and that the plaintiffs were entitled to discharge the duties of captain and honorary secretary of the women's section during the remainder of their year of office.

In 1926 disputes among the women members of the club took place, with the result that an extraordinary general meeting of the members was held on February 12, 1927, and a resolution was passed deleting from the rules of the club a provision for the election of a women's committee to manage the affairs of the women's section of the club. Miss Cole had been appointed captain and Mrs. Myhill had been appointed honorary secretary of the women's section in November, 1926. No woman member of the club received notice of the extraordinary general meeting of February 12, 1927.

Sir Henry Maddocks, K.C., and Mr. J. P. Eddy appeared for the plaintiffs; Mr. J. B. Melville, K.C., and Mr. Cartwright Sharp for the defendant company.

* Reported by T. S. BOYD and G. F. L. BRIDGMAN, Esqrs., Barristers-at-Law.

Sir Henry Maddocks read an affidavit of Mr. William Thomas Curtis, the captain of the club, in which he said that neither of the plaintiffs nor any of the lady members held any shares in the company. There had been a bitter quarrel, which was still continuing, among the members of the ladies' section. It was the only desire of the committee and himself to arrive at some solution which would check the quarrel, as it was likely to bring the whole club into disrepute and to render friendly relations impossible.

The committee never approved of the election of the plaintiffs to their offices, and they had grave doubts as to the validity of that election. It was alleged that neither of the plaintiffs was elected by voting, but that Miss Cole declared herself and Mrs. Myhill to be elected, on the ground that no other effective nomination had been received. In fact, the nomination of a Mrs. Baker as captain and secretary had been received, but was returned on the ground that the same person could not be nominated for both posts.

It was further stated that at an annual general meeting of the ladies' section it was resolved that the club committee should be asked to take over the affairs of the ladies' section. The committee were very anxious to smooth over the difficulties of that section, and they accordingly invited the members to an informal meeting. It was suggested at that meeting that the office-bearers should resign and that a new annual general meeting should be called and new officers elected.

The plaintiffs and other members absolutely refused to resign, and in view of that the committee came to the conclusion that the resolution that the committee should take over the ladies' section should be made effective. The necessary resolutions were passed at an extraordinary general meeting of the club held on February 12, 1927. Lady members were not entitled to receive a notice of that meeting or to attend and vote at any general meeting of the club. In conclusion, it was submitted that the committee had power to remove any of the ladies alleged to have been elected and to make such arrangements for management as they thought fit.

Evidence having been called for the plaintiffs,

Mr. Melville, in opening the case for the defendants, said that this was an important case for golf clubs, as the administration of this golf club was similar to the administration of many other golf clubs all over the country. If his Lordship should hold that these ladies had the right to attend the general meetings it would upset the domestic arrangements of many other clubs. The ladies' section were not shareholders in the company, and he submitted that only those persons who held shares under the rules had any voice in the management of the club or any right to attend the meetings. The names of the parties had not appeared in last year's year-book.

Counsel said that he had come to the conclusion that it was unnecessary to call any evidence for the defence. It was also undesirable that one member of a club should be called to contradict another member. Before the present proceedings no woman member had ever asked to be summoned to general meetings of the club and had never protested against not being summoned. The rules of the club were to be construed with the defendant company's memorandum and articles of association to which they were subject.

The scheme adopted with regard to the defendant company's club was clearly to divide the members into two classes—one consisting of the full and five-day members, who took up shares and had a full voice in the management of affairs, and the other consisting of the non-proprietary members, who were the women members, the country members, the junior members, and the temporary members. The Court would not interfere by a very drastic remedy in the purely domestic matters of a club—a course which the Court always took with reluctance. The Court was being asked to stifle the acts of the club committee by directing that they were to carry on the women's competitions through Miss Cole and Mrs. Myhill.

Sir Henry Maddocks, in reply, said that the members of a proprietary club had a stake in the club as well as the company that owned it. The contract between the proprietors of a club and the members under which each member became a member of the club was contained in the rules. Arising out of the same transaction there could also be a contract between a new member and the old members.

An action for damages lay against the proprietors of a club by a member who was damnified by a breach of the rules. The Court very jealously guarded the exercise of rules which might do injury to a member's reputation. Junior members were the only class of members of the club who, it was provided by the rules, should have no voice in the management of the club. If women were not "members" of the club they could be expelled and socially ruined without any redress. Even though a woman had more restricted privileges than those enjoyed by men members, she was entitled to have proper notice of extraordinary and annual general meetings, and the fact of that notice not having been sent to Miss Cole and Mrs. Myhill rendered invalid the resolution passed on February 12, 1927.

Mr. Justice Branson, in delivering judgment, said that the question before him was whether the meeting of February 12, 1927, was properly called under the rules of the club, or whether the fact that no women members were summoned to it was a breach of the rules and rendered it void. The case turned on the proper construction which was to be placed on the rules of the club.

The articles of association of the defendant company provided that every member of the club should hold at least two shares in the company and the rules of the club had to be construed with reference to the memorandum and articles of association.

The decision in the case depended on the view which was taken of the use of the word "members" in the rules. The plaintiffs had contended that a woman member was a member in every respect and, as such, was entitled to vote for the committee of management of the club and to attend annual and extraordinary general meetings. When one looked at the rules, although it was perfectly true that the word "members" was used in different senses in different rules, it emerged clearly that a distinction appeared in rule after rule between a full member of the club, who was entitled to a voice in the management, and a woman member, who was entitled only to certain very restricted privileges of the club. The management of the club was obviously intended to be maintained in the hands of the men's committee.

Ever since the formation of the club in 1920 it had been assumed that the opinion which he now expressed about the meaning of the rules was correct, and the women members of the club had been aware that the view taken by the management of the club was that they were not entitled to receive notices of general meetings. It was unfortunate that the rules were not quite so clear as they might have been made with a little more care in drafting.

Had he been forced to hold that the resolution of

February 12, 1927, was invalid he would still have found himself in some difficulty, because the relief claimed by the plaintiffs seemed to go further than that which had ever been given in any Court in a case involving the internal management of a club. The action failed.

Judgment was accordingly entered for the defendants, with costs.

[Solicitors—Mr. G. E. H. Bellingham; Messrs. Lawrence, Graham, and Co.]

House of Lords.
(Viscount Haldane, Viscount Sumner, Lord Atkinson, Lord Wrenbury, and Lord Blanesburgh.)

1927.
Apr. 4.

THE RUAPEHU.*

Ship—Ship repairers—Dockowners—Damage by fire in dry dock—Ship undergoing repairs—Limitation of liability—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 and 64 Vict., c. 32), s. 2.

By s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, "(1) The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . performs any duty or exercises any power . . . (4) For the purpose of this section the term 'dock' shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks. . . ." The defendants' steamship, while undergoing repairs by the plaintiffs in the plaintiffs' dry dock at Blackwall, sustained damage by fire, the outbreak of which was found to be due to the negligence of the plaintiffs' servants employed in the repairs. The plaintiffs therefore claimed a declaration that as dockowners they were entitled under s. 2 of the Act of 1900 to a decree limiting their liability.

Held (Lord Wrenbury and Lord Blanesburgh dissenting), that though the work in which the negligence occurred, giving rise to the liability of the plaintiffs in the present case, was work done by the plaintiffs in the capacity of ship repairers and not in the capacity of dry dock owners, s. 2 applied and the plaintiffs were entitled to limit their liability.

Decision of the Court of Appeal (42 *The Times* L.R., 708; [1927] P., 47) affirmed.

This was an appeal by the defendants from a decision of the Court of Appeal (42 *The Times* L.R., 708; [1927] P., 47) reversing a judgment of Mr. Justice Hill (42 *The Times* L.R., 468).

The action was brought by Messrs. R. and H. Green and Silley Weir, Limited, who were the owners of a dry dock at Blackwall, where they carried on the business of ship repairers, to limit their liability under the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, for damage done by fire to the defendants' steamship Ruapehu while she was undergoing repairs by the plaintiffs in their dock in May, 1923. In an action tried in 1924 the plaintiffs were held liable for the damage. They now claimed to limit their liability to £69,067, being £8 per ton on the tonnage of the largest vessel using their docks in the preceding five years.

At the hearing on February 25, 1926, however, it was agreed that the question of amount should stand over pending the decision of the question whether the plaintiffs were entitled to limit their liability at all under section 2 of the Act of 1900, which provided:—

"(1) The owners of any dock or canal, or a harbour authority, or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock . . . owner . . . performs any duty or exercises any power.

"(4) For the purpose of this section the term 'dock' shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places and jetties."

It was admitted that the fire in question occurred without the actual fault or privity of the plaintiffs.

Mr. Justice Hill held that the section only limited the liability of a dockowner as dockowner, and did not include a liability for anything which a dockowner might choose to do in any other capacity; that the work in which the negligence occurred giving rise to the liability of the plaintiffs in the present case was work done by the plaintiffs in the capacity of ship repairers and not in the capacity of dry dock owners; and that, therefore, section 2 did not apply and the plaintiffs were not entitled to limit their liability.

The Court of Appeal (Lord Justice Bankes, Lord Justice Atkin, and Lord Justice Sargant) allowed the appeal, being of opinion that some limitation must be placed on the general words of the section, otherwise they would lead to an absurdity. They said that the question was whether the limitation must refer to acts done by the dockowner in his capacity as such or whether it must be limited to acts done on the premises. It was simpler to apply the section with a limitation as to area, and it was much more probable that that was the intention of the Legislature. Section 2, therefore, applied to the facts of this case.

Mr. W. A. Jowitt, K.C., and Mr. G. St. C. Pilcher appeared for the appellants; Mr. H. P. Macmillan, K.C., Mr. G. P. Langton, K.C., and Mr. K. S. Carpmael for the respondents.

Viscount Haldane.—My Lords: This is an appeal from a judgment of the Court of Appeal which reversed a judgment of Mr. Justice Hill in an action brought by the respondents as plaintiffs in which they sought to limit their liability for damage and loss arising out of a fire to £69,067 7s. 2d. with interest. This limitation was claimed under section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, which enacts that, *inter alia*, the

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

owner of docks of various kinds, which include dry docks, is not to be liable for loss or damage to any vessel, where the loss or damage is caused without his actual fault or privity, beyond a statutory limit. It is conceded that there was neither actual fault nor privity in this case. The respondents are the owners of a dry dock at Blackwall, and they carry on there the business of ship repairers.

In May, 1923, the s.s. Ruapehu was lying in the respondents' dry dock at Blackwall undergoing repairs which they were carrying out. A fire took place in her hold and the vessel was seriously damaged. The owners commenced an action for such damage before Mr. Justice Hill. He gave judgment for the owners against the present respondents. The Court of Appeal affirmed his decision. The respondents then commenced the present action for a declaration, under the Merchant Shipping (Liability of Shipowners and Others) Act of 1900, of limitation of liability. The question was raised whether the respondents were dockowners within the meaning of section 2 of that Act, a preliminary point which was disposed of adversely to the respondents by Mr. Justice Hill as Trial Judge, but in their favour by the Court of Appeal. The only question now before the House on this appeal is whether the decision of the Court of Appeal in the respondents' favour on this point was right.

Section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, enacts (subsection 1) that "the owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods or merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding" a defined sum per ton of certain kinds of tonnage of ships which within a limited period have been "within the area over which such dock or canal owner, harbour authority, or conservancy authority performs any duty or exercises any power." Subsection 3 enacts that section 504 of the Merchant Shipping Act, 1894, shall apply to this section as if the words "owner of a British or foreign ship" included a harbour authority and a conservancy authority and the owner of a canal or of a dock. Subsection 4 declares that for the purpose of this section the term "dock" shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-places, and jetties. It is clear that the respondents' dry dock at Blackwall was, at the material period, within the section.

The real question which we have to determine is whether the Act means that the respondents, who were repairers as well as dockowners, when doing the work which resulted in damage, are entitled to invoke the language used, or whether the limitation of liability is confined to acts done or omitted to be done by those whose function is that of dockowners only, and not, as in this particular case, of repairers also who are carrying out the repairs.

Mr. Justice Hill, the Trial Judge, thought that the negligence for which the present respondents had been held liable had nothing to do with docking, or the arrangement of shorers or blocks, or the pumping out or letting in of water, or other matters necessary to the proper management of a dry dock or of a ship in relation to a dry dock. The work of the respondents was done, he thought, in the capacity of ship repairers, and not in that of dry dock owners. If shipowners were to hire space in a dry dock belonging to a public authority, and to employ ship repairers to do repairs to a ship while she lay there, and the repairers incurred liability by negligence, it would be clear that the liability as repairers did not amount to liability as dockowners. When liability is incurred by exactly the same kind of negligence, he was of opinion that the fact that the ship was in dry dock did not turn the work into work done in the capacity of dockowners, for the mere circumstance that the ship was in the repairers' dry dock could not have that effect. If the negligence gave rise to a fire in the sheds belonging to the yard of those claiming limitation of liability, and if the fire spread to the ship, no one could say that this was negligence of the claimants in the capacity of dry dock owners, or that the liability was incurred in that capacity. This illustration, and other analogous illustrations which the learned Judge gave, seemed to him to show that the liability in the present case did not arise from negligence in work done in the capacity of dockowners.

My Lords, the first observation which occurs on this reasoning is that the question what liability arose must be determined by the words used in the section, and not from what might reasonably be expected in the actual circumstances of a case such as this. The Legislature has, on grounds which may seem good or seem bad, employed certain language. With the special grounds which influenced it we have nothing to do. The only question is whether the words are clear. Now, turning to these, I cannot find any ambiguity in the language. It declares that the owner of a dry dock is not to be liable in excess of the statutory limit, and the conditions defining the limit are to be sought for within the area over which the dockowner performs any duty or exercises any power. There is not a word about the capacity in which the dockowner has acted. It may well be that Parliament desired to encourage the construction of docks even by professional repairers. The expressions used in the statute are indistinguishable from those used in the Merchant Shipping Act of 1894 and in earlier Acts of which that statute took the place. The dockowner is put in the same position as was a shipowner. Now, if we turn to the case of a shipowner, a question analogous to that which arises in this case was settled as long ago as 1872, not, it is true, by this House, but by the full Court of Appeal in Chancery, constituted of Lord Selborne, Lord Justice James, and Lord Justice Mellish, in *London and South-Western Railway Company v. James* (L.R., 8 Ch., 241). The railway company, who were also shipowners, contracted to carry passengers and goods through from London to Guernsey. The passengers and goods were taken under the through contract by railway from London to Southampton, and were there put on board a ship which belonged to the railway company. A particular ship, on her way to Guernsey, came into collision with another ship and sank, with several of the passengers and all the goods. On claims for damages in respect of loss of goods and of life it was held that the railway company was entitled to the limitation on liability imposed by the then Merchant Shipping Act of 1862, section 54, the terms of which were for present purposes completely similar to those as regards ships of the Act of 1894. It was argued that the limitation had no application to the case of persons and goods carried by the shipowner when he was not merely shipowner but also carrier. But Lord Selborne and the Lords Justices held that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief given by the statute.

My Lords, the case which I have cited presents only an analogy, but I think that the analogy is a very close one, especially for the reasons given in some detail, not only by Lord Selborne, but by Lord Justice Mellish. The Court refused to entertain a distinction founded on the capacities in which the railway company contracted. It was held that the words of the enactment were so free from ambiguity as not to admit of any such distinction being drawn. Liability for what happened by the loss of the ship was specifically limited. I cannot find that this decision was noticed in the Courts below or in the arguments here, but I think that the principle adopted in it comes very close to that of the present case.

In the Court of Appeal, where the judgment of Mr. Justice Hill was reversed, Lord Justice Bankes held that some restriction must be put on the generality of the words in the section enacting the limitation. He thought that this was the result of the decision in the case of *The City of Edinburgh* (37 *The Times* L.R., 148, 468; [1921] P., 70, 274). That was a case in which by the negligence of the servants of a firm of ship repairers a vessel and its cargo were damaged by fire. The repairs were being done in a dock belonging to the Mersey Docks and Harbour Board. The ship repairers sought to limit their liability on the ground that they were owners of a dry dock at Garston, some distance away. It was held by Mr. Justice Hill, who also tried that case, that they were not entitled to a limitation of their liability under the section which we have to construe. For the section, in restricting the liability of the dock-owner, had, in his view, regard to the area over which he "performs any duty or exercises any power." The liability was one incurred by the ship repairers as such at a distance, and not as dockowners or at or near their dock.

The Court of Appeal (Lord Sterndale, M.R., and Lords Justices Scrutton and Younger) affirmed this judgment, but expressions were used by the two former which point to a somewhat different reason from that of Mr. Justice Hill having been in their minds. Lord Sterndale thought that the words must refer to a limitation of liability of the dockowner as such—*i.e.*, "in respect of something in some way connected with his dock." Lord Justice Scrutton considered that the very wide words, if interpreted in their widest sense, would lead to absurdity, and it was an absurdity to limit the liability of a person who owned a dock for anything that he chose to do in another capacity. Thus, while Mr. Justice Hill made area or geographical restriction the basis of his judgment, the Court of Appeal, or at any rate the majority there, determined the case rather on the principle of distinguishing the capacity in which the repairer acted. I am not sure that Mr. Justice Hill, in his judgment in the present case, was not influenced contrary to his own opinion towards the view of capacity rather than of geographical area (which appears to have been adopted by the Court of Appeal), which differed from his opinion on the point in the case of *The City of Edinburgh* (*supra*). Anyhow, in reversing his judgment in the case now before us, the Court of Appeal, differently constituted, reverted to the principle that the basis of the limitation was area and not capacity. Lord Justice Bankes expressly says so. He doubted whether *The City of Edinburgh* (*supra*) was really based on any different principle, although he admits the ambiguity of some of the expressions used in it. He held that to introduce a limitation which depends on the nature of the act done was to create unnecessary confusion. It was simpler to read the limitation as confined to area. Lord Justice Atkin agreed. He considered that to read the words of the section literally and to apply them to the circumstances of the present case gave rise to no such absurdity as was contended for in *The City of Edinburgh* (*supra*). Moreover, it would often be impossible to determine whether particular work was done by a person as repairer or as dockowner. Lord Justice Sargant agreed. He held that there was no such absurdity in the repairers' contention as would justify a departure from the grammatical and ordinary interpretation of the words used in the statute.

My Lords, I also think that the words of the statute are too plain to admit of any other restraint being put on their operation than that of geographical area. I think that this is the result of the interpretation placed on the statute in 1872 in *London and South-Western Railway Company v. James* (*supra*). That interpretation appears to me to be the true one, and I am of opinion that this appeal should fail.

Viscount Sumner.—My Lords: The respondents, the plaintiffs in the limitation action, carry on business as ship repairers at Blackwall, where they own a dry dock. While they were repairing the appellants' s.s. Ruapehu in their dry dock, fire broke out, without their actual fault or privity, and great damage was done to ship and cargo, for which at common law they were responsible. The evidence in the damage action was to the effect that the same negligence would have caused the same fire if the repairing work in question had gone on while the ship was afloat. No further evidence now material was given in the limitation action, but it was common ground that the respondents' business is to repair ships, and that at the time in question they were using their dry dock for the Ruapehu in the ordinary course of business. I think we must take this state of facts as the basis of this appeal. True, we do not know whether the respondents have a wet dock or any other submerged ground than such as may be necessary for docking and undocking ships in connexion with the dry dock; we do not know whether they also do repairs to ships afloat within their premises or to ships elsewhere whether afloat or not; we do not know whether they have any other business than that of ship repairers, but it seems to me that, if any of these questions could have affected the solution of the problem which arises on the *prima facie* case for limitation of liability, the appellants should have provided the materials for such answers as might have served to modify or to negative that right. For present purposes the respondents are dry dock owners; the damage was done in their dry dock and by their servants in the course of their employment; and we know of no business carried on by the respondents except that of ship repairers who use their dry dock for that purpose.

My Lords, the language of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, is clear enough. "Dockowners," which includes dry dock owners, without any specification of the use to which they put their docks, are expressly empowered, when liable for damage to ship and cargo occurring without their actual fault or privity, to limit their liability as the respondents claim to do. The appellants' argument really is that the respondents are nevertheless not within the Act, because they are dry repairing dock owners, and themselves use their dry dock for one of the main purposes for which dry docks exist—namely, ship repairing. To adopt this argument is practically to strike dry docks out of section 2, subsection (4). The short answer is that the Act says nothing of the kind. The respondents

fall within the description of those persons on whom the right of limitation is conferred. What is there in the words to restrict this description so as to exclude them ?

The City of Edinburgh (37 *The Times* L.R., 468 ; [1921] P. 274) does not, in my opinion, touch this case. What had to be decided and what was decided there was this—how far, if at all, was the right to limitation available, where the ownership of the dock and the use of that dock had no connexion whatever with the damage or with the injured ship or cargo. The answer was not at all. A contrary conclusion would have made the Act confer a personal immunity, at the expense of owners of ships and cargoes whom they had wronged, upon persons who happened to own a dock somewhere else. The policy of the Act, beyond an intention to protect dockowners from being crushed by liabilities for accidents, which they cannot always avoid, is not declared on its face and would only be a subject of speculation now, but it certainly is safe to say, as Lord Sterndale said, that the section refers to a limitation of liability of the dockowner in respect of something in some way connected with his dock. This is the true ground of this decision, which, as a decision, cannot be questioned. I do not think it is either accurate or helpful to argue that this is a "docks clause" not a "repairers' clause," or that the action which leads to the liability must have been action by a dock-owner "as such" (except in the sense of the above words) or must have consisted in "dockowning activities." If a dry dock owner or a graving dock owner is within the section, whether or not (so far as the words go) he repairs ships in his dock or only hires it to others, I cannot see why he is not acting as a dry dock owner "as such" when he repairs a ship in his own dock in the ordinary course of business. The appellants' argument really begs the question and further introduces criteria for distinguishing one case of damages from another, almost infinitely complex, almost impossible to apply, and most arbitrary in their operation. The Act says nothing about them. They would not have been even plausible but for the notion that there is something in this kind of limitation which public policy requires us to restrict, but this, as it seems to me, is purely a matter for the Legislature. True, there is the rule that those who claim exemption from a common-law liability must bring themselves within it, but this depends on the language of the Act. Here the right to the limitation is clear, provided that the respondents are dockowners, as they are.

The question is asked, *à propos* of Lord Sterndale's canon in *The City of Edinburgh* (*supra*), "What connexion is there in this case between the dry dock and the fire in the ship's hold ?" The answer is, "The ship was in the respondents' dry dock and it was because she was in that dry dock that their careless workman was employed upon her at that time." True, he might equally have been employed on the Ruapehu if she had been lying afloat at buoys in the Thames and might have been equally careless there, but these were not the facts. It is true also that, if independent repairers had been at work on the Ruapehu in the respondents' dock and had been liable for the fire, they would have been liable in full, but that is because they would not be dock-owners in any way connected with the damage. Just as we cannot, as a matter of construction, extend the section to them when they are not dockowners, so we cannot exclude the respondents from it when they are. The proposition is not, "necessarily connected" or "inevitably connected" with the dock, but actually connected with it in some way. On the appellants' argument in half the cases of fire on board ship the shipowner would lose the benefit of the statutory limitation, because, as fire will break out equally on shipboard as on shore, if you upset lighted lamps or fling lighted matches among inflammable merchandise, there would be none but a casual connexion between the burning of the cargo and the ownership of the vessel. This would revolutionize what is well settled under the Act of 1894 and many earlier Acts. I see no reason for treating the amending Act of 1900 in any different way. It may be that the section fastens on ownership because the ground of the limitation may be supposed to be the great inroad upon the property owned by the judgment debtor if he were cast in damages without statutory limit, though this would have been an argument for deciding *The City of Edinburgh* (*supra*) the other way, but it throws no light on the question before us or, if it does, the light favours the respondents, for the judgment debtors are equally liable for their servants' wrong-doing to the full extent of their property, whether the servants were heating rivets or fixing shores.

My Lords, I think further that nothing can be founded upon the specification of the parties who are to enjoy the benefit of limitation of liability, or on the reference to the "area" over which they "perform any duty or exercise any power." These expressions form part of the context, but they neither add to nor take anything from the main operative words. The parties are four, dockowners (with a statement of what the word "dock" includes), canal owners with no such statement, harbour authorities, and conservancy authorities, both of these last as defined in the Merchant Shipping Act, 1894, section 742, and not *prima facie* as owners of docks in any sense of the word. I find nothing here that excludes the respondents from being "dockowners" or that restricts the kind of operation in the course of which the liability that is to be limited is to arise. The reference to an "area" is inserted primarily in order to show where the appropriate measure for the amount of the limited liability is to be found, but in any case the Ruapehu was within the respondents' "area" when she was burnt. The words "performs any duty or exercises any power" are, it is true, odd words to apply to a private company using its own business premises and are suggestive of public authorities and undertakers, but, unless they have the effect of excluding private owners from the category of dockowners, which they clearly have not, they carry the present issue no farther. As for the observation that the section, by including wharves and jetties in docks, may raise some difficult questions, when we come to consider whether in such cases the damage is "connected with" the dock, I agree that they may, and will consider them when they do, but I need say no more about them now.

The only sound way of construing such a section is to follow its exact words and give effect to them unless some plain necessity can be found for implying some limitation. There is no absurdity, no repugnance, no inconsistency, produced by reading the words in their plain grammatical sense, and, when they are so read, the conclusion must be that at which the Court of Appeal arrived. With that I agree. I think the judgment of the Court of Appeal should be affirmed and that this appeal should be dismissed.

Lord Atkinson.—My Lords : The facts have already been fully stated and it is unnecessary to

repeat them. The parties are practically agreed as to the question which arises for decision in this appeal.

The appellants in the seventh paragraph of their case state it as follows :—

"7. It was agreed, as appears from the correspondence passing between the parties previous to the trial of the action before the Honourable Mr. Justice Hill, that the question raised by paragraph 3 of the amended defence as to whether the respondents were dockowners within the meaning of section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, and as to whether they were entitled to limit their liability as such in the special circumstances of the present case, should be tried as a preliminary point, and this is the only question for decision upon the present appeal."

The third paragraph of the amended defence runs as follows :—

"The defendants deny that the plaintiffs are dockowners within the meaning of 63 and 64 Victoria, c. 32, and further say that the said liability of the plaintiffs was incurred by them as ship repairers and not as dockowners."

And the respondents in the second paragraph of their case state it as follows :—

"The sole question which arises on this appeal is a preliminary point of law, namely, whether the respondents (plaintiffs in the action) who are owners of a dry dock at Blackwall are entitled by virtue of section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 and 64 Victoria, c. 32), to limit their liability in respect of a fire caused by the negligence of their servants on board the s.s. Ruapehu at a time when the said steamship was lying within the respondents' said dry dock."

A reference to a most helpful authority, not cited in argument, but appealing to one's common sense, at least in my view, shows that the contention of the parties is based upon a false principle. That authority is the case of *London and South-Western Railway Company v. James* (L.R., 8 Ch., 241). I shall refer to the case in detail presently, but I think I may at once say that it appears to me to determine that the right of the owners of a ship which has been lost or has met with an accident depends not so much on what was the nature of the thing which met with the accident causing damage as upon what that particular thing was engaged in doing at the time when the accident happened. The particular thing in that case was a ship, and the work which she was engaged in doing was carrying passengers and goods from Southampton to Guernsey. Repairs, even substantial repairs, may be executed on a ship while she is in a wet dock belonging to certain owners, such as putting new boilers or engines into her while she is afloat, just as they may be done possibly in a graving dock belonging to the same owners. In both cases she is in the hands of repairers, the only difference being that she rests upon and is upborne by the water in the one case, and rests upon mechanical supports in the other, but the owners of the docks, the harbour authority, or the conservancy authority, exercise control over the graving dock as they do and claim to do over the floating dock. I think it is a mistake to suppose that in the case of the graving dock this authority of the dockowners, the harbour authority, or the conservancy authority is entirely superseded by that of the repairers, who happen to be executing repairs upon the ship, which it would not be if the repairs were effected in a floating dock. In the case of *London and South-Western Railway Company v. James* (*supra*) through tickets were purchased by the passengers from the company in London covering the whole journey by sea and land from London to Guernsey. No tickets of any other kind were issued to them in London, and no tickets of any kind were issued to them in Southampton. When they arrived there they straightway embarked on a steamship bound for Jersey, in this case named the Normandy. Goods were loaded on this vessel to be carried to the same destination. In the course of the voyage the steamship Normandy collided with another steamship named The Mary, and sank.

Many of the Normandy's passengers and their luggage and effects were lost and all her cargo was lost. In cross suits between the owners of the two vessels the Normandy was held alone to blame. Several actions were brought against the company, some by passengers for loss of luggage, injury and delay; some, under Lord Campbell's Act, by the administrators of the passengers who were lost. A case for limitation of liability was instituted in the Court of Admiralty, and an order was made by that Court restraining all these actions on payment by the company into Court of the sum of £6,376, being £15 per ton on the gross tonnage of the Normandy plus interest. On January 27, 1872, the Court of Exchequer, in an action instituted by one John James, one of the Normandy's passengers, decided that a writ of prohibition should issue to prohibit the Judge of the Court of Admiralty from enforcing the injunction issued by him.

This judgment was affirmed by the Court of Exchequer Chamber. This decision left the persons who had brought actions, or intended to bring actions against the company in respect of the collision, free to proceed with them. The company thereupon filed a bill against the owners of the steamship Mary, and against the several persons who had actually instituted or threatened to institute actions against the company, stating the above facts, and also stating that the collision had occurred without the actual fault or privity of the company, and claiming that the company as the owners of the Normandy were entitled to such limitation of their liability as was in that behalf provided by the Merchant Shipping Act of 1854 and the Amendment Act of 1862, and alleging that the company for the purposes of the suit admitted their liability to the extent and to the amount mentioned in these Acts, and were willing to pay £15 per ton on the gross tonnage of the Normandy and interest thereon.

The bill prayed for a declaration that the company were, as owners of the Normandy, entitled to the benefit of the limitation of liability under the Merchant Shipping Acts, and that the losses and damages in respect of which they were answerable might be determined as the Court should direct, and that the defendants might be restrained from proceeding further in this suit or actions against the company.

John James, one of the passengers, denied that he had any notice of a by-law or any notice of the vessel by which he was to travel. The company allowed judgment to go by default in each of the actions which had been brought against them, but the damages had not been assessed. The Master of the Rolls granted an injunction against all the litigants except James. The other litigants were to be at liberty to have their damages assessed but not to levy them. The company appealed. The appeal was heard by a full Court. The principal point made upon the appeal was that the company were in this case acting as carriers of persons and goods, and that the Merchant Shipping Acts had no application to such cases.

Lord Selborne, in giving judgment, said at page 250 of the report that "the ordinary case was not excluded, and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner; nor is this inference rebutted by the subsequent repeal of this section (*i.e.*, section 505 of the Act of 1854)." Lord Justice Mellish delivered a most helpful judgment. He said: "I think that the case clearly comes directly within the words of the Act. The London and South-Western Railway Company were the owners of the ship Normandy, and they are sued by Mr. James for damages on account of the loss of goods which were being carried on board that ship. The case being directly within the words, it ought to be held within the Act, unless it is clearly not within what was the scope and intention of the Legislature in passing the Act. But what was the scope and intention of the Legislature in passing the Act? Ever since the reign of George II. there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons to embark their capital in ships by limiting the liability to be incurred by the loss of goods; and this, previously to Lord Campbell's Act, was the principal liability. It was thought expedient to limit the liability, because a ship might carry gold, or goods of great value, and then, from some trifling act of neglect on the part of the master, or on the part of the man steering the vessel, the shipowner might be made subject to enormous liability. On that account the Legislature thought it was for the public advantage that there should be this limit on the liability of the owner. Why should that not apply to the case before us? The London and South-Western Railway Company are encouraged by that limitation of liability to embark, as shipowners, in the trade of carrying passengers and goods between Southampton and Jersey, and I do not understand what the grounds are upon which it is said they are not to avail themselves of this limitation. The ground put by the Master of the Rolls is simply that the passenger took a through ticket from London to Jersey. It was admitted that if the passenger had taken a ticket from London to Southampton, instead of from London to Jersey, and when he got to Southampton had walked on board the ship and had gone as a passenger to Jersey, then he would be subject to the limitation. But what possible object can there be in holding that, in order that the company may avail themselves of the limitation, it shall be necessary to deprive all their passengers of the convenience of paying for their ticket at one time, instead of paying on two different occasions? Such a decision would not deprive the company of the benefit of the Act, and would only put the passengers to inconvenience. In my opinion the case is both within the words and within what I think was the spirit of the Act."

The words of this judgment apply as appropriately to the owner of a dock as they do to the owner of a ship. Are not the owners of docks encouraged by the right of limitation of liability to embark as dockowners in the trade of affording facilities to ships to load and unload and be repaired in their dry dock? It is admitted that the words of the second section of the Merchant Shipping (Liability of Shipowners and Others) Act of 1900 must be construed, if they are to be at all reasonably construed, so as to put some limit on its general language. This must, I think, be so, because the liability which is to be limited is the liability which would fall upon the dockowners if sued at common law for injury done to a ship in their dock by reason of the negligence of their servant. If the dockowners had docks at Leith and also docks at Southampton, and a ship was injured in the docks at Leith by reason of the negligence of the owner's servant, then if the dockowner was sued at common law in respect of the injury done at Leith, everything connected with the dock at Southampton would *prima facie* be held to be irrelevant and could not be gone into. Yet, as I understand it, it is contended that when the question is what liability is to be imposed, the condition, value or management of Southampton Docks, though at common law irrelevant, becomes relevant for the purpose of fixing liability. This inquiry as to the limitation of liability must, in my view, be confined to the condition of things and the occurrences in the docks in which the accident took place.

Lord Justice Bankes said that the second section of the Act of 1900 should be construed as if the words "whilst being at or upon the dock or canal" were, as I understand, inserted after the word "vessel" and before the words "be liable to damages beyond an aggregate amount not exceeding . . ." These words will effect the just and desired object of confining the liability which is to be limited to damages inflicted in the docks or canal mentioned earlier in the section.

On that construction, which, in my view, is necessarily the right one, the appeal fails and should be dismissed with costs.

Lord Wrenbury.—My Lords: The question to be decided is as to the nature of the acts in respect of which a dockowner is by virtue of section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, entitled to limit his liability. If he carries on the business not of a dockowner only, but of a ship repairer also, is he entitled to limit his liability in respect of acts done by him as a ship repairer?

I have to assume that such events have happened that the dockowner has come under a common law liability in damages for some act done by his servants without his actual fault or privity. The section is one by virtue of which he is not to be liable in full for the damages which he is at law liable to pay. He is to be liable, so to speak, for less than he owes. It would be a material assistance if some principle could be suggested for this remission of liability, but it would seem to be the fact (and I accept it as being the fact) that the only ground for it is that a ship is a chattel of so great a value that a full liability would be so heavy that the construction and ownership of docks would be discouraged unless limitation of liability were sanctioned. This, however, does not give much assistance towards determining what the extent of the concession is to be in order to achieve the object in view. But it does give some assistance towards saying that it is to the dockowner *qua* dockowner that the privilege is given.

The question is entirely one of the true meaning of section 2 of the Act, and I prefer, in the first instance, to endeavour to ascertain that meaning for myself by a careful perusal of the section without reference, for the moment, to any authority; applying the usual principle of scrutinizing the language used, regarding in every case the context, bearing in mind the object indicated by the words, and thus settling the true meaning of the section in the particular circumstances of this case.

A dockowner, let us say, who is also a ship repairer, does acts in reference to a ship in the dock which he owns, but they are acts which are referable not to his character of dockowner but to his character of ship repairer. Is he entitled to limit his liability? That is the question. Purposely I assume that acts

as dockowner and acts as ship repairer are capable of being discriminated. If they are not and all the acts may be taken as being done as dockowner, the question under debate does not arise.

The first guidance that I obtain in reading the section is that the dockowner is one of a group of four persons or bodies who are grouped together and form the common nominative to the verb which follows. They are : (1) the owners of any dock ; (2) the owners of any canal ; (3) harbour authorities ; and (4) conservancy authorities. The last three of these four are not bodies likely to be contemplated as carrying on the business of ship repairers. I am entitled, I think, to say that the Legislature when it mentions the dockowner is thinking of a dockowner comparable with the other three bodies, and not of a dockowner who may be carrying on other business in connexion with ships, *e.g.*, as ship repairers or persons who supply ships' tackle.

Further, I find that by virtue of the definition in section 2 (5) the owner of a wharf or pier or jetty is, for the purposes of the Act, a dockowner. Many repairs may be done without going into dry dock. If a ship repairer, who undertakes the repair of a ship afloat, builds or buys for the purposes of his business a pier or jetty and moors the ship there while he is executing the repairs, is he a dockowner entitled to limit his liability in respect of acts done as a ship repairer ? It is truly said, I think, that it would be a cheap mode of insurance for such a ship repairer to become a dockowner by building or buying a pier.

The Court of Appeal measured the dockowner's right to limit his liability in respect of acts done as a ship repairer by geographical considerations, impressed, seemingly, by the fact that the section attributes importance to the area of the dock, since in measuring the limit of liability the ship whose tonnage is to determine the limit is to be the largest which, within a certain time, has been within the area. But there is nothing in the section to convey that the right to limit liability, as distinguished from the measure of the liability, is to be governed by the relative positions of the ship and of a dock which the ship repairer happens to own. If *The City of Edinburgh* (37 *The Times* L.R., 148, 468 ; [1921] P. 70, 274) was rightly decided (and I think it was) in my judgment it governs this case—not, of course, that it binds this House, but that in material facts it is not distinguishable. A decision is indistinguishable when not the facts but the material facts are the same. *The City of Edinburgh* (*supra*) differs from this case only in the one fact that the dockowner who was repairing the ship was repairing it in a dock which was not his own. The dock that he owned was some miles away. In the present case the dockowner was "at home" ; he was repairing the ship in a dock which he owned. I fail to see any ground upon which he should be entitled to limit his liability in the one case and not in the other. As a dockowner he either is or is not entitled to limit his liability in respect of acts which he does in a business other than that of dockowner. He must succeed in claiming limited liability, if at all, by reason of the fact that he is a dockowner, not by reason of the fact that he is a dockowner "at home." I agree with Lord Sterndale that the liability in respect of which he claims limited responsibility must be a liability of the dockowner as such—*i.e.*, in respect of something in some way "connected with his dock," and with Lord Justice Scrutton that his limited liability as a dockowner does not extend to "anything which he chooses to do in any other capacity."

In *London and South Western Railway Company v. James* (L.R. 8 Ch., 241) a question arose upon the Act, but the facts were inverted. The railway company were, as shipowners, entitled by virtue of the statute to limit their liability. The question was whether they had *forfeited* that right because they were also a railway company and contracted with the passenger to carry him on a journey which, commencing with a journey by rail, included a passage by sea. It was held that they had not. Here the question is whether the ship repairer has *acquired* a right to limit his liability by reason of the fact that he is a dockowner and is repairing a ship in his own dock. *London and South Western Railway Company v. James* (*supra*) would have been in point if the accident had happened on the railway and the company had contended that their immunity as shipowners extended to the railway journey. That, of course, was not the case. I fail to see that that decision has any bearing upon the present case.

Everyone is agreed that some limitation must be placed upon the very general words of the section, because there would otherwise be included cases in which the application of this section would lead to an absurdity. The proper limitation is, I think, to read the section as if it contained the words "as such" so that the dockowner as such will enjoy the benefit in respect of acts done by him as dockowner.

In my opinion the appeal should be allowed.

Lord Blanesburgh.—My Lords : That the actual decision of the Court of Appeal in the case of *The City of Edinburgh* (37 *The Times* L.R., 468 ; [1921] P., 274) was not only right but inevitable no one at your Lordships' Bar has been bold enough to contest. Any other result on the facts of that case would have been absurd. Nevertheless the dockowners there, on the grammatical and ordinary construction of the words of section 2 (1) of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, seemed entitled to claim a decision in their favour. The words of the section so construed appeared to cover their case exactly. Yet they failed, and, as is now agreed on all hands, they rightly failed, and for one of two reasons, either of which was, in that case, adequate. They failed, either because it was, as is suggested, the opinion of the Court of Appeal that the section is only operative to limit the liability—say of the owner of a dock—in respect of a claim within the section which is made against him in that character ; or they failed, as is suggested by the respondents, because the damage there sued for was sustained by the City of Edinburgh when she was outside the area of the repairers' dock, and the Court of Appeal was of opinion that the section was, on construction, when a dock was in question, confined to cases where the vessel was actually within the dock at the critical moment.

My Lords, I was myself a party—albeit, a silent party—to that decision of the Court of Appeal. I have my own views of what the Court intended to decide. A statement of them might not have been irrelevant when this case was in the Court of Appeal. It would be of no moment now. The whole question is at large in this House, and it being conceded that the section, if absurd results are not in many cases to ensue, must be held to be limited either in the one way or in the other, the duty is now cast upon your Lordships to choose between these two alternatives. The choice is vital. In the present case everything turns upon it. If the appellants' limitation be accepted—I may compendiously describe it as a "limitation by function"—their appeal will, I think, succeed. If the respondents' be adopted—their

limitation may be termed a "limitation by area"—then even more inevitably the appeal must fail.

Some of the considerations to which your Lordships will have regard in making your choice between these two alternatives are not, I should suppose, open to controversy. The House would hesitate to accept a form of limitation calculated to lead to absurdities only less numerous and serious than those from which the unqualified section has been rescued. A limitation again would be at once suspect if, as its result, it excluded from the benefit of the section cases for which, having regard to its whole frame and tenor, it must be presumed the Legislature intended to provide. Still another consideration occurs to me as apposite. The benefit of the section is extended to four classes of beneficiaries compendiously described as, the owner of a canal; the owner of a dock; a harbour authority; a conservancy authority. To each of these classes, various as they are in responsibility and status, the section extends a privilege in terms identical. It would seem to follow that any proper modification introduced into it must also with equal appropriateness apply to every case, and as the selection made will, when promulgated, apply to each member of every class benefited, it should owe nothing to the accidental circumstances of the case in which it was called for. In other words, while your Lordships, in making your final choice, will not forget the position of the owner of a dry dock, who repairs vessels within it, neither will you fail to have regard to the position under the section of the other beneficiaries, for example, that of a harbour authority, to which I will allude later.

Real assistance in this most important inquiry is, I think, supplied by an examination of the terms in which the classes to be benefited are by the section defined. The aspect in which each of them is being regarded by the Legislature is on such examination brought into full relief. A significance concealed by the compendious words of description employed in subsection 1 itself is thereby revealed.

Now the only one of these descriptive terms which is not subsequently expanded is the term "canal." Every other is the subject of a definition. I begin with the word "owner." The "owners of a dock or canal" are defined to include "any person or authority having the control and management of any dock or canal, as the case may be," subsection 5.

An owner of a dock, that is to say, to be within the protection of this section, need not be in any sense a proprietor nor need he have any proprietary interest in the dock. He is entitled to the benefit of the section if he can say of himself that he controls and manages it.

A "dock" again, as has already been stated, includes many things besides dry docks. For facility of reference I again transcribe the miscellaneous list. The term includes "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-places, and jetties," subsection 4.

This definition is, I think, significant in at least three relevant directions. When taken in connexion with the definition of "owner" it shows how small is the place—even in the category of "owners of docks"—which is held by those of the respondents' sub-class. Again, while it is a catalogue of places, with reference to each of which the owners in their "control and management" will frequently be responsible for damage to ships, very few of them are places in which even the possibility of their owners' conducting upon them any separate business is other than remote, or is indeed existent at all. More particularly still the definition in its remarkable comprehensiveness seems to dispose once and for all of the suggestion—never a very hardy one—that the extension of the benefit of the section to the respondents as repairers of ships under the name of the owners of a dry dock may well be justified by the view that the Legislature had an intention to encourage such repairers to construct their own dry docks wherein ship repairs could be carried out. The principle of *noscitur a sociis* is fatal to such a suggestion.

The definitions of a harbour authority and a conservancy authority are also specially suggestive in the present connexion. "Harbour authority" includes "all persons or bodies of persons, corporate or unincorporate, being proprietors of, or entrusted with, the duty or invested with the power of constructing, improving, managing, regulating, maintaining, or lighting a harbour." Merchant Shipping Act, 1894, section 742.

"Conservancy authority" includes "all persons or bodies of persons, corporate or unincorporate, entrusted with the duty or invested with the power of conserving, maintaining, or improving the navigation of a tidal water," *ibid.*

Now, my Lords, this being a section by which an identical benefit is, in identical terms, conferred upon these various classes of persons or bodies, it is manifestly important to discover, if one can, whether there is now disclosed any characteristic position or responsibility common to them all and of a nature not inappropriate to restrict the benefit which by the section is indifferently extended to each.

And first, it cannot be suggested that all the individuals or bodies concerned are looked upon as the potential owners of separate businesses for any of the responsibilities of which they should have their liability limited. This is not so of any one of them, even in their subdivisions; it is almost unthinkable in relation to a conservancy. Ownership or the possession of a proprietary interest again is not the essential thing. Even in the case of a canal or dock it is not, as has been seen, essential to protection; in the case of a conservancy authority, the possibility of ownership is not so much as mentioned in the definition, and in the case of such an authority such possibility *ex necessitate rei* is indeed remote.

But the examination discloses that there is attached to every one of the four a responsibility which, while in no way inconsistent with ownership, is capable of a separate existence. That responsibility is in relation to canals and docks described as the power of "control and management": it is, in relation to harbour authorities and conservancy authorities, the discharge of the duties and powers with which they are respectively entrusted and invested. And there being nothing in the section necessarily leading to any other conclusion, I should myself have thought, on a consideration of these things alone, that the liability and the only liability which under it a defendant is in any circumstances entitled to limit is a liability which, in the case of "the owner of a canal or dock," arose from his responsibility for the control and management of the canal or dock, and in the case of a harbour authority or conservancy authority arose from its discharge or failure to discharge some duty or power with which the authority in question was entrusted or invested.

But, my Lords, the correctness of this view by no means depends on that consideration alone. Later, in describing the area with reference to which the limit of liability is to be ascertained, the section

refers to it as the area "over which such dock or canal owner, harbour authority or conservancy authority performs any duty or exercises any power" —the same terms being employed, it will be noticed, both with reference to the "owners" and the "authorities"; the terms chosen, as applicable to all, being taken from the definitions of the harbour and conservancy authorities to which reference has been made. My Lords, that comprehensive reference couched in these terms, so significant when they are traced to their origin, supplies to my mind the strongest confirmation of the view that the liability with which the section is dealing is a liability arising as above stated and none other.

But the argument does not even stop there. Subsection 6 of this section 2 has not yet been alluded to. To my mind it clinches the whole matter.

The subsection is as follows:—

"Nothing in this section shall impose any liability in respect of any such loss or damage on any such owners or authority in any case where no such liability would have existed if this Act had not passed."

My Lords, the necessity, or, at the least, the propriety of such a reservation is apparent if the liability referred to is intended to be confined to a liability arising from the performance of a duty or the exercise of a power in relation to a canal, dock, harbour, or conservancy area. But how entirely otiose and unnecessary it becomes if the liability to be limited is one that may arise on the part of the "owner" or "authority" on any account whatever.

Accordingly, my Lords, by reference to the terms of the section, unaltered and unexpanded, but, be it noted, to all its terms, I reach the conclusion that the liability of the respondents to the appellants, already established in this House, is entirely outside its protection. That liability was in no way referable to the duties or powers of the respondents as owners of their dock. The negligence which led to the fire on the s.s. Ruapehu in the dry dock of the respondents was negligence of their servants in the course of their duties as ship repairers—it was negligence which would have caused the fire wherever the vessel had been, whether in the dock of the respondents or of another, whether in a dock at all or afloat.

My Lords, I would further observe that the relevance to the present discussion of subsection 6 of this section 2 is very pointedly illustrated by the case of *London and South Western Railway Company v. James* (L.R. 8 Ch., 241), to which reference has been made by three of your Lordships. I think myself that the distinction between that case and the present has been clearly shown by my noble and learned friend, Lord Wrenbury. I refer to it again only because the whole basis of Lord Selborne's judgment is confirmatory of that view of this present section which I have ventured to present to your Lordships.

The gist of Lord Selborne's judgment is to be found in the following words at page 249 of the report:—

"We think it manifest that the ordinary case, or at least one of the most ordinary cases, in all contracts of affreightment is that of the shipowner carrying on board his own ship. The corresponding term 'carriage' occurring in the 505th section of the Act of 1854, with what is there said about freight, appears to me to show that the ordinary case was not excluded and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner; nor is this inference rebutted by the subsequent repeal of this section."

My Lords, I claim support from these words, "Whether the owner was carrier or not." Lord Selborne there recognizes a separation of function exactly comparable to the separation of function in the case of the owner of a dry dock who also repairs vessels within his dock. But, more apposite still, these words foreshadow the principle which in terms is to be found embodied in subsection 6 of this section. The liability of the respondents as ship repairers will be limited by the section only to the extent to which as owners of a dock they are under the same liability. But they must as dockowners be under some liability if there is to be any limitation at all. When the dock-owner is also ship repairer, he will be entitled under the section to limit the amount of such damage as would, in a question between the ship and the dock-owner, have been recoverable against the latter had he been some one other than the ship repairer. And to a limitation of that damage he will be entitled, whether or not in respect of it he was *also* liable as ship repairer or in any other character. But liability as dockowner for that damage there must be.

My Lords, the strength of the appellants' case is not, however, dependent only on the cogency of the considerations by which it can be affirmatively supported. It gains almost as much from the destructive criticism to which the respondents' alternative limitation is exposed. It is, I think, true of that limitation to say, first of all, that it is purely arbitrary. It will enable those in the position of the respondents to limit their liability where its origin was, in connexion with their dock, as remote or accidental as was the liability in the case of *The City of Edinburgh* (*supra*). I agree with my noble and learned friend, Lord Wrenbury, in thinking that there is, in principle, no distinction between the facts of that case and the present. But, secondly, I think this limitation is calculated to create absurdities hardly less serious than those which it would remove. Under it the liability for any damage done by the respondents, even as ship repairers, would be limited if the vessel in question were within the dock of the respondents; their liability, even as dockowners, for damage done by them without their actual fault or privity, would be unlimited if the vessel were in another dock or even just outside their own. The limitation, too, would produce the striking result shown by one of the illustrations of Mr. Justice Hill. He supposes the case of a railway company owning a pier—which is a "dock" within the meaning of the section—and also steamships. The railway company for reward permits another ship to be at the pier. One of the railway company's steamships, by the negligence of the master or crew, collides with and sinks that ship. The negligence arises and the liability is incurred in the capacity not of pier owner but of steamship owner. Yet the respondents' proposed limitation would presumably entitle the railway company, if it suited them, to limit their liability by the standard provided by the Act of 1900, and not by that provided by the Merchant Shipping Act, 1894. More serious still, the limitation proposed by the respondents would exclude from benefit cases—it may be many cases—which I suggest to your Lordships are clearly within the benefit of the section. Take, by way of example, one case of a harbour authority. Amongst the defined duties of such an authority, as has been seen, is that of lighting its harbour. Suppose that without the actual fault or privity of the authority the entrance to its harbour is on some stormy night left unlighted, and in consequence a vessel making for that entrance loses her bearings and is wrecked on rocks outside the harbour. My Lords, that would, I should suppose, be the case of cases clearly within the protection of the section

so far as a harbour authority is concerned. Yet, if your Lordships are induced to sanction, as the proper and necessary limitation, this limitation by area, the authority would, in such a case, be left liable without limit of amount for the total loss of that ship.

My Lords, the only purpose of introducing the limitation by area in preference to a limitation by function is to include within the section liabilities incurred on what I may call general account. I have given my reasons for the view that such liabilities are quite outside the scope of the enactment. It is, however, permissible to suggest in the present connexion that a court of construction should hesitate before, by actually reading words into the section which are not there, it is led at such a price as that just indicated to produce a result at once so dubious and so equivocal. Limitation by area can, admittedly, only be made effective by reading words into the section. Unlike, as I think, limitation by function, it cannot be extracted from the section as it stands.

My Lords, I find myself in this case and for these reasons in agreement with my noble and learned friend, Lord Wrenbury.

In my judgment it would be proper for your Lordships to discharge the order appealed from and restore that of Mr. Justice Hill.

[Solicitors—Messrs. Pritchard and Sons; Messrs. William A. Crump and Son.]

K.B. Div. } 1927.
(Avory, Swift, and Talbot, JJ.) } Apr. 4.

MAY v. BEATTIE.*

Metropolis — Road transport—London traffic — Restricted street — Advisory committee — Ordinary and additional members — Powers of Minister of Transport—London Traffic Act, 1924 (14 and 15 Geo. V., c. 34), ss. 1 (4), 7, Sched. II.

When the Advisory Committee appointed under the London Traffic Act, 1924, is considering and reporting and advising upon matters dealt with by the Minister of Transport in virtue of s. 7 of that Act, the additional members do not form part of the committee, and cannot be directed by the Minister to do so.

This was a case stated by Ealing magistrates which raised an important question as to the power to restrict omnibus traffic on particular routes under section 7 of the London Traffic Act, 1924.

The Attorney-General (Sir Douglas Hogg, K.C.), Mr. Roland Oliver, K.C., Mr. H. M. Giveen, and Mr. H. D. Roome appeared for the appellant, a police inspector; Mr. Comyns Carr, K.C., and Mr. F. W. Wallace for the respondent, the proprietor of an omnibus who had advisedly plied for hire in a "restricted" street in which he was not entitled to ply for hire if the order made in respect thereof was valid.

The Attorney-General, in opening the appeal, said that the question arose under a somewhat complicated statute, the London Traffic Act, 1924. That Act set up a Traffic Advisory Committee, which consisted of two classes of members: ordinary members, who were persons unconnected with the transport industry, and, therefore, unbiased in favour of any particular undertaking; and additional members, who were representatives of the transport industry. Under the Act, the ordinary members were to be members on all occasions; the additional members only on certain occasions specified in the Act.

The London Traffic Act, 1924, provides:—

"Section 1 (4).—The ordinary members shall form part of the committee on all occasions, and the additional members shall form part of the committee when considering and reporting to and advising the Minister upon any matter referred to the committee under or by virtue of section 10 of this Act or any matter or question referred to the committee under this Act in connexion with the matters specified in Part I. of the Second Schedule to this Act:

"Provided that the Minister may, if he thinks fit, direct that in any particular case the additional members shall form part of the committee when considering and reporting to and advising him upon any matter or question referred to the committee under this Act in connexion with any of the matters mentioned in Part II. of the said schedule.

"Section 7.—(1) Where as respects any street or part of a street within the area consisting of the City of London and the Metropolitan police district the Minister is of opinion that by reason—(*a*) of the width of the street or part of the street or the density of traffic thereon; or (*b*) of the existence of alternative facilities for the conveyance of passengers along the street or part of the street or in proximity thereto or of the omnibus accommodation on the street or part of the street being excessive; it is desirable that an order under this section shall be made, he may by order declare the street or part of the street to be a street in which the plying for hire by omnibuses ought to be prohibited or restricted. . . ."

Subsection (2) gives power to the Minister to make regulations as to plying for hire by the omnibuses of particular proprietors "but so nevertheless that the right so to ply shall not be limited to the omnibuses of one proprietor in any case where it appears to the Minister to be reasonable and practicable that the right should be exercised by other omnibuses also."

Subsection (5) requires the Minister before making an order or regulations to refer the matter to the Advisory Committee for their advice and report.

Schedule II. to the Act is in three parts:—

"Part I.—Matters in respect of which the additional members are to form part of the Advisory Committee: (*a*) The co-ordination of all or any of the various forms of transport services, and cooperation between the persons operating the same or different forms of transport services with a view to the combined operation of all means of transport in the London Traffic Area in the best interests of the public; . . . (*d*) the making of new orders, by-laws and regulations . . relating to traffic on streets in the London Traffic Area; . . . (*f*) the comparative desirability of different forms of transport services in various circumstances. . . .

"Part II.—Matters in respect of which the additional members are, if the Minister so directs, to form part of the Advisory Committee: . . . (*i*) The exercise of any of the powers of the Minister from whatsoever source derived in relation to traffic on streets in the London Traffic Area, with the exception of any matters dealt with by him in virtue of section 7 of this Act."

Part III. deals with matters in respect of which the additional members are not to form part of the Advisory Committee.

The respondent was charged before the Ealing petty sessions upon two informations laid by the

* Reported by J. W. Hall, Esq., Barrister-at-Law.

appellant, charging him that he on March 30, 1926, not being a scheduled proprietor within the meaning of paragraph 3 and Schedule I. of the London Traffic (Restricted Streets) (Uxbridge-road) Provisional Regulations, 1926, did ply for hire westward with his omnibus on sections B and C respectively of the said Uxbridge-road contrary to paragraph 5 of the said regulations and section 7 of the London Traffic Act, 1924.

The Minister on February 14, 1925, asked for the advice and report of the Advisory Committee on the exercise of his powers under section 7. On April 17, 1925, the Minister gave notice in the *London Gazette* of his intention to make an order declaring certain streets (including the Uxbridge-road) to be restricted streets, and regulations as to the number of omnibuses which might ply for hire thereon. On June 3, 1925, the Minister in purported exercise of his powers under section 7 of the said Act made an order (the London Traffic (Restricted Streets) (No. 2) Order, 1925 (St. R. and O. 1925, No. 549)), by which the Uxbridge-road from Shepherd's Bush-green to Harefield-road, Uxbridge, was declared to be a restricted street.

On February 9, 1926, the Advisory Committee made a report, by the ordinary members only. On March 22, 1926, the Minister purported to make Provisional Regulations (the London Traffic (Restricted Streets) (Uxbridge-road) Provisional Regulations, 1926), which purported to come into operation on March 29, 1926. The said regulations divided the Uxbridge-road into three sections, A, B, and C, and provided that, save as therein provided, no omnibus should ply for hire on the said road or any part thereof except the omnibuses of the scheduled proprietors. The respondent was not a scheduled proprietor.

On March 30, 1926, the respondent did ply for hire with his omnibus on sections B and C of the Uxbridge-road. On the same day the Minister published a further notice in the *London Gazette*.

The respondent contended that the order and provisional regulations were invalid and *ultra vires* upon the grounds :—(1) that the Minister had not complied with the provisions of the London Traffic Act, 1924, in that the additional members of the Advisory Committee had not been consulted by him ; (2) that the Minister, in taking into consideration and acting upon the said report of the ordinary members of the Advisory Committee, took into consideration matters outside the purview of the London Traffic Act, 1924 —namely, the financial position of the London United Tramways Company, Limited, which owned and operated a tramway system on the said Uxbridge-road, and of other undertakings owning and operating tramways in other parts of the London traffic area ; and the desirability of improving the financial position of the said undertakings by protecting the same from the competition of omnibuses on the said road and other roads in the said area which were served by tramways.

A number of other objections were set out in the case, but, inasmuch as the magistrates by a majority found that the provisional regulations were invalid and *ultra vires* upon the first two grounds, they gave no decision upon the remaining grounds.

The majority of the magistrates put their judgment in writing, and said :—

"What has happened is this : contrary to the terms of section 1, subsection (4), the Minister has referred the questions provided by section 7, subsection (5), to an advisory committee consisting of ordinary members only, and we are of opinion that these regulations are therefore invalid. In addition, even assuming the report of the committee to be in order, we are of opinion that the findings are largely based on the economic position of the tramway companies. This is a question as to which we find no reference in the Traffic Act, which appears to us to be an Act dealing only with the congestion and regulation of the traffic in the Metropolitan area."

The Attorney-General, continuing his argument, said that the matters on which the additional members of the committee were to be consulted were specified in the Act. The exercise of the Minister's powers under section 7 was expressly excluded. On the second point, it was the Advisory Committee that had made a report in favour of protecting the tramways for the sake of certain advantages which they gave the public, such as cheaper fares. The Minister was not bound to act on the report, nor was there any evidence that he had been influenced by the report in making his regulations.

He submitted that the case ought to go back to the magistrates, and it would be convenient that they should decide all the matters raised, as it was urgent in the public interest that this question should be settled.

Mr. Comyns Carr pointed out that if the matter was important from the point of view of the Minister of Transport, it was equally so from the point of view of the independent proprietors of omnibuses. The respondent here was the owner of only one omnibus, in respect of which he had duly deposited a schedule and obtained a licence. If he were driven off the road there was no alternative route to which he could go.

He submitted that in the absence of the clearest words no Court would hold that an Act of Parliament had the effect of driving a man off the streets for the benefit of his competitors. The Act must be construed strictly against those who proposed to act under it, *Reed v. Ingham* (3 E. and B., 889, at p. 899). The Act itself set up the committee with a view to facilitating the "regulation" of traffic. Considerations of the financial position of particular suppliers of traffic facilities were outside the purview of the committee.

The additional members were not included in the committee, but local authorities, such as those of East and West Ham, which owned tramway undertakings, were represented as ordinary members.

In his submission this question clearly fell under Part I. (*d*) of the Second Schedule. It might also have fallen under I. (*a*) or (*f*), but it was enough if it fell under (*d*). The only way to reconcile Part II. (*i*) with Part I. (*d*) was to construe the reference to section 7 as a reminder that that was already a matter on which the additional members must be included and was not in the Minister's discretion under Part II.

Not only would the opposite construction produce a direct conflict between Part I. (*d*) and Part II. (*i*), but if it had been the intention to exclude section 7 from the consideration of the additional members the appropriate place for it was Part III., which contained no mention of it at all.

As to the other question, apart from the wording of the report itself, that the Minister acted upon it was evidenced by the fact that restrictions were applied only to those parts of the routes where there was tramway competition. It required very strong words in a statute to authorize the putting of money into a person's pocket at the expense of his competitors, and it was not a thing that this Act entrusted to a Government Department.

Mr. Justice Avory.—This is a special case stated by justices of the peace for the county of Middlesex raising several questions of law, only two of which have, up to the present, been decided by the justices ;

if we agree with their view it would not be necessary to send the case back, but if we dissent from them, then it is obvious that it has to go back for their determination upon the other points.

The first ground upon which the justices have decided, and which is very plainly stated in their judgment, is this, that the regulations made by the Minister under the London Traffic Act, 1924, in this case were invalid because they were not made upon a report of the Advisory Committee upon which the additional members, as they are called, sat and formed part.

The Act of Parliament, by section 7, subsection (5), provides : " Before making an order declaring any street or part of a street to be a restricted street, or making any regulations under this section, the Minister shall give such notice of his intention to make the order or regulations, as the case may be, as he may think best adapted for informing persons affected, and shall refer the matter to the Advisory Committee for their advice and report."

The order in this case was made upon June 3, 1925, and an attempt has been made by Mr. Comyns Carr before us to take a point which was not taken before the justices, namely, that that order was not made after the advice and report of the committee, and he based that contention on the fact that the only report of the committee which was produced before the justices was one dated in February of 1926. I am of opinion that that point is not open, first because it was not in fact taken before the justices, and, secondly, because from page 5 of this report it is abundantly clear that before this date, February, 1926, the committee had made a previous recommendation to the Minister recommending the making of orders and regulations under section 7 of the Act, and the report on its face states that these recommendations were adopted by the Minister, with the results which are set out in the report. Therefore the case falls to be dealt with on the assumption that this order was made after the Advisory Committee had advised and reported upon the matter, and it is not disputed that the regulation which is in question was in fact made after the advice and report.

Now the question to be determined here is whether the Act of Parliament required that the additional members, as they are called, should form part of the committee when they were considering and advising and reporting to the Minister in this particular case. Section 1, subsection (4), provides that " The ordinary members shall form part of the committee on all occasions, and the additional members shall form part of the committee when considering and reporting to and advising the Minister upon any matter referred to the committee under or by virtue of section 10 of this Act, or any matter or question referred to the committee under this Act in connexion with the matters specified in Part I. of the Second Schedule to this Act : Provided that the Minister may, if he thinks fit, direct that in any particular case the additional members shall form part of the committee when considering and reporting to and advising him upon any matter or question referred to the committee under this Act in connexion with any of the matters mentioned in Part II. of the said Schedule "—that is of the Second Schedule. That refers us to the Second Schedule, Part I and Part II., and here, before dealing with the difficulties which arise, it is fair to say that the learned Attorney-General admitted that this legislation was at least open to criticism, and the learned counsel, Mr. Comyns Carr, has admitted that it is full of tautology. I concur in both those criticisms upon it, and would add to them that not only does it contain a large amount of tautology, but it contains a certain amount of contradiction also, which makes it very difficult to construe.

Was this a matter which comes within Part I. of the Second Schedule ? If it was, then the respondent here says that under subsection (4) of section 1 of the Act the additional members ought to have formed part of the committee. Now there is no doubt that the different clauses of Part I. of the Second Schedule are in such general terms that they might be said to include anything and everything which the Minister could do under this Act. Mr. Comyns Carr relies mainly upon clauses (*a*) and (*d*) of Part I. He says that the order and regulations in this case related to the co-ordination of all or any of the various forms of transport services within the meaning of clause (*a*), or, he says, it clearly was a matter relating to the making of new orders, by-laws, and regulations relating to traffic on streets, within the meaning of clause (*d*). No doubt the words are wide enough to include this particular matter. In my view, Part I. of the Second Schedule is not intended to refer or relate to the general administrative functions which the Minister is called upon to perform under the Act, but they are matters which contemplate future general legislation ; and that view is confirmed, I think, by Part II. of the Schedule. If, as may, I think, be presumed, Part II. was drafted after or simultaneously with Part I., those who drafted it must have had in view what had been provided in these clauses (*a*) and (*d*) of Part I. when they enacted, as they did in Part II., certain matters in respect of which the additional members are, if the Minister so directs, to form part of the Advisory Committee. That obviously contemplates that they are not to form part of the Advisory Committee unless the Minister so directs. And in clause (*i*) of that Part II. we find this provision, that one of the matters in respect of which the additional members are, if the Minister so directs, to form part of the Advisory Committee, is : " The exercise of any of the powers of the Minister from whatsoever source derived in relation to traffic on streets in the London traffic area." That is a wide and comprehensive phrase, which would seem to include all the powers which are given by this Act to the Minister, as all the powers which are given, or almost all of them, are in relation to traffic on streets in the London area. But it says : " With the exception of any matters dealt with by him in virtue of section 7 of this Act." Now I read that exception in Part II. of the Schedule to mean this, that when the Minister is dealing with matters by virtue of section 7 of the Act, in that case not only do the additional members not form part of the Advisory Committee, but that is not a case in which the Minister is to direct or can direct that they shall form part of the Advisory Committee. Turning back to section 7, in order to see whether there is any intelligible reason why that should have been made an exception to the general rule, we find that it is a section which deals expressly with the power of the Minister to declare a street to be a restricted street in which the plying for hire by omnibuses ought to be prohibited or restricted, and that power is to be exercised by the Minister if he is of opinion that by reason of the existence of alternative facilities for the conveyance of passengers along the street or part of the street or in proximity thereto, or of the omnibus accommodation on the street or part of the street being excessive—in those cases he is given power to prohibit or restrict omnibuses from plying for hire in a particular street or part of a street. Therefore, that section 7 being limited in that way in its operation, there does appear at all events an intelligible reason why it should be made an exception and taken out

of Part II. of the Schedule as one of the cases where the Minister can call in the assistance of the additional members. If that view is right, then it is clear that the objection based on that fact that in this case the additional members did not form part of the Advisory Committee fails.

The second ground is this. It is perhaps better to read the actual words of the judgment of the justices in this case. They say : "Even assuming the report of the committee to be in order, we are of opinion that the findings are largely based on the economic position of the tramway companies. This is a question as to which we find no reference in the Traffic Act, which appears to us to be an Act dealing only with the congestion and regulation of the traffic in the Metropolitan area." Now in my view, whatever conclusion may be drawn from the report of the committee—about which I will say a word in a moment—there is before us no evidence, and there was not before the justices any evidence, that the Minister, in making this order and in making these regulations, was influenced or that his decision was based upon what is called the economic position of the tramway companies. Looking at the report of the committee, although no doubt it contains figures showing the amount of the capital which has been expended on the tramways, and showing the losses which have been made in recent years on the tramways owing to omnibus competition, although it contains those particulars, in my view the overriding consideration which the committee had in mind was the necessity of maintaining the tramways in the interests of the public ; and it is obvious, and it was obvious to them, that they cannot be maintained if they are continually being carried on at a heavy loss. Even if it be assumed that the Minister took into consideration these figures that appeared in the committee's report, I see nothing whatever to justify us in saying that he was influenced by any other consideration than the necessity of maintaining the tramways for the benefit of the public, and, in the words of section 7, the existence of alternative facilities for the conveyance of passengers along the street in question—which in fact, of course, means, and can only mean in this case, the existence of the tramways.

On those grounds, therefore, I think the second objection also fails and that the appeal, therefore, ought to be allowed on these two points.

The other points of law which are set out in the special case depend, apparently, upon the finding of certain facts which have not yet been found, and it is for that reason that they must all be remitted to the justices ; and in accordance with the express wish of the Attorney-General, even if we cannot give an actual direction to the justices, we certainly express the hope that they will determine all these other objections before the case comes back to this Court again.

Mr. Justice Swift.—I agree, and I have nothing to add.

Mr. Justice Talbot.—I am of the same opinion. In this case the question arises primarily under section 7, subsection (5), of the London Traffic Act, 1924, which provides that before making a certain order or certain regulations the Minister is, amongst other things, to refer the matter to the Advisory Committee set up under the Act, for their advice and report ; and the first point deals with the constitution of the Advisory Committee, and it bears upon the construction of section 1, subsection (4), of the same statute. That subsection contemplates that there are certain members who are to be on the committee on all occasions, and there are certain additional members who are to form part of the committee when considering certain matters, and upon the question what those matters are the controversy here depends. They comprise, first of all, matters referred to the committee under section 10 of the Act, which is not here material, or any matter or question referred to the committee under the Act, in connexion with the matters specified in Part I. of the Second Schedule to the Act.

Now, there are, as I read the Act, two functions of this committee. First of all, there are certain matters which have to be referred to them by the Minister before he can take certain steps under the statute, amongst other things, before he can make the order or the regulations which are in question here ; but besides that, they have a duty, under section 2, of considering and reporting to the Minister on any matters within the scope of the provisions of the Act or such matters and questions as may be referred to them under the Act, or as the Minister may from time to time refer to them in connexion with any of the matters mentioned in the Second Schedule to the Act.

The argument for the respondent in this case is based upon the provisions of the Second Schedule, and it is said that that schedule uses words which are quite wide enough—and indeed they certainly are, considered by themselves—to include such an order and regulations as are in question here. But in my opinion, although the drafting of the Act is responsible for the confusion which has been introduced, that is not the true way to read section 1, subsection (4), or the reference to the Second Schedule which is contained in it. In my opinion the Second Schedule relates not to matters which the Minister is bound to refer to the committee under the Act, but it refers to matters which he may refer under section 2 and which, if he does refer, it is the duty of the committee to assist him on. I think that follows when the Act is carefully looked at, and when sections 1 and 2 and the Second Schedule are compared. It is greatly assisted by the heading of the Second Schedule : "Particular Matters which may be referred to the Advisory Committee"—a heading which is singularly inappropriate if it comprises a matter which the Minister under the Act is bound to refer to the committee before he can take the action which is here in question. So read, I think the Act becomes fairly consistent, whatever one may think of the way in which it has been expressed. I agree, also, if I may say so, that when you look at Part II. of the schedule under the heading "Matters in respect of which the additional members are, if the Minister so directs, to form part of the Advisory Committee," and when you find under that these words : (*i*) "The exercise of any of the powers of the Minister from whatsoever source derived in relation to traffic on streets in the London traffic area, with the exception of any matters dealt with by him in virtue of section 7 of this Act," it is really impossible to conceive that Parliament can have been intending to except section 7, which deals with the restriction of the plying for hire by omnibuses within a certain area, and with that alone, from the part of the schedule which contemplates the option of the Minister in certain cases to direct a particular constitution of the Advisory Committee, and at the same time to leave the making of new orders, by-laws, and regulations relating to traffic on streets in the London traffic area (which comprises only a part of what is mentioned in clause (*i*)) in the embracing words "The exercise of any of the powers of the Minister from whatsoever source derived in relation to traffic on

streets in the London traffic area." To leave him, as to that, obliged to order that the committee whom he consults is to include these additional members is a construction so insensible that I think it goes very near to demonstrating that the construction argued for on the part of the respondent is untenable.

With regard to the other point, I would only like to say this, that assuming, as I do for the purposes of this judgment, that the Minister in making this order and these regulations did not shut his eyes to the financial effect of unrestricted omnibus competition upon statutory tramway undertakings, it appears to me impossible to contend that he was not entitled to consider that amongst other things. His attention is specially directed by the Act to, amongst other things, the existence of alternative facilities for the conveyance of passengers along the street in which he is invited to make an order either for prohibiting or restricting the plying for hire of omnibuses; and to say that Parliament, in giving such power, intended that he should not be entitled to consider how the existence of the tramway in that street might be affected if some reduction or restriction of omnibus competition was not effected, seems to me really quite an impossible view of the powers which Parliament by this statute intended to confer upon the Minister. Parliament naturally and obviously considered that, dealing with that question, he would consider all matters relevant to it, all the results of the existence of tramway facilities in the street, and it is not perhaps immaterial to observe that by the same section Parliament retained to itself the power, if necessary, to disallow any regulation made under the Act by the Minister.

For these reasons I am of opinion that the magistrates came to an erroneous decision on the two points of law which they decided, and I agree that the matter must go down to them to deal with the rest of the case.

[Solicitors—Messrs. Wontner and Sons; Mr. J. R. Cort Bathurst.]

K.B. Div. } 1927.
(Avory, Swift, and Talbot, JJ.) } Apr. 7.

REX v. ESSEX JUSTICES—EX PARTE PERKINS.*

Justices — *Certiorari*—Bias—Justices' clerk a partner in firm which had acted for complainant—No personal knowledge that firm had so acted—Order quashed.

Certiorari will issue to quash a maintenance order made by justices when it is shown that the justices' clerk is a member of a firm of solicitors which acted for the wife at an earlier stage of the same proceedings, even though it is proved that the wife's business was conducted exclusively by a managing clerk in charge of a branch office, and that the justices' clerk was in fact quite unaware that his firm had ever acted for her. The test is not whether there is in fact bias, but whether a reasonable man concerned in the proceedings might think that the tribunal was not impartial.

Rex v. Hurst and Others, Sussex Justices—Ex parte McCarthy (40 *The Times* L.R., 80; [1924] 1 K.B., 256) applied.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

This was a rule *nisi* for a *certiorari* to bring up and quash, at the instance of William John Albert Perkins, a maintenance order made by the justices of the Tendring Division of the county of Essex in favour of his wife, Kathleen Maria Florence Perkins. The rule was obtained upon the ground that the justices' clerk, having acted as solicitor for one of the parties until immediately before the hearing, took part in the hearing.

The applicant filed an affidavit setting forth that he was the managing director of a printing works. After some detail not material to this report, the applicant stated that in or about June, 1926, his wife consulted Mr. C. Gordon Jones, who practised as Messrs. Jones and Son at Clacton-on-Sea and was clerk to the justices of the Tendring Division, as to arranging a deed of separation, and that he received from Mr. Jones a number of letters, and that in particular on July 19 and on August 4, 1926, Mr. Jones wrote to the applicant threatening to issue a summons; to some of these letters the applicant replied. [The letters were exhibited to the affidavit and were all written from Hurlingham Chambers, Clacton-on-Sea, and were signed "Jones and Son." The applicant's reply was also addressed to "Messrs. Jones and Son."]

On September 15, 1926, the applicant was served with a summons at the instance of his wife charging him with wilfully neglecting to provide reasonable maintenance for his wife and children. On September 27, 1926, he attended at the Petty Sessional Court for the division of Tendring, appearing in person. Six justices sat. Mr. Field, a solicitor, appeared for the wife, and began the case by saying that, as the justices were aware, the case had been in the hands of other solicitors. Mr. C. Gordon Jones acted as clerk to the magistrates, and (as the affidavit alleged) "practically conducted the proceedings," taking part in the examination of the wife and in particular eliciting that she was not willing to return to live with her husband. The applicant further alleged that he was much confused and embarrassed in his cross-examination of his wife by Mr. Jones saying that he was not to make speeches but only to ask questions. He made certain other complaints as to the conduct of the proceedings, in that letters put in by him were not passed by Mr. Jones to the Bench, but were shown to Mr. Field. Finally the applicant asked the Bench to adjourn the application for three months to enable him to find accommodation for his family. The Bench retired with Mr. Jones, and on returning the chairman stated that they had decided to adjourn the case for two months, the applicant to pay 30s. a week meanwhile. Owing to a misunderstanding as to the date fixed for the adjourned hearing, the applicant was not present thereat, but he was informed that Mr. Jones again acted as clerk and the justices made the permanent order now sought to be quashed.

In the concluding paragraph of the affidavit the applicant said: "During the proceedings at which I attended I felt embarrassed in my conduct of the case by reason of the feeling that although Mr. C. Gordon Jones had formally divested himself of his capacity of solicitor for my wife and was now a part of the tribunal, whose duty it was to adjudge the matter in question, or was their legal adviser, he was adverse to me. I was not aware at the time that I could make objection to his conducting the proceedings or advising the magistrates or retiring with them."

The justices did not show cause, but filed an affidavit to the effect that they were unaware that Mr. Jones or his firm had acted for the complainant,

that they had been shown by him all the documents, that he did not "practically conduct the proceedings" or put any more than the usual formal questions, and that when he retired with them he advised them—contrary to their general opinion—to grant the application for an adjournment. Mr. Jones in no way showed any feeling against the applicant, but if the applicant had given the slightest intimation that Mr. Jones or his firm had acted for the wife they would have arranged for a deputy to sit as clerk.

Mr. Gordon Jones, who showed cause by counsel, filed an affidavit that he was the surviving member of the firm of Jones and Son, solicitors, of Colchester, clerk to the justices of the Tendring Division, and also of the Lexden and Winstree Division of the county of Essex, and Registrar of the Haverhill County Court of Suffolk, and had offices at Colchester, at Clacton-on-Sea in the Tendring Division, and at Haverhill. The Clacton-on-Sea office was kept mainly for the purpose of the business of the clerkship to the Tendring justices, and was under the management of his clerk, Mr. Francis Probyn Dighton. He personally seldom attended at the Clacton office except on Court days, but was available by telephone or otherwise for special or urgent matters, and routine and minor business was dealt with by Mr. Dighton, whose duty was to make a weekly report to the Colchester office of the business transacted at the Clacton office. In Mr. Dighton's report for June 12 there was a reference: "New matters: 57. Mrs. Perkins. Separation agreement. I am afraid the costs will be very small." No further reference to the matter occurred in any report from Mr. Dighton, and Mr. Jones, if he had thought of it at all (though he did not), would have assumed that the matter had been completed or become abortive. He never heard anything further, and he made no inquiry about Mrs. Perkins or her business till after the rule *nisi* was granted. He had not seen or signed any of the letters written by his firm, nor did he when the case appeared in the agenda paper of the Court on September 27 in any way connect it with the Mrs. Perkins whose name had been mentioned in Mr. Dighton's report in June. Mr. Dighton did not attend the Court on either date, and Mr. Jones did not know that Mr. Field had not been instructed by the complainant in the ordinary way. He did not remember any mention being made of "other solicitors," and certainly did not understand that his firm was referred to. He answered the applicant's affidavit in detail, and in particular stated that he advised the justices on September 27 that the case was not sufficiently made out to justify them in making a permanent order—which they were prepared to make—and he advised them to grant the applicant's request for an adjournment. The applicant appeared from the paragraph of his affidavit quoted above to have been aware throughout the proceedings that Mr. Jones through his firm had been or purported to have been directly or indirectly or in some way interested in or concerned for his said wife, but apparently deliberately forbore to draw attention to the alleged circumstances, and gave no indication of embarrassment such as he alleged. Any protest or suggestion by the applicant that Mr. Jones or his firm had been concerned would at once have received attention, and Mr. Jones would have asked the justices to appoint a deputy-clerk, and this could have been done without delay or expense. Mr. Jones finally said that he was not consulted in any way when the justices made the final order which it was sought to quash.

Mr. S. E. Pocock showed cause for Mr. Gordon Jones; Mr. Alexander Cairns supported the rule.

Mr. Justice Avory.—This is an application on behalf of one William John Albert Perkins to remove into this Court a maintenance order made in favour of his wife, Kathleen Maria Florence Perkins, dated November 22, 1926, on the ground that the justices' clerk, having acted as solicitor for one of the parties until immediately before the hearing, took part in the hearing. There is no dispute upon the material facts that before the hearing of the summons the firm, of which the clerk was a partner, had acted for the wife, and carried on a considerable correspondence with the husband upon the very subject which came before the justices—namely, the neglect of the husband to maintain his wife. On the hearing the present applicant appeared in person to answer the complaint, and the justices' clerk was present taking the ordinary part which a justices' clerk takes. I certainly think we must accept a statement made by the justices' clerk that he was not in fact aware that his firm were acting as solicitors for the then defendant, the fact being that the business of his office at Clacton was conducted entirely by a managing clerk who reported weekly. With the exception of one weekly report that a Mrs. Perkins had called at the office there was no mention of the name. I accept the statement of the justices' clerk that if he had ever seen that name he had entirely forgotten it.

But he did retire with the Bench after the applicant had cross-examined his wife with a view to showing that no order should be made. The applicant did suggest, it is true, at the end of his case that if an adjournment were granted he could make arrangements. The clerk retired with the justices, and suggested to them that there were no grounds for the making of a permanent order, and he advised that an adjournment should be granted. On the adjourned hearing the applicant, through some misunderstanding, did not attend, and the justices made a permanent order.

It may be quite true, as Mr. Pocock has said, that no injustice has been done. We must apply the principle which Lord Hewart, C.J., repeated in the case of *Rex v. Hurst and Others, Sussex Justices—Ex parte McCarthy* (40 *The Times* L.R., 80; [1924] 1 K.B., 256, at p. 258): "It is said, and no doubt truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance, but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

I think the Lord Chief Justice clearly meant to say "seem," not "be seen," as it appears in the reports. He continued: "The question, therefore, is not whether in this case the deputy-clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

The only difficulty which arises in this case arises from the fact that the clerk has stated on affidavit—and I accept it—that he did not in fact know that his firm had acted; and, if we had to decide whether there was in fact bias, that would be most material,

but what we have to determine is whether it would appear to one of the parties that justice was done. In my view, although the clerk did not know that his firm had acted, I think the necessary, or at least the reasonable, view would be that justice was not being done, inasmuch as the clerk was a member of the firm which had acted for the present applicant's wife.

The only other question is waiver. The applicant states in paragraph 10 of his affidavit : "During the proceedings at which I attended I felt embarrassed in my conduct of the case by reason of the feeling that although Mr. C. Gordon Jones had formally divested himself of his capacity of solicitor for my wife and was now a part of the tribunal whose duty it was to adjudge the matter in question, or was their legal adviser, he was adverse to me." He knew the fact, therefore, that Mr. Jones was a member of the firm, but he goes on : "I was not aware at the time that I could make objection to his conducting the proceedings or advising the magistrates or retiring with them." The question is whether in those circumstances he can be said to have waived this objection. We must act on what was said by Sir John Romilly, M.R., in *Vyvyan v. Vyvyan* (30 Beav. 65, at p. 74) : "Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim." I think it cannot be said that the applicant was fully cognizant of his rights, and therefore he cannot be said to have waived them. For these reasons, although no moral blame attaches to the clerk to the justices, I think that this rule must be made absolute.

Mr. Justice Swift.—It is essential that justice should be so administered as to satisfy reasonable persons concerned that the tribunal is impartial. As was said by Lord Hewart, C.J., in *Rex v. Hurst and Others, Sussex Justices—Ex parte McCarthy* (40 *The Times* L.R., 80 ; [1924] 1 K.B., 256, at p. 259) : "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

Might a reasonable man in the position of the applicant think that there was interference ? I think he might, and I agree that the order made by the justices must be moved into this Court to be quashed.

Mr. Justice Talbot.—I agree.

On an application for costs against the justices' clerk,

Mr. Justice Avory said :—It is a little unusual for a clerk to justices to appear to show cause, but as he has done so the order must be with costs.

[Solicitors—Messrs. Doyle, Devonshire and Co., for Messrs. Jones and Son, Colchester ; Mr. Edward E. Kent.]

House of Lords.
(Viscount Haldane, Viscount Sumner, Lord Atkinson, Lord Wrenbury, and Lord Blanesburgh.)
1927.
Apr. 4.

LAKE v. SIMMONS.*

Insurance (Theft)—Jewelry—Necklets obtained from assured by woman to show to third parties — Sale by woman — Larceny by trick — Necklets obtained by assured "on approval" — Whether held "in trust" — "Responsibility" of assured — Exception in policy.

The plaintiff, a jeweller, insured against theft with the defendant and other Lloyd's underwriters jewelry which was his own property, or which he held in trust, or for which he was held to be responsible, while it was in his custody or in the custody of any person or persons to whom he might have entrusted the same on the condition of sale or return, for valuation or inspection, or for any purpose whatsoever. The policy excepted "loss by theft or dishonesty committed by . . . any customer . . . in respect of goods entrusted to him. . . ." A woman, who had previously bought from the plaintiff and paid for certain minor articles, told the plaintiff that her "husband" (a man with whom in truth she was living) wished to give her as a birthday present a pearl necklet of the value of £1,000. The plaintiff procured from London firms two necklets on approval, the "appro. notes" declaring that they remained the property of the senders, and he allowed the woman to take them away to show to her "husband," and the necklets were debited to that man in the plaintiff's books. Later the woman brought back one necklet, saying that her "husband" preferred the other, but that he was away, and could not pay for it until his return home. At another interview she said that her sister's fiancé wished to buy the necklet which she had returned, and she was allowed to take it away again to show it to him, the necklet being debited to him in the plaintiff's books. In fact the woman's statements about her "husband" (who knew nothing about the necklets) were all untrue, her "sister's fiancé" was a fictitious person, and she sold both the necklets through a pawnbroker.

Held, that the woman's conduct constituted larceny of the necklets by a trick, since the plaintiff had never intended to pass the property in them to her, but only that she should hand them for inspection and approval to others whom only the plaintiff intended to be his purchasers and debtors, and that the goods had not been "entrusted" to a "customer" within the meaning of the exception, since there was no mutual assent to a contract of bailment, and since the plaintiff did not look on the woman as a possible purchasing customer ; and therefore the action succeeded.

Decision of the Court of Appeal (42 *The Times* L.R., 425 ; [1926] 2 K.B., 51) reversed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 425 ; [1926] 2 K.B., 51), reversing by a majority the judgment of Mr. Justice McCardie (42 *The Times* L.R., 168 ; [1926] 1 K.B. 366). The Court of Appeal held that the respondent was not liable to the appellant on a Lloyd's policy of insurance, underwritten by the respondent, dated December 28, 1922, in respect of the loss of two pearl necklaces valued at £750 and £700 respectively. The substantial question was whether one Esme Ellison

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

who had been convicted of the theft of the necklaces, was, in relation to the necklaces, a customer of the appellant within the meaning of one of the exceptions in the policy.

The facts are fully stated in the judgment of Lord Haldane.

Mr. Jowitt, K.C., and Mr. J. B. Melville, K.C., appeared for the appellant; Sir John Simon, K.C., and Mr. F. van den Berg for the respondent.

VISCOUNT HALDANE.—My Lords: In this case there is no dispute as to the facts. What has happened is that two of the learned Judges of the Court of Appeal have taken a different view of the interpretation to be put on them from that taken by Lord Justice Atkin who dissented, and that taken by Mr. Justice McCardie who tried the case.

The narrative of events is briefly this. The appellant, who claims as plaintiff on a policy of insurance, is a jeweller at Exeter who became insured in 1922 by a Lloyd's policy underwritten, among others, by the respondent, to cover risks up to a total of £16,000 for 12 months. The property so insured consisted of the appellant's stock-in-trade, and it included precious stones, pearls, and all other articles usually kept in stock by jewellers. What was insured extended not only to the property of the appellant, who was described in the policy by the name of his firm, but to what he held in trust or commission, or was held by him as responsible while in his own custody, "or in the custody of any person to whom" he might "have entrusted the same on the conditions of sale or return, for valuation, or inspection, or for any other purpose whatsoever." The perils insured against were loss or damage or misfortune to any of the property arising from any cause, with the exception, set out specially in the policy, of "loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post), or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured, his servants or agents," unless such loss "arise, when the goods are deposited for safe custody by the assured, his servant or agents, with such broker or customer or broker's customer."

The claim of the appellant under this policy was for the value of two pearl necklets (valued at £750 and £700 respectively) lost during the currency of the policy. The circumstances in which the claim arose are as follow:—The claim was made by the appellant against the respondent, representing a number of insurers, by reason of the fraudulent conduct of a woman named Esme Ellison, who was convicted, on October 2, 1923, at the quarter sessions of the city of Exeter, of theft of the necklets, the subject of the claim in this action, and was sentenced to hard labour for sixteen months. She was a practised criminal, who had been previously convicted of larceny and false pretences and had spent substantial periods in prison.

In the early part of 1923 Esme Ellison was living with a Mr. Van der Borgh, who probably knew nothing of her past, as his wife, which she was not, at Stonelands, a well-known residence near Dawlish, not very far from Exeter. On March 2, 1923, she called at the appellant's shop in Exeter, and saw his manager. She said that she was living with her husband at Stonelands, and mentioned that her sister had just become engaged to a Commander Digby. She bought a ring for £30. This sum was debited to her personally, as Mrs. Van der Borgh, and she paid it on March 6 by cheque on a local bank with which she had opened an account. On the same date she bought from the appellant a pair of old Sheffield dishes for £16 16s., which were duly debited to her personally as before, and she paid the price on March 16 by a cheque on the same account. On March 6 she also bought a diamond ring for £28 10s., which was again debited to her personally as Mrs. Van der Borgh, and for which she paid by cheque on April 4. In some of these transactions the appellant personally dealt with Esme Ellison.

When she made her visit to the appellant's shop on March 6, she saw the appellant and told him that her husband intended to give her as a birthday present a pearl necklet of the value of £1,000, and she asked the appellant to produce some necklets for her inspection. After he had sent for and got them she saw them at the shop. She told him that a relative, a Mrs. Bosanquet, who she said was staying at Stonelands, wished to give a wedding present to one of her sisters who had become engaged. On March 16, at an interview with the appellant, she looked at two necklets which he showed her, and asked him to permit her to take them to Stonelands in order that her husband, who was temporarily absent, might look at them. This the appellant let her do. He made an entry in his books which is:—"P. F. Van der Borgh, Stonelands, Dawlish. (1) A fine pearl necklet of 121 pearls, £1,100; (2) A fine pearl necklet of 139 pearls, £1,000. On appro." The learned Judge who tried the case and the Court of Appeal agreed in thinking that Esme Ellison was under these circumstances a "customer" within the meaning of the policy. No doubt on the earlier occasions she was so, but that does not conclude the question as to the relationship in the transactions to which I now come.

What was the precise nature of the transaction between the appellant and Esme Ellison in regard to the two pearl necklets? As already stated, it took place on March 16, 1923. The appellant made an entry in his books, not in her favour but in that of P. Van der Borgh, her supposed husband, as the purchaser, on approbation. He let her take both necklets away to show him. On March 21 she paid a further visit to the shop. She bought one of the necklets, saying that her husband was pleased with the other and had selected it, but that Commander Digby, who, she had said, was engaged to her sister, admired the one she brought back, but would not be able to pay the whole price at once. On March 28 she made yet another visit to the shop and stated that Commander Digby continued to admire the necklace she had brought back, and that she wished to take it back to show to him again. On April 4 she called again, and the appellant let her take it away for this purpose. He entered in his books, "Lt.-Commander Digby, Caddistock, Dorset, a fine pearl necklet (139 pearls), £1,000 on appro." There was no such person as Commander Digby, nor had Esme Ellison a sister. Van der Borgh knew nothing of the transactions about the necklets. She herself made away with both of them. She disposed of them, and neither has been recovered.

The learned Judge who tried the case found the facts as I have stated them, and he also found that Esme Ellison's conduct was fraudulent throughout; that the small preliminary purchases in her own name were part of a design to gain the confidence of the appellant; that at the time when she gained possession of each necklet she intended to steal it; that the only purpose for which the appellant gave her possession was that she might hand the one to Van der Borgh for his inspection and the other to the fictitious Commander Digby for a similar purpose;

that she received the necklets for limited and specific purposes only; that the appellant intended that his purchaser and debtor should be Van der Borgh in the one case and Digby in the other, and not Esme Ellison. In these findings of fact the Court of Appeal concurred. Both Courts held that as the result she was guilty of larceny by a trick.

My Lords, so far I have no doubt that this was a true conclusion. If that were all, the case would come within the initial and operative words of the policy, which insures against the risk of theft. It would also come within the words which follow descriptive of the property insured; for these expressly mention property for which the insured is responsible if it is in the custody of any person to whom the insured has entrusted it on the condition of sale or return, for valuation or inspection, or for any other purpose whatsoever. But there is in this policy the exception to which I have already referred in quoting the language of policy. It is exception 1, which excepts from the insurance loss by theft or dishonesty committed by, *inter alios*, "any customer or broker or broker's customer in respect of goods entrusted to them" by the insured, unless the loss arises when the goods are deposited for safe custody.

It is contended for the respondent that what has been established in point of fact amounts to an entrusting, obtained by false pretences, of the property, as distinguished from an obtaining by larceny by a trick or theft. What we have to determine is thus a question on the construction of the exception. Was the case simply one where there was no real consent to any property or such possession being taken over by the woman, and in that sense theft in contemplation of law? Or was it a merely voidable as distinguished from a void transaction, in which a delivery, which was intended to pass the possession and a limited proprietary title in the nature of a bailment, was brought about by a false representation, so that it would stand if the seller did not affirm it? That this question is a difficult one is obvious, for the Judges in the Courts below have been evenly divided about it. We have had it fully argued at the Bar.

My Lords, in the speeches of counsel on the appeal a mass of authorities was cited and relied on. I have thought it my duty to read them through. I cannot say that I have derived much new light from the study. Some of the cases cited lay down principles of law which are general and clear. About these principles there is, however, no real controversy. Others relate to the application of principles to circumstances which are not the same as those in the case before us. They help, in truth, but little. What is important for our purpose is to get before our minds the particular concrete questions before considering the law to be applied.

Now the first of the questions is partly, at least, one of mixed fact and law, the interpretation to be placed on the application of the word "entrusted" in the exceptions. "Entrusted" is not necessarily a term of law. It may have different implications in different contexts. In its most general significance all it imports is a handing over of possession for some purpose which may not imply the conferring of any proprietary right at all. I hand my umbrella to a servant to enable me to be free of it while I am taking off my coat. In a very general sense I entrust him with the umbrella. But there is no easily definable bailment in such an instance. What I have really done is to divest myself of the embarrassing circumstance of holding it. Entrusting may, of course, introduce a bailment, conferring some definite but restricted proprietary right. It is a question, then, of a contract entered into. And whether there is such a contract depends on more than a bare parting with possession. To entrust to a customer or broker or "broker's customer," as specified in the exception, means a definite contract. The reference to "safe custody" as a purpose outside the exception points to this. So does the reference to a broker or a broker's customer. But in the general clause at the beginning of the policy, where the entrusting may be for any purpose whatsoever, the word is surely used in a more general sense to cover all cases in which the article has been deliberately put into the possession of some other person.

Now it may well be that in this more general sense the appellant entrusted Esme Ellison with the possession of the necklets. She may well have been his customer on other occasions. But on this particular occasion it is plain from his evidence and from his books that he did not look on her, but only on Mr. Van der Borgh and the supposed Commander Digby, as the possible purchasing customers.

Esme Ellison was a mere intermediary, little more than a porter, so far as any contract was concerned, a person entrusted with the possession for purposes which seem to fall short of all of those specified in the exception. She certainly got no property. Having regard to the circumstances that in contemplation of law she stole the necklets from the appellant, it is only in a qualified sense that she even got the possession. No doubt she got possession physically, but there was no mutual assent to any contract which would give her even the qualified proprietary right to hold it of a bailee proper. The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The latter was entirely deceived as to the identity of the person with whom he was transacting. It was only on the footing and in the belief that she was Mrs. Van der Borgh that he was willing to deal with her at all. In circumstances such as these I think that there was no such *consensus ad idem* as, for example, Lord Cairns, in his judgment in *Cundy v. Lindsay* (3 App. Cas., 459), declared to be requisite for the constitution of a contract. No doubt physically the woman entered the shop and pretended to bargain in a particular capacity, but only on the footing of being a different person from what she really was. There was never any contract which could afterwards become voidable by reason of a false representation made in obtaining it, because there was no contract at all, nothing excepting the result of a trick practised on the jeweller.

Jurists have laid down, as I think rightly, the test to be applied as to whether there is a mistake as to the party which is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier ("Traité des Obligations," section 19) lays down the principle thus, in a passage adopted by Mr. Justice Fry in *Smith v. Wheatcroft* (9 Ch. D., 223): "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided

by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." In the careful judgment delivered in *Phillips v. Brooks, Limited* (35 *The Times* L.R., 470 ; [1919] 2 K.B., 243) Mr. Justice Horridge decided that the alternative view secondly stated by Pothier applied to the case with which he was dealing. A fraudulent person had entered a jeweller's shop and looked at and selected certain jewels which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer who drew a cheque pretending to be someone else, and signing it in a well-known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed subsequently. Mr. Justice Horridge found as a fact that, though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as Mr. Justice Wendell Holmes says at the beginning of the ninth lecture in his book on "The Common Law," no contract because there is really only one party.

This being so, I think that on the facts found there ought to be judgment for the appellant. No doubt if there was a bailment such as alleged by the respondent, and if it is merely voidable, as where the handing over merely follows on a further false representation which leaves an initial contract intact, a determinable right of property of some kind may pass sufficient to enable a title to be made by the bailee to someone who takes under proper circumstances without notice. But it is otherwise when the bailment is void *ab initio*, as in case of mere theft. I am unable to see how the relation of entrusting to a customer within the meaning of the exceptions can arise here. Lords Justices Bankes and Warrington came to the conclusion that there was in this case an entrusting to a customer within the words of the exception. I find myself more nearly in agreement with the other view taken by Lord Justice Atkin and by Mr. Justice McCardie at the trial. I go rather farther than the learned Lords Justices went in their interpretation of the facts. For to me it appears that on the occasion with which we are dealing the jeweller was not dealing with this woman as a customer. We have to remember that what he did was to let her have possession in her alleged capacity of the wife of a husband who was to inspect and possibly approve. Nothing short of a belief in her identity as a wife who was transacting for her husband as the real customer would have induced the appellant to act as he did.

My Lords, I do not rely on any doctrine belonging to criminal as distinguished from civil law. The only relevance of the criminal law is, I think, the analysis of the elements required to establish a consenting mind in a general sense. On the broader ground stated I am of opinion that on the facts before us the judgments of Mr. Justice McCardie and Lord Justice Atkin were right and those of the majority of the Court of Appeal wrong. If so the appeal must be allowed, with costs here and also in the Courts below.

Viscount Sumner.—My Lords : The facts which are material here fall under two heads. The first is accurately described by saying that the woman Ellison might have been convicted of larceny by a trick ; the second by saying that no actual contract, either of sale or of agency or otherwise, purported to have been made between her and Messrs. Lake and Co. "Larceny by a trick" is a short way of saying that the actual delivery of the necklace to her by Mr. Lake *de manu in manum*, though it wore the outward appearance of consent on his part, was in that respect illusory, because, owing to the deception which Ellison practised on him, his mind did not go consensually with his physical action. It might have saved some discussion, if the finding of fact had simply been so described, without resorting to the more formal title of the crime which she committed, but in my opinion the result is the same. Whichever description is preferable, I adopt the conclusion of both Courts below. I should have been slow to differ from the learned Judge, for, in any case, his finding involved consideration of Mr. Lake's state of mind, and he alone heard his evidence. The conclusion that his state of mind was an appearance of consent produced by the trick and not a real consent induced by fraud is a judicial conclusion from the circumstances proved, from the evidence of the victim as to what was said and done, what he believed, and what he would or would not have done in the absence of that belief, and finally, from the Judge's own view of the ability of the witness himself to analyse and explain his own mental processes with tolerable exactness. A conclusion from these materials is greatly assisted by seeing him and judging what manner of man he is. It would therefore be rash to set up any opinion of my own against the trial Judge's conclusion and I am content to accept it, but I wish to add that, on the evidence, it was doubtless right.

As to what purported to be done the case is clear. The necklaces had been placed in Mr. Lake's hands on approbation under such circumstances that, for the purposes of this case, he was in the same position as if he had actually been the owner. Ellison proposed Van der Borgh and the fictitious Digby as purchasers. She never proposed to be the buyer herself. She never acquired nor was meant to acquire any property from Mr. Lake. He let her take the goods in order that these persons might see them on approval. He gave her no authority to negotiate or to conclude a bargain or to pass property from him to them. If the pearls were approved, if they were kept beyond a reasonable time, if the persons who were to have the opportunity of approving or of disapproving the pearls offered to them dealt with them in a manner inconsistent with such offer, a direct sale by Messrs. Lake and Co. to them would result with an immediate passing of the property from the vendors to them.

My Lords, however otiose it may be to do so in your Lordship's House, I would venture further to say something as to the definite consequences of this finding, since any obscurity on this question is certain to raise doubts on a branch of law which is settled beyond dispute and ought not to be unsettled. First, when Ellison took the necklaces from the hand of

Mr. Lake, she took them as a thief and with no more consent on his part than if she had picked his pocket. The facts are not that she received them from Mr. Lake honestly and without any trick and afterwards formed a felonious intention to deprive him of them, which intention she proceeded to carry out. If that had been so, her offence would have been that of larceny as a bailee. Such a state of facts would further have been inconsistent with obtaining the pearls by false pretences, for a felonious mind only arising after she received the goods from the jeweller would not constitute criminality at the time of the actual obtaining. The whole argument as to the meaning and effect of the word "entrusted" in the exceptions clause in the policy is at once vitally affected if the expression "larceny by a trick" is used in anything but its strict, that is, its only legal, sense.

Again, if Mr. Lake consented to nothing, analogies from the distinction between void and voidable contracts are beside the mark, and equally so are arguments which turn on *consensus ad idem* as an ingredient in the conclusion of a contract. A voidable contract imports a consent with a right to avoid it. The jeweller must then make an election in order to free himself from the obligation. As it is, there was no contract and nothing to avoid. Enlightenment as to the facts was what Mr. Lake needed, and, on becoming aware of Ellison's dishonesty, he could forthwith have taken back his pearls, provided that he avoided any trespass or use of unjustifiable force in doing so. Again, we need not ask how far Ellison would have enjoyed rights under an assumed or implied bailment if some stranger had converted the pearls as against her. What is clear is that she herself had no property or title of any kind as against Mr. Lake. A legal expression, not altogether felicitous, attributes to a pawnee what is called a "special property" as against the pawnor's "general property" in a chattel, but as there was no question of pledging these pearls to Ellison or of giving her a lien or security over them, she had no special or any other property in them and the possession was merely that of a thief. We come back again to the larceny by a trick.

Such being the relevancy of this finding, the next step is to consider whether anything can be imputed to Mr. Lake which would be equivalent to his consent, however it may have been obtained.

Your Lordships heard an argument to the effect that Mr. Lake was not deceived as to the identity of Ellison. She was the same person, it is said, whom he had seen before, and, if he continued to deal with her, it must have been because he gave credit to her statements, which in itself made his act an "entrusting." I think this immaterial. Such facts may raise difficulties in deciding whether his frame of mind involved misplaced consent or was consistent with absence of any consent at all, but the conclusion that it was such as would negative the appearance of consent, and so remove the difficulty in the way of proving an *asportavit*, concludes the whole issue. It matters not whether the trick takes the form of claiming falsely to be a particular person, or of claiming falsely to be another kind of personage than the thief is, or in manipulating the objects which are to be acquired. The trickster is equally a trickster in all. If A B passes himself off as C D it is an instance of the first class. The confidence trick man, posing as a benevolent millionaire from the United States, is of the second. The man who rings the changes and confuses the barmaid, whom he has asked for change, is of the third. The result in all is absence of consent on the part of the person tricked. Of course *animus furandi* may be a separate matter and it remains to be proved. If the jury were persuaded that the trick was all a joke they would have to acquit, but that would not set up a true consent on the part of the party hoaxed nor would it establish a bailment. The joker's possession would still be bad for want of any consent.

Let us now examine the structure of this accustomed form of policy. Even in reported cases it figures as in use in 1914 (*Moore v. Evans*, 32 *The Times* L.R., 224; [1916] 1 K.B., 479), and I have no doubt is much older. I offer no observations on its drafting. If it suits the parties, as it obviously does, there are no doubt sound reasons for the shape in which it comes before us. It begins with (*a*) a recital that a premium has been paid to insure Messrs. Lake against the risks of loss and/or damage by fire, burglary, robbery, theft, accident, from whatsoever cause or misadventure to/of the property herein specified; this is (*b*) certain chattels, including pearls, the property of Mr. Lake, in trust or on commission or for which the assured is/are held to be responsible, (*c*) while in their own custody or in the custody of any person to whom they may have entrusted the same on sale or return for valuation or inspection, or for any other purpose whatsoever. (*d*) The loss must have occurred from Mr. Lake's premises, 43, High-street, Exeter, or while in transit in the United Kingdom. Then follows (*e*) the duration of the policy. Having thus recited the name and premises of the assured, the kind of chattels covered and their relation to the assured, and the place in which they are to be when covered and the period of the insurance, the policy declares as follows: "Touching the adventures and perils to the property hereby insured, which we the assurers . . . do take upon us, they are the loss of and/or damage or misfortune to the before-mentioned property or any part thereof, arising from any cause whatsoever, except as hereinafter mentioned," and then follows the material exception clause No. 1.

Leaving out words not material for present purposes, I think that as a matter of construction the exception clause takes out of the stipulated cover against "thefts" generally certain thefts conditioned in accordance with its terms, and these fall into two classes—viz., those committed by employees of the assured under all circumstances, and those committed by customers, brokers, or brokers' customers, when, but only when, the words "in respect of goods entrusted to them by the assured" are satisfied.

Now that must mean the same theft or thefts as in the recitals which define the extent of the insurance, and, though not so peculiarly a term of art as larceny, theft in each case must mean anything that the law would regard and punish as theft in the fullest sense of the word. Next, the part of the clause, under which a quality of the excluded theft is indicated by the words "by any customer . . . in respect of goods entrusted," must cut out something already in the policy and exclude something already included by the general recitals and provisions. When the goods have passed out of the assured's own custody, they are not covered unless they have been "entrusted" to others on sale or return, for valuation or inspection, or for any other like purpose under the *ejusdem generis* rule of construction. "Entrusted" has therefore the same sense in the exception as in the general words, and the only material "entrusting" is an entrusting (*a*) by the assured, (*b*) for one of the specified purposes. I think it follows that "entrusting" in the exception cannot mean a bare handing over or physical delivery. It does not extend beyond

such a delivery as satisfies the two qualifications stated. The goods must have been handed over in a way that can be described as "entrusting" and for one of the named purposes, which in this case can be no other than "on the conditions of sale or return." Here it is quite plain that the pearls were never entrusted to Ellison on conditions of sale or return. She was not the person who was to approve or to buy or return them—that was Mr. Van der Borgh or Commander Digby. If there was entrusting, it was to one of them. One of these persons was imaginary. The other was not a customer and he was not, in fact, aware of what was being done or concerned in it in any way. In fact, nobody was entrusted.

In the next place, Mr. Lake, who trusted Ellison in the sense of believing what she said, who entrusted the pearls to her, if at all, only that she might take them to Van der Borgh or Digby for purchase or return by them, and who did what was done under a complete delusion, can only be said to have "entrusted" the pearls to her if he consented to her having them. If there was a trick which prevented any true consent arising, there could be no entrusting. The terms are mutually exclusive. In my opinion, the natural meaning of "entrusted" involves that the assured should by some real and conscious volition have imposed on the person to whom he delivers the goods some species of fiduciary duty. There is no room here for any colloquial sense. A large and important part is played in a jeweller's business by the various kinds of genuine "entrusting" which the earlier part of the policy describes. The exclusion from the risk covered of any delivery of possession, however devoid of mental assent on the part of the person who gives it, would be quite arbitrary and hard to reconcile with the general insuring words. The language is the insurers' own, and in an exception it must be read *contra proferentes*. If they intended no more than "handed over," they should have said so, and the more plainly the better.

Against this conclusion reliance has been placed, both before your Lordships and below, on three lines of argument, of which the last two have particularly found favour with Lords Justices Bankes and Warrington. The first is that in the exception clause "entrusted" should be read as referring simply to a physical act and means "handed over"; or alternatively that, though Ellison's mind was felonious, Mr. Lake's was, in his ignorance of that fact, an entrusting mind at the moment, and it is to his mind in connexion with his act that the exception must be deemed to refer. With this I have already dealt. A second is that in a commercial document no legal technicality of the criminal law should be taken into account. A third is that the element of consent should be taken in the sense in which, in the Factors Act, 1889, section 2, the Court of Appeal was disposed to read it in *Folkes v. King* (39 *The Times* L.R., 77; [1923] 1 K.B., 282).

Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure. This, however, is not a case in which the appellant proposes to read the policy as if he was arguing an old-fashioned indictment, nor do I think it fair to discuss his contention as if it involved "technicalities of the criminal law." Even if it be the case that the occasion on which the doctrine of larceny by a trick at common law was first developed was one in which a thief would otherwise have escaped conviction, where he had called in fraud to the assistance of his nimble fingers, the doctrine is now statutory under the Larceny Act, but I do not think the doctrine was ever one which could be described as being an artificial view of the facts as opposed to the actual facts of the case. It was not merely "invented by Judges" to prevent a thief from taking advantage of his own wrong and relying upon a possession which he obtained unlawfully. Before this "invention" an accused person who contended that there was no sufficient evidence of a taking was not relying on a possession unlawfully obtained; he was relying on the law and was taking proper advantage—if that is the right word—of being in the right as to the law of evidence. I dissent from the view that criminal law should be treated as irrelevant merely because a document is commercial. After all, criminal law is still law, and so are its definitions and rules. The distinction between a real consent, obtained by deceit, and an unreal consent, extracted by a trick, is equally applicable to civil disputes. As Mr. Justice Story says (Equity Jurisprudence, s. 222): "consent is an act of reason accompanied with deliberation . . . Grotius has added that what is not done with a deliberate mind does not come under the class of perfect obligation. And hence it is that if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

On the bearing which apparent consent, obtained by a trick, may have on the "consent" which is mentioned in section 2 of the Factors Act, 1889, there has been so signal and so indecisive a conflict of authoritative opinion that I should be loth to offer any conclusion of my own, unless it was quite clear that the point was necessary to the decision of this case. I think it is not. The fact that it is the word "entrusted" that is before us and not the word "consent" is a minor matter, but the nature of the document under construction is crucial. By the present policy the underwriters stand behind Mr. Lake and hold him harmless if certain events happen to their detriment, specifying these events in their own words first by a general inclusive statement and then by a particular exclusion thereout. All theft is covered except such theft (so far as this case is concerned) as is committed by an "entrusted" customer. The question of larceny by a trick and the question of false pretences do not arise under the words "theft or dishonesty." The relevance of larceny by a trick is to test whether a customer whose dishonest act is in issue is a customer "entrusted." The word clearly connotes a definite state of mind. Whose mind? Only that of the assured. It is he who entrusts, if entrusting there be; no third party other than the thief enters into the case, and it is the jeweller's state of mind that matters on the issue "consent or no consent," while the thief's state of mind, and not the jeweller's, is relevant to loss by theft or dishonesty. Further, this contract is made for the protection of the assured and nobody else. The Factors Act, on the other hand, was framed for the benefit and protection of third persons into whose hands commercial documents of title have passed for value and in good faith on their part. The action which prejudices them is action which only becomes possible because an unauthorized person has got the documents in circumstances that lead others to act in the belief that the true owner has given his consent. An argument may well arise in such circumstances that, as against the third party who has changed his position, the original owner cannot deny a consent which is not only apparent but is invested with this appearance by what he has done. What they have to be protected against is not confined to the results of his

intelligent and consensual action, but against the results of any action on his part at all. Be this as it may, it seems to me not to be decisive in the present case and I say no more upon it.

I agree that Ellison was not a customer for the purpose of the exceptions clause. There is no point in introducing a person, who is by trade a broker and still less his customers too, who may be unknown to the assured, unless that capacity is directly connected with the goods with which the exception deals. Accordingly, my Lords, I think that the appeal succeeds.

Lord Atkinson.—My Lords : The argument in this case has ranged over a very wide field. My noble friends who have preceded me have dealt with the various points which have been argued by counsel on both sides. I do not propose to deal with these points again. I think the appeal succeeds. I think Miss Esme Ellison obtained the possession of the jewelry handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That when she got possession of it she feloniously appropriated it is not disputed. But the operation of entrusting the possession of the jewelry, though not the property in it, to her, which *prima facie* would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from and unconnected with the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation which the woman made to the appellant, and which he apparently believed ; secondly, the action which he took, acting on that belief ; and thirdly, the felonious appropriation of the goods, when obtained, to her own use. The so-called entrusting of the jewels to her furnished to her—as she intended it should—the opportunity for and means of committing the theft.

It does not appear to me to be possible to separate the handing over of the possession of the jewels from the falsehood which preceded it and the felonious action which followed it. The entrusting of goods to a customer mentioned in the exception cannot mean the delivery in all good faith by a dealer of goods to a customer which that customer has planned to steal, and by that very delivery enabling the customer to effect her felonious purpose. The true character of the operation was larceny of the appellant's goods by means of a trick—the trick being the false and fraudulent representation which this woman made to the appellant, by which the delivery to her of the possession of the jewels was obtained.

The appellant had no suspicion, apparently, that he was about to be robbed through the medium of this trick. He acted perfectly honestly in giving over the possession of the jewelry. So does every one, presumably, who suffers from larceny by a trick. It is the honest belief of the person robbed in the false statements made which enables the intending thief to defraud him. That, however, does not alter the real character of the entire transaction.

Again, the inclination of my opinion is that Miss Esme Ellison was not a customer of the appellant *quoad* the goods, the possession of which was handed over to her, within the meaning of the exception, though she may have stood to the appellant in the relation of customer in other transactions. No doubt the appellant regarded the handing over of the jewels to her as ancillary to a possible sale of them to her pretended husband, but the idea of having any dealing of that kind with the appellant in reference to this jewelry never entered her head. From the first she apparently designed and intended a theft. That was the nature of the only dealing that she had in mind. As I have said, I think the appeal succeeds.

Lord Blanesburgh.—My Lords : I think also that this appeal succeeds, and, while I entirely agree with the judgment of my noble and learned friend Lord Sumner, which I have had the advantage of reading, I propose specifically to base my judgment on the simple ground that Ellison was not in either transaction a customer of the appellant within the meaning of the exception clause of the policy.

I do not doubt that by the month of March, 1923, she had resorted to the appellant's shop for the purpose of purchasing goods from him with sufficient frequency to justify her inclusion in the class of persons aptly enough described as the customers of the appellant in connexion with his business of a jeweller. I am free also to agree that, if the only customers or persons referred to in the exception clause had been customers of the assured, it might on construction have been difficult to avoid the conclusion that nothing more was required to bring Ellison in this respect within the exception. With reference to a clause so framed it could with force have been urged that his customers were so excepted because the assured had no need to be protected against the unlikely dishonesty of people whom he knew and trusted in business.

But, my Lords, the exception is not confined to customers of the assured. It extends to a "broker or broker's customer" as well, and, as will be seen in a moment, no corresponding explanation of their appearance in the exception can be put forward.

If the whole expression is to be construed in absolute or detached terms, as I have so far construed the word "customer," who, it may be asked, is a "broker" ? May he be any kind of broker ? What is the qualification for his inclusion if he may not ? What possible connexion, still construing the word at large, is there between the assured and the "customer" of such a broker ? Who is such a "customer" ? Who is not ? How would that position, one way or the other, be known to the assured ? It is, my Lords, I think, quite impossible to say. In my judgment, therefore, it is necessary to reconsider the effect of the whole phrase "customer, broker or broker's customer in respect of goods entrusted to them," from this standpoint and with a view of seeing whether there is any relation in which they all stand to the assured which makes it possible at once to fix their identity and to justify the exception in regard to each of them indifferently, and that relation, in my judgment, is that the customer of the assured, the broker or the broker's customer, are, each and all of them, such with reference to the particular goods so entrusted to them. And Ellison was not, and never pretended to be and was not treated by the appellant as being, a customer in that sense in relation to either of the necklaces now in question.

My Lords, I am in entire agreement with Mr. Justice McCardie on this point. I cannot think that it would have been dealt with in the Court of Appeal so lightly as it was if the Lords Justices had noticed that reasons which are apt enough to justify the inclusion of customers of the assured as such in the exception, have no application either to brokers or *their* customers and that in construing the clause no wider meaning can properly be attached to the word "customer" in the one case than in the other.

[Solicitors—Messrs. Kenneth Brown, Baker, Baker ; Messrs. Windybank, Samuell, and Lawrence.]

House of Lords.
(Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Carson, and Lord Blanesburgh.)
1927.
Apr. 4.

BLATCHFORD v. STADDON AND FOUNDS.*

Master and Servant—Compensation for injury by accident—Industrial disease—Painter—Lead poisoning—Liability of last employer—"Employment to the nature of which the disease was due"—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), s. 8 and Schedule III., as extended by Order of February 26, 1918 [S.R. and O., 1918, No. 287].

The appellant, a painter, claimed compensation from the respondents, a firm of builders and house decorators, in respect of disablement caused by lead poisoning. The appellant served in the Navy as a painter until 1918, and during that service contracted the disease of lead poisoning. His last employment was with the respondents from October to December, 1924, when he left owing to illness. In July, 1925, the certifying surgeon certified that he was then suffering from lead poisoning and was thereby disabled from earning his full wages at the work at which he had been employed. The certificate gave no date for the commencement of the disablement, and, accordingly, by virtue of s. 8, subs. 4, of the Workmen's Compensation Act, 1906, it was deemed to have commenced at the date of the certificate. The arbitrator was not satisfied that there was anything in the nature of the appellant's employment with the respondents that would tend to aggravate or accelerate the process of the disease so as to warrant a finding that his disablement was due to that employment and made an award in favour of the respondents.

Held, that the appellant was entitled to compensation under s. 8 (1) from the respondents as being the last employers who had employed him within the twelve months immediately preceding his disablement in the employment to the nature of which the disease was due, *i.e.*, in work of the same character as that to which his disease was due, namely, lead painting, notwithstanding that he failed to prove that his disablement was due to his employment by the respondents.

Dean v. Rubian Art Pottery, Limited (30 *The Times* L.R., 283; [1914] 2 K.B., 213) overruled.

Decision of the Court of Appeal (135 L.T., 219) reversed.

This was an appeal from an order of the Court of Appeal (135 L.T., 219) affirming an award made by the County Court Judge of Devon under the Workmen's Compensation Acts, 1906 to 1923, in favour of the respondents.

The appellant, a painter, claimed compensation from the respondents, a firm of builders and decorators, in respect of disablement caused by lead poisoning. The appellant, who served in the Navy until 1918 as a painter, contracted lead poisoning during that period. Subsequently he worked from time to time as a painter for various employers until July, 1924. He was then out of work for a period. From mid-September to mid-October he worked for Messrs. Woolacot and Son. From October 23 to December 12, 1924, he worked for the respondents. He then fell ill and left the employment. He was, in fact, then suffering from lead poisoning, though this was not discovered till June, 1925, and he had not since been at work. On July 13, 1925, the certifying surgeon certified that he was then suffering from lead poisoning and was thereby disabled from earning full wages at the work at which he was employed, and an appeal by the respondents to the medical referee against this certificate was dismissed. The certificate gave no date for the commencement of the disease, and accordingly by virtue of section 8 (4) of the Act of 1906 it was taken to have commenced at the date of the certificate.

The appellant claimed that he was entitled to compensation under section 8 (1) from the respondents as being the last employers who had employed him within twelve months previous to the date of disablement in the employment to the nature of which the disease was due.

The respondents resisted the claim on the ground that the disease was not contracted while the appellant was in their employment, nor was it aggravated or accelerated during that employment. They also claimed to be entitled to contribution under section 8 (1) (*c*) (iii.) from Messrs. Woolacot and Son, who were added as third parties for that purpose.

The County Court Judge said that the evidence failed to satisfy him that there was anything in the nature of the appellant's employment by the respondents that would of itself tend to aggravate or accelerate the process of the disease, from which he had probably been suffering for a considerable time, and he could not find that the appellant's disablement was due to such employment. Accordingly, on the authority of *Dean v. Rubian Art Pottery, Limited* (30 *The Times* L.R., 283; [1914] 2 K.B., 213) he made an award in favour of the respondents. The Court of Appeal (the Master of the Rolls, Lord Justice Scrutton and Lord Justice Sargant) affirmed this award.

Mr. Edgar T. Dale and Mr. Montague Berryman appeared for the appellant; and Mr. W. Shakespeare and Mr. J. L. Pratt for the respondents.

VISCOUNT SUMNER.—My Lords: The appellant is a painter by trade, and the respondents are a firm of builders and decorators. On December 12, 1924, the appellant, who was then and had been for seven weeks in the respondents' employment as a painter, left them owing to illness. Though his panel doctor did not for a long time detect it, he was then suffering from lead poisoning, a disease from which he had suffered six years before. The learned arbitrator, in summing up evidence which was sufficient to warrant his finding, said that it showed that "there was nothing exceptional in the nature of the work that the applicant was called upon to perform whilst in the respondents' employment. It has failed to satisfy me that there was anything in the nature of his employment by the respondents that would of itself tend to aggravate or accelerate the process of disease, from which the applicant had probably been suffering for a considerable number of years, so that I can find that it was due to such employment that

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

the lead poisoning became so acute as to render the applicant disabled." It has, however, turned out that the disablement is permanent. The applicant has not worked since he left the respondents' employment. Lead poisoning was eventually diagnosed in June, 1925, and a certificate was obtained from the certifying surgeon that he was suffering from effects of lead poisoning and was thereby disabled from earning full wages at the work at which he had been employed, a conclusion subsequently affirmed by the medical referee on appeal. The certifying surgeon, not being able to certify a date on which the disablement commenced, duly deleted the words in the form of certificate, which fix the date of commencement, and under the Act the commencement is deemed to have been the date of the certificate, viz., July 13, 1925. The applicant's last employment was not at or immediately before this date, and accordingly he did not enjoy at the hearing the benefit of the presumption which arises under section 8 (2) of the Act of 1906. The issue then may be briefly stated as follows :—Has the applicant, in the state of facts found by the learned arbitrator, proved enough to establish a right to receive compensation from the respondents ? He says in this appeal that he has, for he has proved that within the period limited by section 8 he suffered from one of the scheduled diseases, due to the nature of his employment, as a workman who handles lead paint in connexion with his work as a painter. The respondents say that he has not, for he has not proved that his suffering arose out of his employment by the respondents, and that nothing in the Act, either clearly or at all, makes them liable for a misfortune, which did not arise out of or in the course of some employment by them, nor, without the clearest words, can persons be called on to pay compensation to a workman when their employment has not in any way affected a disabling disease contracted elsewhere. The arbitrator's award in the respondents' favour was affirmed by the Court of Appeal, bound as they were by the decision in *Dean v. Rubian Art Pottery, Limited* (30 *The Times* L.R., 283 ; [1914] 2 K.B., 213). In effect it is that case which is now under appeal, but the question really depends not on authority but on the construction of the Act of 1906, section 8 (1).

When the Workmen's Compensation Act of 1897 was re-enacted as amended in 1906, the Legislature decided to introduce into it a provision dealing with diseases, which affect those who use certain processes in their trades, commonly called "industrial diseases." A schedule to the Act specifies some of these diseases, and section 8 of the Act is the code which regulates them. Under the Act of 1897 and the earlier sections of the Act of 1906, the subject of compensation is injury or death due to "an accident arising out of and in the course of" the workman's employment, and an "accident" (a word which is not defined by the statute) is spoken of in its ordinary sense. As a mere matter of drafting it would have been easy to enact in 1906 that disablement or death, caused by any of the scheduled diseases, should be deemed to be an "accident" within the Act of 1897 and the corresponding sections of the Act of 1906 and should be compensated accordingly. This, however, would only have been the beginning of trouble.

An accident may result in an attack of some disease and so become disabling, though not otherwise of any moment. In such a case the supervention of disease is a matter of chance and not of certainty, and to that extent is an accidental or fortuitous consequence, but no one in ordinary language would say that the illness was itself an accident. Hence, diseases, which, when they attack a workman, do so because of his trade and incidentally to it and to the processes which he uses in it, would not be within the words above quoted from the Act of 1897 without further legislation and could not be brought within its fundamental principle merely by calling them "accidents." Their peculiar character made much more extensive provision necessary. They come on gradually ; their first steps may not be perceptible for some time ; their rate of progress may vary widely ; they have their ups and downs. The patient sometimes makes a complete recovery and sometimes only an apparent one, and the periods during which they may be quiescent and latent may vary greatly. In the case of such diseases an applicant who had not been long in the employment of the respondent would naturally be met with the suggestion that his disease had been previously contracted and therefore did not arise out of it, and in meeting this defence by proof that it actually arose during and out of his employment by the respondent he might well find the difficulty insuperable. It appears to be common ground, and rightly so as far as I know, that this fatal disadvantage may often occur and that the Legislature must have been aware of it. If there was to be an effective remedy, much more had to be done than simply to declare the disease to be an accident. Means had to be found for enabling the workman to recover compensation from an employer even though he could not prove the precise time when the disease was contracted.

I will therefore examine section 8 (1) itself. The scheme, as applicable to the present case, is this. A workman, disabled from work through suffering from a scheduled industrial disease, of which it can be predicated that it is due to the nature of his employment within twelve months before his disablement, is to be entitled to compensation under the Act of 1906. How and on what conditions ? The manner of his compensation is to be as if the disease were a personal injury arising out of and in the course of the trade in which he was employed within the twelve months previous to the date of the disablement and to the nature of which the disease was due, the disablement being treated as being the accident. The conditions are these. The person from whom the compensation is to be recoverable shall be the employer who last employed the workman during the said twelve months, its measure is to be the workman's earnings under that employer, and it is to that employer that notice of the disablement is to be given. It will thus be seen that the modifications, subject to which compensation is to be recovered as if in the case of an accident under the Act of 1897, are considerable. They are intended to obviate the disadvantage, which would handicap the workman if he had to prove disablement by disease as if for an accident, under the Act of 1897 and its equivalent sections of the Act of 1906, and they provide a means, perhaps rough and ready, of enabling a suffering workman to get compensation from someone certain in respect of a disease contracted at a wholly uncertain time.

Provisos are finally added to mitigate the hardship of exacting compensation from an employer whose employment may not be shown to have had and may not actually have had anything to do with the onset or the progress of the disease or with the ultimate disablement of the workman. He is to have the opportunity of recovering over part or even the whole of the compensation from others, whose employment of the workman during the twelve months in question in processes, from the nature of which

such a disease arises, may have been its source in fact. To enable this employer to bring such other employers into the proceedings and to have his own claim over disposed of at the same time as the workman's, the latter is to give him information as to the names and addresses of such other employers, failing which, or if, though given, his information is insufficient to enable the proceedings mentioned to be taken against them, the employer sued is to be allowed to negative any liability to pay compensation by proving that the disease was not contracted while the workman was in his employment.

My Lords, I think that a scheme is thus disclosed for bringing industrial diseases into the Act of 1906, which substantially meets their peculiar features mentioned above. The way in which this is done sufficiently meets the objection that, unless shown in the clearest words, an intention cannot be imputed to the Legislature to make one employer pay for what was entirely due to the service of others. This objection was pointedly phrased by saying that "the last employer" named in the section must mean "the last relevant employer," the last employer in point of time, out of and in the course of whose employment the disease had wholly or partly arisen. I think that the scheme of the section is on its face such that the last employer cannot be thus limited. The ground for making him the person from whom compensation is to be recoverable is that he is a person certain and designated, upon whom the workman may claim without being sent from pillar to post. It is contemplated that contribution may be recovered over to a substantial extent, and for the rest the employer must protect himself by insurance, the cost of which will form part of his trade outgoings. The paternal benevolence of the Legislature towards workmen is well known, and if the price of that benevolence is paid by the last employer, who thus has to bear others' burdens, there is nothing new in that in this kind of legislation, nor is it done to an extent that need surprise anyone who has fully digested the position in which the Act of 1897 had already placed employers.

Turning now to particular expressions in the section, I would observe :—

(*a*) In construing the Act effect must be given to the words "to the nature of." Their meaning cannot be the same as if the section had simply said "is due to" any employment. I think they are inserted because this part of the section is not concerned directly with something arising out of the particular service of the particular employer sued, but with results, which are incidental to the class of employment, in which the workman has served several employers. If the disease is incidental to that class of employment, so that it can be attributed to service therein, then he is to be compensated, as if something could be proved, which *ex hypothesi* may not be proved, namely, as if an accident had arisen out of and in the course of that employment under a particular employer and at a particular time and had been proved to have so arisen. The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident. This is in favour of the workman. The employer, *per contra*, gets the provision that the proof of the disease is to be given by the certificate of the certifying surgeon, and if the surgeon cannot determine when the disease was contracted, the date of his certificate is to be taken as arbitrarily fixing the time of that event. If the suggested limitation on the relevancy of the last employer were adopted, the anomalous result would be that the date of the accident would be fixed, but its connexion with the employment, then or last previously subsisting, would be at large, and the workman's difficulties, arising in any case from the gradual appearance of the symptoms of his disease, would be aggravated by his being tied to a date for the accident, which might be long after the time when the disease was really contracted.

(*b*) The workman's proceedings are imperatively fixed by the words "compensation shall be recoverable." No power to implead other employers for his compensation is given to him, but, on the contrary, express power to bring in other employers and prove them liable is given to the last employer, and to him alone. The section treats the statutory compensation as one compensation, recoverable by the workman from the last employer, unless, by the action of that last employer in joining a prior employer and in proving his allegation in the terms of proviso (ii), such compensation becomes recoverable in the proceedings already begun by the workman from that prior employer, who has thus become the employer from whom the compensation is to be recoverable.

(*c*) The words in section 8 (1) (*b*) and those at the end of proviso (i) specify expressly the only events in which the compensation shall not be recoverable from the last employer, and thereby exclude any implication that it may also not be recoverable, if the workman fails to show that his disablement by disease arose out of that last employer's service. Except in so far as proviso (ii) applies, where one set of proceedings originally begun by the workman against the last employer is clearly contemplated, the only cases in which compensation is not to be payable by the last employer are where the workman has given insufficient or no information and the employer has then proved that his employment of the workman had nothing to do with the disease and the case of the wilfully false representation made by the workman to which section 8 (1) (*b*) refers.

For these reasons I think, on the construction of the Act itself, that the appeal succeeds, and it follows that the contrary view expressed in *Dean v. Rubian Art Pottery, Limited* (*supra*), is one that, with all respect to the Court of Appeal, I cannot accept. It has already been criticized (*McTaggart v. Barr* [1915] S.C., at p. 231), and departed from (*Docherty v. Archibald Russell, Limited* [1918] S.C., 115) in the Court of Session. I think that the crucial error in the judgments in *Dean's* case (*supra*) may be found in the view that the nature of the employment mentioned in subsection 2 means the nature of the particular employment with the respondents (p. 220), and that proof, that the disease was not in any degree due to the nature of the employment under the respondent, means not caused or produced in his employment (pp. 223 and 225). I think that the appeal should be allowed, that the award made by the arbitrator should be set aside, and that the case should be remitted to him to find the amount of compensation due to the applicant and, if necessary, to deal with any claims over against any other employer which may be substantiated by the respondents. I would gratefully add that I have felt myself much indebted to the very clear arguments of the learned and experienced counsel who addressed us on behalf of the respective parties. I move your Lordships accordingly.

I am desired to say that my noble and learned friend Lord Carson concurs in this opinion and motion.

Lord Atkinson.—My Lords : This is an appeal from an order of his Majesty's Court of Appeal in

England, dated the 9th day of February, 1926, dismissing an appeal by the present appellant from an award made by His Honour Judge Higgins at the County Court of Newton Abbot, Devon, in favour of the present respondents in an arbitration under the Workmen's Compensation Acts, 1906 to 1923, dated the 18th day of December, 1925, whereby the said Judge awarded that the present appellant was not entitled to receive compensation from the present respondents in respect of incapacity from lead poisoning, and further ordered the present appellant to pay to the present respondents the costs of the arbitration.

An application for arbitration under the Workmen's Compensation Acts, 1906 to 1923, dated August 24, 1925, was filed in Newton Abbot County Court of Devon by Alfred James Blatchford, the present appellant, against Staddon and Founds, the present respondents.

The relevant facts in the case to which it is most important to have close attention are clearly set forth in the judgment of the County Court Judge, and are repeated with accuracy and all necessary fullness in the judgment which the Master of the Rolls delivered in the Court of Appeal. He set them out as follows :—

The applicant, who is a painter, claims compensation from the respondents, who are builders and decorators, in respect of disablement caused by lead poisoning. The applicant is 53 years old, and was in the Navy until 1918 as a painter. During his service there he contracted lead poisoning, a definite symptom whereof, namely, drop wrist, showed itself during that period. Since his discharge from the Navy the applicant worked as a painter during 1920. From the beginning of 1923 until July, 1924, he was in the employment of Mr. Battershill. From July to mid-September, 1924, he was out of work, and from mid-September to mid-October, 1924, he was employed by Messrs. Woolacot and Son. After ten days' unemployment the applicant entered the respondents' employment on October 23, 1924, and remained therein until December 12, 1924, when he left owing to illness. He then saw his panel doctor, who diagnosed his condition as being due to cardiac weakness ; and the learned Judge held, upon evidence which was ample to enable him to do so, that the applicant was suffering, and had been suffering ever since his employment in the Navy, which ceased in 1918, from lead poisoning. On July 13, 1925, Dr. King, certifying surgeon, gave his certificate to the effect that the applicant was then suffering from the effects of lead poisoning. That means that after being absent from painting work, and absent from the employ of the respondents for seven months, he then got a certificate that he was suffering from the effects of lead poisoning.

Difficulties have arisen when dealing with cases similar in character to the present in construing a number of enactments aimed at engrafting on legislation designed to secure to workmen compensation for injuries by accident arising out of and in the course of their employment (accidents which necessarily happened at a particular point of time) incapacity for work caused to a workman by certain industrial diseases, which, in most instances, develop slowly, abate often in virulence, and frequently recur with disabling effects. There is nothing similar in the events which bring these two species of disablement or injury into effect. To repeat : In 1920 the appellant worked as a painter for a Mr. Williams. From early in 1923 to July, 1924, he worked as a painter for a Mr. Battershill. From that date in July, 1924, till September in that year he was out of employment. From September 15, 1924, till October 13 he worked as a painter for Messrs. Woolacot and Son, during which time he stated he was in normal health. On October 23, 1924, he started to work as a painter with the respondents. In close on two months afterwards, namely, on December 12, 1924, when he was afflicted with "general debility," which affected his hearing, he left that employment, but he only obtained a certificate from a certifying surgeon on July 13, 1925, that is, seven months after he had ceased to work for the respondents. He obtained a certificate from the certifying surgeon, Dr. Colin King, certifying that he was suffering from the effects of lead poisoning and was thereby disabled from earning full wages at the work at which he had been employed—no date is mentioned in the certificate as to when this disablement commenced. The commencement of the appellant's disablement must, therefore, under section 8, subsection 4, be taken to be July 13, 1925.

The respondents appealed against this certificate to the medical referee, Dr. J. Ragan Thomas, who, on August 21, 1925, dismissed the appeal and certified that Blatchford was then suffering from lead poisoning and was thereby disabled from earning full wages at the work at which he was employed. Section 8, subsection 2, of the Workmen's Compensation Act, 1906, evidently does not apply to this case, as the workman was "not at or immediately before the date" of this certificate, July 13, 1925, employed with the respondents. That event took place seven months before the date of disablement, and therefore cannot be said to have taken place immediately before that date. The onus of proof mentioned in that subsection did not exist (*Dean v. Rubian Art Pottery, Limited* (30 *The Times* L.R., 283 ; [1914] 2 K.B., 213).

The County Court Judge, the proper judge of fact, found that on December 12, 1924, the day on which the appellant left the respondents' employment and also the day upon which the panel doctor found he was suffering from general debility affecting his heart, the evidence satisfied him that there was nothing exceptional in the nature of the work that the appellant was called upon to perform while in the respondents' service. The evidence, he says, failed to satisfy him that there was anything in the nature of his employment to aggravate or accelerate the process of the disease from which the appellant had probably been suffering for a considerable number of years, so that he could not find that it was due to such employment that the lead poisoning became so acute as to cause the applicant to be disabled.

It is clear that the employer can, under section 8, subsection 1, protect himself from liability (despite the conditions mentioned) by proving that the workman's disease was not due to his employment under the defendant. But it is contended that the employer never can free himself from liability under section 8, subsection 1 (*c*), by proving, no matter how conclusively, the fact that the workman's disease was not contracted while he was in the employer's employment, but proving nothing more.

That result, which at first sight looks strange and rather unjust, is necessitated by the provision in section 8 (1) (*c*) to the effect that compensation shall be recoverable from the employer who last employed the workman during the 12 months antecedent to the latter's disablement. If he, the employer, were permitted to protect himself by proving simply the fact that the workman's disease was not contracted while he was in his employment, the workman would be placed in this difficulty, that he could not sue any of the other employers he might have worked under

during the 12 months preceding his disablement, inasmuch as section 8 (1) (*c*) provides that compensation shall be recoverable from the employer who last employed the workman during the aforesaid 12 months. This provision necessitates that this last employer shall be kept before the Court as respondent until he is released from liability under the contribution scheme in section 8 (1) (*c*) (iii). If the employer succeeds in proving, in addition to this fact, that the disease was contracted while the workman was in the employment of some employer other than himself, he may join that other employer as a party, who shall thenceforth be treated as the employer by whom compensation is to be paid, but it seems to be clear that except through the operation of the compensation provisions and independently of section 8 (1) (*c*) (ii), which does not touch this case, the mere proof by an employer that the disease from which his workman suffers was not contracted while he was in the former's employment will not apparently *per se* relieve him from liability. If the last employer proceeds to avail himself of the contribution provisions, he may obtain considerable relief in many cases. And it may well be that, taking the general body of employers, this relief is not inadequate, and operates on the whole in their true interest.

The workman, therefore, is only bound under section 8 (1) (*c*) to prove that he was last employed by this employer during the 12 months immediately preceding his disablement in employment of the nature to which the disease was due; that was, in this case, lead painting.

The County Court Judge held that the onus of proof lay upon Blatchford to show that the lead poisoning from which he was suffering was, so to speak, brought to a head owing to the nature of his employment, and that he had failed to discharge this onus.

The learned Lords Justices took apparently, to some extent, if not altogether, the same view. With all respect I do not think that it was necessary for the workman to prove that it was the employment with the last employer which, in fact, caused his disablement or suspension. It will, I think, be sufficient for him to prove that his work with his last employer during the 12 months immediately preceding his disablement was of the same nature and character as the work to which his disease is due. I think, therefore, that the appeal succeeds, and that the decision appealed from should be reversed and the decision of the County Court Judge set aside and this appeal allowed.

Lord Wrenbury.—My Lords: I have found the construction of section 8 of the Workmen's Compensation Act, 1906, so difficult that after perusing it again and again I am not sure that even now I can accurately state its effect. The difficulty arises, I think, from the fact that, as it appears to me, the draftsman, when he sat down to draw the section, cannot have had present to his mind any clear idea as to the test which he was going to impose to determine whether any particular employer was to be liable or not. Was the test to be that the workman was in the employer's service during the contraction of the disease so that the employer could be regarded as having contributed to its development, or was the test to be that the workman has been in the employer's service within some period of 12 months from a definite date fixed by a definite event such as suspension? Was it to be a defence that it was found as a fact that the workman suffered from the disease when he entered the particular employer's service and did not contract it in that service? The section oscillates among all of these. I have to find the test which I am to apply and have to reconcile as best I can the conflicting provisions which the section contains.

The Act of 1897 and the first section of the Act of 1906 had to do with the case of an accident properly so called. An accident, in most cases at any rate, happens at a point of time easily identified, and there is no difficulty in stating who is at that point of time the employer. In that class of case the statutory liability is quite plainly imposed upon the employer in whose employment the accident was suffered. The word used is "compensation." That word in general conveys that if one has injured another he is to compensate him for the injury. In the case in question the employer, it is true, has not injured the workman, but the injury has been suffered in the employment of the employer and has, so to speak, been suffered for his benefit. It was an essential factor for allocating liability that the accident was suffered in the employment of the employer.

In drawing section 8 the draftsman was going to provide, not for an accident properly so called, but for an industrial disease as if it were an accident. The contraction of the disease was presumably to be attributed not to any one point of time, but to a gradual development over a long period of time—during which there might be many employers. Under these circumstances section 8 does not provide new machinery, but creates the new liability referentially by the words "as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment" being an employment during a statutory period of 12 months provided for by the statute. [I may here interpolate that although there are three things which might be relevant in this context, viz. (1) "the disease," whatever that means, (2) suspension within section 8 (1) (ii), and (3) a certificate of disablement within section 8 (1) (i), two only of these are here mentioned.] The referential words above mentioned carry me back to section 1, which requires that the accident be in the employment, and if the matter stopped there I should be able to say "Ascertain the 12 months—the accident must be taken as happening every day during that time and every employer in the dangerous trade during that time is liable." But this is not what the Act says. It says that the disease or suspension is to be considered as the personal injury by accident. Does this mean that the contraction of the disease is the accident, or does it mean that the ascertainment in a defined way of the fact of the disease having been contracted is the accident? On the whole from that which I have to say further, I think it must mean the latter. For section 8 (1) (iii) (*a*) provides in express terms that the disablement or suspension shall be treated as the happening of the accident. Perhaps here "disablement" means certificate of disablement. Whether it means disablement in fact or certificate of disablement this is not a period of time over which the disease may have been contracted, but some particular point of time. So here I get back to a case similar to that of the accident properly so called, and the liability created by section 1 attaches (if the referential words are to have effect) only to the employer who was employer at that moment. But obviously that will not do; the liability attaches at any time within the statutory 12 months, that is to say, attaches to any person who was employer during that time, although he was not employer at the date of the accident.

But when I look further, I find that it is not enough to say that the employer was employer during the 12 months. He may escape under section 8 (1) (*c*) (ii)

if he can find another employer within the 12 months and can prove that the disease was contracted whilst the workman was in the employment of that other employer and not whilst in his employment, in which case that other employer is to be the employer from whom the compensation is to be recoverable. Must this other employer have been an employer during the statutory 12 months? It seems to me that he must, for otherwise no liability has by anything which precedes been created in him. If this is so, this extraordinary result ensues. Suppose A has employed the man for 10 months and B had employed him for the preceding two months, A may by proper evidence escape and may pass on the liability to B. But if A has employed the man for 13 months he cannot do so, for B is not liable in any case, and, however exhaustively A may prove that the disease was contracted in B's employment and not in A's employment, A is liable.

The considerations upon which I have last dwelt show that contraction of the disease in the employment is in some cases at any rate relevant to the question of liability. If the principle of section 1 (viz., accident in the employment) is to have effect, it plainly ought to be relevant in all cases. But I cannot find that the Act says so.

In this particular case it is found as a fact that the disease was contracted in 1918, that the man then suffered from drop wrist, a definite symptom of lead poisoning, that there is no doubt that when he entered the respondents' service he was suffering from lead poisoning, and that there was nothing in the nature of his employment by the respondents to aggravate or accelerate the disease. In other words the respondents were no parties to the contraction of the disease. But on July 13, 1925, the workman was certified to be suffering from the disease and to be disabled, and by virtue of section 8 (4) this is to be taken to be the date of disablement, and by virtue of section 8 (1) (iii) (*a*) the disablement is to be treated as the happening of the accident, and the employment by the respondents was within the statutory 12 months, so that I am driven to say contrary to the real facts as found that the statute has rendered liable an employer whose service had nothing to do with the workman's unfortunate state of health.

I therefore find myself compelled to assent to the motion proposed.

Lord Blanesburgh.—My Lords: It was in this case found by the learned arbitrator that the appellant, when he left the respondents' service on December 12, 1924, was suffering from lead poisoning, and it was given in evidence by the appellant himself that when he was working for the respondents on some houses he used pure lead paint which he himself mixed and that he used the same paint when working for them on other houses. He was duly certified on July 13, 1925, as suffering from the effects of lead poisoning and as being thereby disabled from earning full wages at the work at which he had been employed, and, being in no way in fault under section 8 (1) (*b*) or (*c*) (i) of the Act, he claimed compensation from the respondents as his last employers under subsection 1 (*c*).

That the respondents' business is of such a nature that lead poisoning may probably enough overtake those engaged in its processes is not disputed, no rebutting evidence was given, and in these circumstances it might well have seemed that the appellant, in proving what he did, had established within the meaning of section 8 (1) that his lead poisoning was due to the "nature of the employment" in which he had been employed within the prescribed period of 12 months, so that the liability of the respondents to make compensation to him as his last employers within that period followed almost as of course. But it was contended by the respondents, and hitherto successfully, that they were under no liability in the matter. Not because the appellant's lead poisoning had not been contracted in "any process involving the use of lead or its preparations or compounds." The appellant's disease had been so contracted, but had been contracted some years before—when he was employed in the Navy—and the respondents' contention was that in respect of his consequential disablement they were not bound by the section to provide compensation for the reason that the appellant had not succeeded in showing, as, in the words of the Master of the Rolls, he was required to show, that the poisoning "was brought to a head or caused by or aggravated by or accelerated by the employment by the respondents." The main question on this appeal is whether the appellant was under any obligation to establish a further case of that kind as the condition of success in his present claim.

My Lords, the history and exceptional position of section 8 in this statute has already been brought to your Lordships' notice. It is a new enactment dealing, as a code, with a new subject-matter for compensation—industrial diseases—upon conditions and with limitations peculiar to itself, both as regards the workman entitled to claim compensation and as regards the employer or employers chargeable with its provision. The section is, and it should, I think, be regarded as being, *sui generis*, different, and, in view of the scheme of compensation embodied in it, necessarily different, both in its character and incidents from those provisions of the statute which provide, according to another arrangement of liability, compensation for accidents more appropriately so called. I believe myself that most of its supposed difficulties have resulted from a misplaced endeavour to torture the provisions of the section into a correspondence with these other provisions of the Act to which I have referred, when there is not, and there was never intended to be between them, any correspondence at all. If the section in its entirety be read free from any such prepossessions and in accordance with the natural and ordinary meaning of the words employed in it, its terms, as it seems to me, are reasonably explicit.

In the present case, the immediate question is as to the true meaning of the words in subsection 1: "due to the nature of any employment in which the workman was employed at any time within the twelve months," &c. It has been held by the Court of Appeal in *Dean v. Rubian Art Pottery, Limited* (30 *The Times* L.R., 283; [1914] 2 K.B., 213) that these words are the equivalent in the present case of the words "due to the employment under the respondents," and that accordingly the appellant cannot here succeed unless he makes against the respondents such a case as the Master of the Rolls has paraphrased in the words I have taken from his judgment.

My Lords, if a conception so very simple as that imputed by this construction of it is alone intended to be conveyed by the expression in debate, it is permissible to ask why the Legislature should have chosen for use in the section no less than six times a phrase so oblique as that selected when the appropriate words of directness were so immediately at its hand. And this question has point added to it when another consideration is borne in mind. The word "employment" is not, as I think, in this phrase used immediately to describe the relation between employer and workman, a sense in which it is so

frequently utilized throughout the Act and the sense in which the Court of Appeal in *Dean's* case (*supra*) supposed it to be used here. In this phrase, as it seems to me, the word very clearly refers to the work or process in which the workman had been engaged and not to his contract with an employer to engage in it. If so, the non-appearance in the clause of the direct words is explained. They would have conveyed a sense which was not intended.

But, my Lords, one must face the reason why the Court of Appeal in *Dean's* case (*supra*) adopted the construction which it did. It adopted that construction, forced as it was, because thereby the Court was enabled to bring section 8 into line with the rest of the Act in this, that it made liable to provide compensation in respect of these diseases only an employer responsible in some sense for the workman's breakdown. And *Dean's* case (*supra*) has received the *imprimatur* of two of the learned Judges of the Court of Appeal in the present case in that such is its result or at all events its tendency.

My Lords, it is, I think, clear that such is not the intent of the section. It is demonstrable that such could not be its result if its paramount purpose to provide compensation for the disabled workman by the limited class made responsible for it was to be achieved. And it is the necessary effect of provisions in it which are quite free from ambiguity that the "last employer" in cases which may be not infrequent is alone liable to provide compensation for a workman's breakdown for which, in terms of the section itself, he is regarded as having no responsibility whatever.

My Lords, there are two classes of disease dealt with in the section. There are, first of all, diseases which are definite in origin. There are, secondly, diseases which are described as being "contracted by a gradual process." Lead poisoning is in the second class. With regard to each class of disease the right to compensation arises only where the workman is disabled or suspended from work or dies as a result of it. There is no limitation of time in respect of the date at which a disease of the first class originated or as to the date at which the gradual process in a disease of the second class commenced. That date in each case may have been years before the consequential disablement or suspension or death. The workman or his dependents are not by any such lapse of time deprived of compensation on disablement or suspension or death supervening. But it can be recovered only if within 12 months the workman has been employed in an employment to the nature of which the disease is due, and then only from the employer who last within that period so employed him. All this is clear.

And, my Lords, it is, I think, equally clear that in the event of disablement due to a disease definite in origin where in a case like the present the workman is not in default under section 1 (1) (*b*) or (*c*) (i), the last employer's only answer to the claim is under subsection 1 (*c*) (ii) to shift the responsibility on to the shoulders of some other employer by showing that the workman's disease originated when he was in the employment of that employer and not in his own. If he fails to show so much, or if the other employer had not employed the man within 12 months, the last employer's liability under the section to make compensation remains unrelieved, although he is himself free from all responsibility for the so-called "accident" on the hypothesis of section 1 (1) (*c*) (i) itself.

This instance is alone sufficient to dispose of the supposed correspondence in this respect between section 8 and section 1 of the Act which *Dean's* case (*supra*) purported to confirm. But such an instance is confined to diseases definite in origin. Is the position different as regards diseases contracted by gradual process? In no way, as I think. There, however, the result is reached by a different process of reasoning.

And first, my Lords, it follows from a very simple consideration. The workman, who has to prove that his disease was "due to the nature of" some employment in which he was engaged, may be a workman suffering from a disease contracted by gradual process as frequently as from a disease of sudden onset. What he has to prove is the same in each case. But in the one class of case there can, as has been seen, be no question of the applicant being under any obligation to make against the "last employer" what would then be the entirely inappropriate case outlined by the Master of the Rolls. Why, under the same words, should such an obligation be implied in the other class of case?

But again, my Lords, while in this second class of cases, as in the first, the last employer is the only person from whom the compensation is recoverable, he may, in a case of gradual progress under section 8 (1) (*c*) (iii), obtain contribution from any other employers who during the 12 months employed the workman "in the employment to the nature of which the disease was due." Now, my Lords, it has not been suggested that under this subsection there is any obligation on the part of the employer seeking contribution to make against the employers against whom it is sought any such case as is outlined by the Master of the Rolls in the passage already quoted; and that there is no such obligation has been held, and I think rightly held, by the Court of Appeal in *Mallinder v. J. Moores and Sons, Limited* ([1912] 2 K.B., 124). That is to say, in a question of contribution the section takes no concern with the fact or time of contraction of disease; it takes no heed of aggravation in the service of one employer or of another. But if that be so, why, under identical words, should there be imposed upon the claimant as against the only employer he is permitted to sue—the last employer—an obligation which is not in turn and by the same words imposed upon that employer in a question with contributors to his liability? And the difficulty of finding any other than a negative answer to this question is enhanced by the fact, so often already insisted upon and clear on the section, that while in the case of these diseases all the employers within the year are as between themselves under a corresponding liability to contribute to the compensation awarded, it is only as against the last employer that the claimant can, in any case, proceed. If he fails against him, he fails entirely.

Whether, therefore, the disease in question be of the first class or of the second it appears to me to be clear that a claimant is under no obligation to prove more than in the present case the appellant proved. His claim to compensation is thereby established.

My Lords, the result, it may be admitted, is arbitrary. But it becomes inevitable, so soon as it is seen that merely by the accident that the disabled workman had, more than 12 months before, left the employment of the employer in whose business his disease originated, a later employer may be made, without recourse, responsible for the entire consequences. Although, however, the result is arbitrary, it cuts both ways. If in this case the respondents are made liable, although they are not shown to have been directly responsible for the appellant's disablement, in another case they may be free of all liability even if the claimant's disease, even one definite in origin, was contracted in their own works.

And this leads me to my final observation, one which has struck me throughout this case as highly pertinent, although I must confess I was quite unable to persuade Mr. Dale, who argued the appellant's case so ably, that it helped him at all.

My Lords, I see in subsections 7, 8, and 9 the strongest confirmation of the view as to the effect of this section which, apart altogether from these subsections, I have already expressed. As is well known, a workman has under this Act a very exceptional interest in insurances entered into by his employer in respect of liabilities under the Act—*see* section 5—and in these subsections I find machinery provided for bringing into existence by provisional order in respect of employers' liability under this section 8 a *compulsory* system of mutual insurance throughout an industry at risk under it. I can myself find no explanation for the element of compulsion, peculiar to this section, being introduced into this insurance, and at the instance of any employer or workman engaged in the industry, except this, that the Legislature, impressed by the arbitrary and it may sometimes be heavy liability imposed as a result of the section's scheme of compensation, was careful to provide some machinery under which the risk might, over all employers subject to it, be as fairly and accurately averaged as is possible under a scheme of mutual insurance sanctioned by Parliament.

On the whole case, my Lords, I am of opinion that the case of *Dean* (*supra*) proceeds upon a wrong principle, and I think it should be definitely overruled. With the rest of your Lordships I am for allowing this appeal.

[Solicitors—Messrs. H. A. Sims and Co., for Messrs. Alfred Riley and Son, Blackburn ; Mr. Arnold Carter, for Messrs. Dunn and Baker, Exeter.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)

1927.
Apr. 11.

DE FREVILLE v. DILL.*

Practice—Jury—Verdict for plaintiff before hearing all the evidence for the defence—Discharge of jury—Discretion of Judge.

Where a jury, before hearing all the evidence for the defence, finds a verdict for the plaintiff, it is in the discretion of the Judge to decide whether the jury should be discharged or whether the case should be continued before the same jury.

This was an application by the plaintiff in the action of *De Freville v. Dill* reported in *The Times* of March 30 and 31 and April 1 and 2, to have the jury, who had formed a premature opinion adverse to the defendant and who had been discharged by Mr. Justice Avory, re-summoned and re-empanelled to hear the rest of the evidence.

The action was one brought by Mrs. May de Freville, of Lowther-road, Wokingham, Berkshire, the wife of Mr. Geoffrey Philip Herbert de Freville, claiming from Dr. Alfred Vincent Dill, a medical practitioner, of The Bourne, Brinscombe, Stroud, Gloucestershire, damages for his alleged negligence in certifying her to be a lunatic on June 9, 1926. Damages were also claimed for alleged assault and false imprisonment.

The defendant pleaded that he signed the certificate in good faith and that he acted with reasonable care. He said that his conclusions regarding the plaintiff's condition at the time of her certification were correct.

Mr. Cremlyn appeared for the plaintiff ; Mr. Singleton, K.C., and Mr. W. H. Gattie for the defendant.

Mr. CREMLYN, in making the application, said that he would ask the Court to say that the Judge did not, in the circumstances, exercise his discretion judicially. There were one or two admitted facts. The defendant only saw Mrs. de Freville for about ten minutes on May 12, 1926, and she was then of sound mind. On May 15 her husband called on the defendant and asked him if she were certifiable. He said that she was not, but suggested that she should be induced to go into a private home for a time.

The plaintiff called 14 witnesses, and had closed her case. The defendant had given his evidence in chief and had been cross-examined for about an hour and a half when, the cross-examination not being completed, the foreman of the jury asked Mr. Justice Avory whether the jury could stop the case. The Judge said : "It depends entirely what views you take as to the evidence." He then told the jury to put their message to him in writing. The foreman did so and handed it to the Judge, who said that it was a finding by the jury that the defendant had been negligent, and returning a verdict for the plaintiff. He then referred to section 331 of the Lunacy Act, 1890, and asked Mr. Singleton, for the defendant, if he had any application to make.

Mr. Singleton made no application for the jury to be discharged, but said that he could not consent to judgment in the circumstances. Thereupon the Judge said that the proper course for him to do was to discharge the jury, as they had given a verdict without having heard material evidence for the defendant.

The foreman said that the jury had simply asked for advice and had taken the advice given to put their opinion in writing. He (counsel) submitted to the Judge that such a note sent to him was not enough to prevent the case from being continued, and the jury might have subsequently heard evidence which would have persuaded them that they had come to a premature conclusion. Mr. Justice Avory had referred to the well-known saying that "a man convinced against his will is of the same opinion still."

The MASTER OF THE ROLLS.—It should be, "He that complies against his will."

Mr. CREMLYN said that the Judge was entitled to discharge the jury only if he had come to the conclusion that they had misconducted themselves and had formed a dishonest or corrupt opinion. He referred to an unreported case of *Kent and Sussex Railway Company v. Hanbury and Co.*, tried at the Kent Summer Assizes in June, 1924. In that case counsel for the defendant in similar circumstances refused to go on, and the Judge directed a verdict to be entered for the plaintiffs. He also referred to *Campbell v. Hackney Furnishing Company* (22 *The Times* L.R., 318), where Lord Alverstone, C.J., said that a premature expression of opinion by a jury in favour of the plaintiffs was not sufficient by itself to justify counsel for the defence in refusing to go on with the case. He submitted that the Judge was bound by the same rule as counsel. Almost the same thing happened in the case of *Harnett v. Fisher* (42 *The Times* L.R., 486). The jury wanted to stop the case, but Mr. Justice Horridge said that they could do so only if they were in favour of the defendant, and so the case went on. Here the jury only asked the Judge for advice.

The MASTER OF THE ROLLS.—This was not a mere indication of what was passing through the jury's

* Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

minds. Mr. Justice Avory said to them : "Write down on a piece of paper what you want to do, and then I will tell you whether you can do it." I have here the book containing the Judge's order and the original slip of paper. On the slip are written the words : "We are all agreed that negligence has been proved and we return a verdict for the plaintiff." What can you have more conclusive of a final decision than this paper ?

LORD JUSTICE SCRUTTON.—It need not be dishonesty to entitle a Judge to discharge the jury ; incompetence and ignorance are sufficient.

Mr. CREMLYN.—No doubt we should very much prefer to have our cases tried by the Judges of the Court of Appeal, but people are entitled to have a jury to decide them.

LORD JUSTICE SCRUTTON.—Yes, a jury which has heard all the evidence on both sides.

Mr. CREMLYN.—I agree that the learned Judge has an absolute discretion, but he must exercise it judicially. He could not, for instance, discharge a juryman because he did not like the look of him. I do not say that the grounds were not grounds on which the Judge could act, but that in the circumstances he ought not to have acted as he did.

Counsel contended that mere ignorance on the part of a jury was not sufficient to entitle the Judge to discharge them.

The MASTER OF THE ROLLS referred to the case of *Ural Caspian Oil Corporation, Limited v. Hume-Schweder* (*The Times*, July 31, 1913). In that case, which eventually went to the House of Lords, almost the same thing happened. The jury handed up to the Judge, before hearing the evidence for the defence, a note which stated that they were all satisfied that the plaintiff was entitled to the commission which he claimed. That showed that justice could not be done by them. It was justice turned topsy-turvy. His Lordship read a passage from the judgment of Lord Shaw in the House of Lords.

Mr. CREMLYN said that that case could be distinguished on the ground that there were two questions for the jury to decide, and they found on one of them only. The House of Lords did not say that the jury ought to be discharged, but that they should be warned not to come to any conclusion until they had heard the whole of the evidence. Here the Judge could not find that the jury could not have come to a proper conclusion on the whole evidence.

Counsel for the defendant were not called upon to argue.

The MASTER OF THE ROLLS, in giving judgment, said that the notice of motion was a most unusual one. Having stated the facts, his Lordship said that the words used by the jury went far beyond a mere indication of a view passing through their minds. They were only consistent with an intention to stop the case without having heard the rest of the evidence for the defendant. It was plain that such a verdict must be bad. It was contrary to the oath taken by the jurors themselves well and truly to hear the case and to decide it in accordance with the evidence. That meant the whole of the evidence and not a part of it only. The intervention offended against the basic principles of justice.

It was argued that Mr. Justice Avory had not exercised his discretion judicially and ought to have allowed the case to go on. In his (the Master of the Rolls's) opinion he acted quite correctly. The Divisional Court in *Campbell v. Hackney Furnishing Company, Limited* (22 *The Times* L.R., 318) held that it was for the Judge who tried a case to decide, in similar circumstances, what to do when such a question arose.

It was quite plain from the observations of Lord Shaw of Dunfermline in *Ural Caspian Oil Corporation, Limited v. Hume-Schweder* (*The Times*, July 31, 1913), that it was for the Judge to decide whether to go on or to stop the case because it was not right for proceedings to continue before a jury which had returned a premature verdict. He (his Lordship) would be very sorry to say anything which might have the effect of limiting or impairing the discretion of a Judge to discharge a jury in similar circumstances. The application must be dismissed, with costs.

LORD JUSTICE SCRUTTON agreed. The case raised a question of not infrequent occurrence and of some difficulty. The slip of paper handed in by the jury showed that they were entirely ignorant of the most elementary principles of the administration of justice. It placed the Judge in a difficulty. On the one hand, the jury had expressed their definite opinion in favour of the plaintiff ; on the other, the case had been going on for four days and considerable expense had been incurred, which it was not desirable to waste altogether.

In his view the question of primary importance was what the Judge who tried the case and had the witnesses and jury before him thought ; whether he thought that in such circumstances the case could go on in justice to the defendant. In some cases perhaps it could proceed, in other cases it could not. If the Judge was satisfied that the case could go on, then it appeared that counsel for the defendant could not object. It would take an extraordinarily strong case to induce the Court of Appeal to interfere with the discretion of the Judge in such circumstances and no such case had arisen here.

LORD JUSTICE SARGANT.—I agree.

[Solicitors—Mr. Harry Coulson ; Messrs. Le Brasseur and Oakley.]

K.B. Div.
(Avory, Swift, and Talbot, JJ.) } 1927. Apr. 5.

REX v. MINISTER OF TRANSPORT—EX PARTE H.C. MOTOR WORKS, LIMITED.*

Hackney Carriages—Licensing of omnibuses—Imposition of undertaking as to fares—Appeal to Minister of Transport—Roads Act, 1920 (10 and 11 Geo. V., c. 72), s. 14 (3).

The Corporation of H. refused to grant licences for the applicants' motor omnibuses unless the applicants gave an undertaking to charge fares within the City of H. higher than those of the corporation tramways. Their reason for requiring this undertaking was that the omnibuses were only needed for through passengers from H. to points outside the city ; and that it was not in the public interest that revenue should be diverted from the tramways which provided an adequate service within the city, or that short-distance passengers should occupy the seats in the omnibuses to the exclusion of the long-distance passengers for whose benefit alone the omnibus service was permitted. The Minister

* Reported by J. W. HALL, Esq., Barrister-at-Law.

of Transport made no order on an appeal by the applicants, considering that it was in the public interest that passengers should be discouraged from using the applicants' omnibuses for short distances, and that the only legal way to secure that result was some arrangement as to fares.

Held, that the Minister had not taken extraneous matters into consideration merely because he proposed, by the regulation of the fares, to secure an object which he considered in the public interest.

These were two rules *nisi,* (*a*) for a *certiorari* to bring up and quash a decision of the Minister of Transport contained in a letter dated November 19, 1926, making no order upon an appeal by the applicants, H.C. Motor Works, Limited, from a refusal of the Hull Corporation to grant to the applicants licences to ply for hire with motor omnibuses in the City of Hull; (*b*) for a *mandamus* to the Minister to hear and determine the matter of the said appeal according to law.

By an agreement made in 1923, the applicants purchased from the Hull Corporation certain omnibuses together with the goodwill of an omnibus service between the City of Hull and the Urban District of Hessle. The route was about 4¼ miles in length, about three miles of it within the city, and the rest in the urban district. The part of the route within the city lay almost entirely through streets in which the corporation had tramways. From 1925 the corporation began to require, as a condition of granting licences to the applicants, an undertaking that they would charge fares within the city exceeding by at least a penny those in force on the corporation tramcars. The view of the corporation was that the omnibus service was required only for the convenience of passengers going from Hull to Hessle and *vice versa,* and would not have been licensed at all for the sake of the traffic within the city, for which the corporation tramways provided an ample and convenient service. They further thought that it was not to the public interest that the efficiency of the tramways should be impaired by depletion of revenue through omnibus competition, and also that it was desirable, in the interests of the through passengers for whom the omnibus service was intended, to discourage short-distance passengers, who could be equally well served by the tramways, from filling up the omnibuses to the exclusion of those who had no alternative mode of transport.

After negotiations which it is not material to set out in detail, the applicants in July, 1926, refused to renew the undertaking which, on legal advice, they had broken, and the corporation refused to renew their licences. The applicants appealed under section 14 (3) of the Roads Act, 1920, to the Minister of Transport, who held a local inquiry and eventually wrote to the applicants on November 19, 1926, that he had decided to make no order on their appeal.

These rules were then obtained upon the grounds that the Minister of Transport, in deciding or purporting to decide the said appeal, did not properly exercise or exceeded his jurisdiction in that he considered and acted upon extraneous matter—namely, the fares charged and intended to be charged by the H.C. Motor Works, Limited. In an affidavit filed on behalf of the Minister it was stated: "In the circumstances of this case the Minister considered it essential in the public interest that some arrangement should be made to discourage the use of the prosecutors' vehicles for the carriage of short-distance passengers on that portion of the route which is served by the tramway system, and in the absence of an arrangement which would have that effect he would not be prepared to order the issue of licences. The Minister is not aware of any arrangement other than an undertaking, on the lines of that required by the licensing authority in this case, which would legally secure this effect."

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. W. Bowstead showed cause for the Minister of Transport; Mr. Montgomery, K.C., and Mr. Paley Scott appeared for the Hull Corporation; Mr. G. R. Mitchison supported the rules.

Mr. Justice Avory.—These are two rules, one for *mandamus* and one for *certiorari,* addressed to the Minister of Transport, calling upon him to show cause why a writ of *certiorari* should not issue to remove into this Court a decision contained in a letter of his dated November 19 last, and why a *mandamus* should not issue directed to him commanding him to hear and determine, pursuant to the statutes in that behalf, the matter of an appeal by the H.C. Motor Works, Limited, against the refusal of the Hull Corporation to grant to the company licences to ply for hire with omnibuses. In each case the rule is moved for upon the ground that the Minister of Transport, in deciding or purporting to decide the appeal, did not properly exercise or exceeded his jurisdiction in that he considered and acted upon extraneous matter—namely, the fares charged and intended to be charged by the H.C. Motor Works, Limited, upon the omnibuses referred to, and that he did not hear and determine the appeal according to law. For the purpose of my judgment and of the view which I take it is not necessary to determine whether any distinction should be drawn in this case between the remedy by *certiorari* and the remedy by *mandamus.* The only ground upon which either of these applications can succeed is that the Minister in coming to his decision was influenced by extraneous considerations, that is, by matters which he had no right to take into consideration in determining the appeal. That is really the only question before this Court.

The Hull Corporation in this case had refused to grant licences, and it appears that they refused to grant them because the applicants refused to give an undertaking that they would charge certain fares upon their omnibuses which were running in Hull along the route upon which trams were running, and the only question with regard to the fares was limited to the fares charged upon the route which was already served by the trams. Upon the refusal of the Hull Corporation to grant the licences except upon that undertaking there was this appeal to the Minister of Transport. He came to his decision only after an inquiry had been held by an officer authorized by him for that purpose, and we have in this case the benefit of the grounds upon which the Minister came to his conclusion set out in an affidavit before us. In that we are told that in the circumstances of this case the Minister considered it essential in the public interest that some arrangement should be made to discourage the use of the omnibuses for the carriage of short-distance passengers on that portion of the route which is served by the tramway system, and "in the absence of an arrangement which would have that effect he would not be prepared to order the issue of licences. The Minister is not aware of any arrangement, other than an undertaking on the lines of that required by the licensing authority in this case, which would legally secure this effect." It is

said that that affidavit of itself shows that the Minister has taken into his consideration the question of fares to be charged upon these omnibuses. In a sense no doubt that is true. It was impossible that he could consider the matter of this appeal without in some sense taking into consideration the question of fares which it was proposed to charge upon these omnibuses, and it is said by Mr. Mitchison that in doing that he was acting contrary to a decision of this Court in the case of *Rex v. Farnborough Urban District Council* (36 *The Times* L.R., 22 ; [1920] 1 K.B., 234). That case was decided in October, 1919. It had reference to something which had been done by the Farnborough Urban District Council in May of 1919, and undoubtedly it was a decision that a local authority, in considering an application for licences for omnibuses to ply for hire in its district, is not entitled to refuse to grant the licences on the ground that the fares charged or proposed to be charged are excessive. It appears that in that case the council had refused to renew the licences on two grounds, first, the refusal of the company to reduce its fares, and secondly, its refusal to adopt penny stages, and the Court came to the conclusion that, in view of the provisions of the Towns Police Clauses Acts of 1847 and 1889, the local authority, while they had power to make by-laws fixing the fares to be paid in hackney carriages, had no power to make by-laws fixing the fares to be charged in omnibuses. If matters had remained as they were in May of 1919, there might have been much greater difficulty in determining this present question, but we have now to determine the question in the light of the provisions of the Roads Act of 1920, particularly section 14 (3), which provides : "Where, upon application for a licence to ply for hire with an omnibus, the licensing authority either refuses to grant a licence or grants a licence subject to conditions, in either case the applicant shall have a right of appeal to the Minister of Transport from the decision of the licensing authority, and the Minister shall have power to make such order thereon as he thinks fit, and such order shall be binding on the licensing authority. An order made by the Minister under this subsection shall be final and not subject to appeal to any Court. . . ." When the application was made in this case for the rule *nisi* Lord Hewart, C.J., having been referred by Mr. Mitchison in making his application to the decision in *Rex v. Farnborough Urban District Council* (*supra*) said, after reading section 14 (3) which I have just read : "Therefore you have these four elements. The licensing authority may grant a licence subject to conditions. Upon appeal to the Minister he shall make such order as he thinks fit. The order made by the Minister is to be final, and it is not subject to appeal to any Court. That was not the law when the *Farnborough* case (*supra*) was decided." The Lord Chief Justice was there pointing out by anticipation that the question of the effect of the decision in the *Farnborough* case (*supra*) would have to be considered in the light of the provisions of section 14 (3) of the Roads Act of 1920. There was a further observation made by the Lord Chief Justice in the case of *Rex v. Minister of Transport*, decided in this Court on January 13, 1927, of which we have been furnished with a shorthand note, but which is not elsewhere reported. It was a case which certainly was determined upon the ground of the undue delay in making the application, but in the course of his judgment the Lord Chief Justice said : "With regard to the question, which becomes in these circumstances a question of less importance, whether it is true to say that the Minister of Transport did in fact refuse to hear and make an order upon the company's appeal, it seems to me to be quite clear that he did, at any rate, entertain the appeal. He sent a representative to hold a local inquiry at which witnesses on the one side and on the other were heard for a period of two days. If after making that inquiry, and equipping himself with that information, the Minister of Transport had written in plain terms that he had considered the appeal, that he had ascertained the facts, and that he had considered the conditions which were complained of, and then dismissed the appeal, there would not have been a word to say." The question is whether the passage in that judgment does not equally apply in this case. The Minister of Transport has held the inquiry, has heard the appeal, has considered the conditions upon which the local authority were willing to grant the licences, and without which they refuse to grant them, and he has given his decision in the words which I have quoted from the affidavit. The question is : Is there anything here which justifies us in saying, or which compels us to say, that in coming to this decision he has taken into consideration matters which were extraneous, and which he ought not to have considered ? In my view the Minister of Transport in this case was considering the public convenience in view of the fact that there was an existing tramway on this route, and while it is clear that both the corporation and the Minister were doing nothing to interfere with the through journey of these omnibuses from Hull to Hessle, all that they had in mind, and all that the Minister had in mind, was to provide that the public convenience should not be interfered with by these omnibuses running alongside the tramways in the city of Hull in such a way as would in the opinion of the Minister be in conflict with the public interest. If incidentally to the consideration of that question he could not shut his eyes to the question of the fares, I do not think it can properly be said that he was influenced by any extraneous consideration in determining what was best in the public interest. On that short ground I think that both these rules ought to be discharged.

Mr. Justice Swift.—I agree, and I have nothing to add.

Mr. Justice Talbot.—I am of the same opinion. The appeal to the Minister from the refusal of the corporation to grant the omnibus company their licences was based, apart from the particular matter of the agreement between the corporation and the company (as to which I need say nothing), upon the contention that the corporation had no legal right, directly or indirectly, to fix or control fares in respect of any of the company's omnibuses plying for hire within the city. It was quite clear that the corporation had refused to grant or renew the licences on a ground connected with the fares charged by the omnibus company, namely, that they had failed to comply with the condition upon which they had previously held licences, which was to charge a minimum fare of not less than a penny in excess of the tramway fare on the Hull and Hessle route, and their refusal to comply with any such condition. Upon that appeal, brought upon that ground to the Minister, the Minister informed the company that he had decided to make no order, and in the affidavit sworn by a gentleman in the office of the Ministry of Transport the ground was made clear upon which he had so decided. The affidavit says that "In the circumstances of this case the Minister considered it essential in the public interest that some arrangement should be made to discourage the use of the prosecutors' vehicles for the carriage of short-distance

passengers on that portion of the route which is served by the tramway system, and in the absence of an arrangement which would have that effect he would not be prepared to order the issue of licences. The Minister is not aware of any arrangement other than an undertaking, on the lines of that required by the licensing authority in this case, which would legally secure this effect."

That matter arises in this way : The route along which these omnibuses ply from Hull to Hessle consists partly of a section in the urban district of Hessle outside the city of Hull, and partly of a longer section inside the city of Hull along the greater part of which is laid a tramway belonging to the corporation. The corporation (and the Minister agrees with them) are of opinion that there is needed along this road a service for persons wishing to go from Hull to Hessle, and from Hessle to Hull, but that there is not needed a service of omnibuses along the part of the road in which the tramway of the corporation is laid ; not only is such a service not needed, but it would have an injurious effect upon the provision of traffic facilities for the public by depleting the revenue of the corporation tramway ; and not only that, but it would diminish the facility which passengers intending to travel along the whole of the road would get, because part of the accommodation which would otherwise be available for them would be occupied by short-distance passengers. In those circumstances the corporation and the Minister had to consider some way by which it could be secured that the long-distance passengers should be provided for, and that the service which provided for them should not be used for short-distance traffic. As the Minister explains in the affidavit which I have read, it appeared to him that the only way—at any rate, it is the only way which has been suggested—and the most effective and reasonable way of doing that is by means of fares. It had been suggested apparently, for some time, that the object could be attained if a pecuniary inducement was given to passengers to travel by tramway so far as the tramway was available, because the fare on the tramway was less than the fare by the omnibus ; and it was with that object, and that only, that the corporation, in the first place, and the Minister on appeal, have purported to deal with this matter of fares. That order having been made by the Minister on appeal, these rules were applied for on the ground that the Minister, in purporting to decide the appeal, did not properly exercise, or exceeded, his jurisdiction, or declined jurisdiction, in that he considered and acted upon extraneous matter, namely, the fares charged, and intended to be charged, by the H.C. Motor Works, Limited, upon the omnibuses referred to, and that he did not hear and determine the said appeal according to law. The words of section 14 of the Roads Act, 1920, have already been read, and I need not repeat them. They are in the widest possible terms, and the Minister is there given power to make such order on the appeal as he may think fit. But what is said is that an object which certainly, so far from being extraneous, is in the closest degree appropriate in the exercise of this jurisdiction, namely, the provision of an omnibus service to the extent, and to the extent only, that it is needed by the public, becomes extraneous because it is to be attained by the machinery of the differential fare to which the Minister refers. The argument in support of that contention is based, and having carefully listened to the very full and careful argument of learned counsel in support of the rule, I think based only, upon the case of *Rex v. Farnborough Urban District Council* (36 *The Times* L.R., 22 ; [1920] 1 K.B., 234). It is said that that case has laid down a binding rule of law to the effect that in no case is an authority which has to consider the question of a licence for a public vehicle, or an omnibus, to consider any question of fares at all, or to do anything which will have any direct effect in regulating fares. Speaking for myself, if I thought that was a fair and just representation of the effect of that decision, I see in the Roads Act, 1920, nothing which would cut down or impair it. I do not think that the language of the Roads Act, 1920, either in respect of conditions, or in respect of the powers given to the Minister on appeal, would avail to allow either the corporation or the Minister to consider the question of fares at all, if that case had laid down such a binding rule of law as is suggested. Speaking for myself, it appears to me that that is quite an illegitimate way of using this decision. The question there was a totally different one. An omnibus company wanted licences within the urban district of Farnborough, and what the district council tried to do was this : They tried to make the grant of the licences conditional on the fares not exceeding a certain maximum scale which they prescribed. That was, of course, solely in the interests of the passengers by the omnibuses in order to enable them to travel by the omnibuses at as cheap a rate as the district council thought could be secured. It was said that they had no power to do that upon one ground, and it is upon this ground only that the Court decided the case. It was said : You are, in effect, doing that which you can do with regard to hackney carriages, that is to say, limiting the fares which those carriages can charge. When you look at the power which the Towns Police Clauses Acts, regulating these matters, give to local authorities with regard to hackney carriages, and under which the fares of those carriages are limited, you find that Parliament has deliberately abstained from extending those provisions to omnibuses, and that when the question of the licensing of omnibuses was dealt with by Parliament they deliberately refrained from extending the powers, or giving powers such as were given in respect of hackney carriages. It was said : You are trying, by your action, with regard to these licences, to do that indirectly which you cannot do directly, namely, fix the fares to be charged by omnibuses. Speaking for myself, I think that that decision, like all decisions, should be read in the light of, and according to, the subject-matter which was there dealt with. The whole object of the action which we are discussing here, first of the corporation, and secondly of the Minister of Transport on appeal, is altogether outside that case, and altogether outside the purview of the enactments of the Towns Police Clauses Act, 1847, which regulates the fares of hackney carriages. It is simply a piece of machinery in order to accomplish that which the Minister says cannot otherwise be accomplished, and which, in his opinion, and in the opinion of the corporation, is in the public interest. It is emphatically one of those matters which the corporation and the Minister have to consider under the Roads Act, 1920, namely, to secure that the omnibus service for which a licence is sought shall be such as provides in the most efficient way for the convenience of the public so as to give the public an additional facility which is needed, without interfering with and injuring other public services which exist, and that it should be so managed and arranged as to confine its operation, so far as possible, to the provision of that for which it is needed, and should provide it in the best possible way. It seems to me quite impossible to say that the decision in the case of *Rex v. Farnborough Urban District Council* (*supra*), given upon a totally different subject-matter,

and with reference to totally different considerations. can be a binding rule of law such as is suggested, namely, to constitute an exception to the power to make orders, and to grant licences, or to refuse to grant licences, conferred by section 14 of the Roads Act, 1920 ; in other words, to impose upon that statute a fetter derived from a decision which obviously was pronounced without reference to any question of the kind. In my opinion that is not a reasonable way of construing either the Act of Parliament or the decision, and I agree, therefore, that both these rules ought to be discharged.

[Solicitors—The Treasury Solicitor ; Messrs. Sharpe, Pritchard and Co., for Mr. H. A. Learoyd, Town Clerk, Hull ; Messrs. Cunliffe, Blake and Mossman, for Messrs. Moss, Lowe and Co., Hull.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Lawrence, L.JJ.)

1927.
Apr. 6.

LEWIS v. GUEST, KEEN, AND NETTLEFOLD, LIMITED. WATKINS v. SAME. TUCKER v. SAME. INGRAM v. CRAWSHAY BROTHERS (CYFARTHFA), LIMITED.*

Master and Servant—Compensation for injury by accident—Award—Incapacitated or partially incapacitated workman doing light work—Cesser of employment from economic causes—Revival of right to compensation—Workmen's Compensation Acts, 1897 to 1925.

Where a workman, partially incapacitated by an accident during the course of his employment, obtains work in lieu of compensation, the cesser of that work entitles him to an award, even in cases where the cesser is due to the state of the labour market and would have resulted in his being unemployed in any event.

These were four appeals from decisions of the Judge of the Merthyr Tydfil County Court sitting as arbitrator under the Workmen's Compensation Acts.

The appeals were by workmen from decisions refusing to award compensation, and were heard together as involving the same questions, although upon slightly different facts. Those facts were stated in the judgment of the Master of the Rolls as follow :—

John Lewis, now 64 years old, had been employed by the first respondents since he was 12 years of age, and was at the date of his accident on October 6, 1904, a haulier at the respondents' coal mine. Through the accident he lost his left arm, which was amputated above the elbow joint. He was out of employment for 12 months, and thenceforward was employed by the respondents in oiling machinery until September 22, 1924, when the pit was closed for economic reasons.

On September 25, 1925, the applicant commenced proceedings for an award, claiming compensation as from September 22, 1924, based on partial, but permanent, incapacity. By their answer the respondents disputed liability and claimed that the applicant was not incapacitated for his ordinary work. The hearing was delayed until the case of *Palmer v. Crawshay Brothers (Cyfarthfa), Limited* (42 *The Times* L.R., 490) had been decided, which it was supposed would govern the claim of Lewis. That case was decided by this Court on April 28, 1926. On October 20, 1926, the cases of Lewis and the others were heard, and on January 19, 1927, the learned Judge delivered judgment deciding against the workmen in all four cases upon the ground that the employment had terminated owing to the state of the labour market, and from that judgment the workmen appeal.

The Act under which this case is to be decided is the Workmen's Compensation Act, 1897, and not that of 1906, which the learned Judge appears to have followed. It is this later Act that contains the words in Schedule I. (3), first introduced into it, on which stress is laid by the learned Judge.

In Watkins's case the workman, while working in the first respondents' steel works, suffered an accident on February 16, 1908, which necessitated his right leg being amputated at the thigh. He was paid compensation, and on April 28, 1910, an agreement with his employers was reached and recorded, whereby he was paid half wages, 16s. 1d., as compensation, in supplement to the wages which he earned on light work which the respondents gave him. On May 3, 1926, the works where he was employed were stopped, and since then he has been unemployed. The workman shortly afterwards commenced proceedings for a review of the weekly payments made to him. The respondents contested their liability on the ground, "that the applicant is out of work owing to industrial conditions and that he is in receipt of unemployment benefit," and they claimed that "the applicant is not incapacitated by reason of his accident from earning wages equal to or in excess of his pre-accident earnings."

The learned Judge held that there was no loss then due to the incapacity arising from the accident and dismissed the application. The Act under which this case and the two following cases are to be determined is the Workmen's Compensation Act, 1906.

In Tucker's case the workman was a hitcher employed at a mine of the first respondents, and on August 12, 1913, suffered an accident whereby his hip was injured and rendered rigid.

He was in the Army for two years, and then was given work by the respondents as a signaller in the pit—this being of the character of a "compensation job." On April 30, 1924, the colliery was closed down for economic reasons, and so Tucker's employment ended. On September 23, 1924, he took proceedings against the respondents, but abandoned them on work being found for him at a pump at Nantwen. On February 17, 1925, this work came to an end, and Tucker again commenced proceedings. His claim was dismissed, but a declaration of liability was granted him. On November 23, 1925, he commenced the present proceedings, the hearing of which was adjourned for the same reason already stated. Ultimately the case was heard and determined on October 20, 1926, when the Judge dismissed the application for the reasons given in his judgment of January 19, 1927. The same points were relied upon in this case by the respondents as in the case of Watkins.

In *Ingram v. Crawshay Brothers* Ingram was injured by an accident on September 12, 1917, whereby some fingers on his left hand were crushed. Light work was given him until the pit closed in October, 1924. On June 25, 1925, at a time when he was out of work, an agreement was reached under which he was to be paid 4s. a week, and he has been paid that sum continuously. In May, 1926, he commenced proceedings for review. The case was heard in October, 1926, and the same judgment dismissing his application was given in this case also.

The four workmen appealed.

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

Mr. Cave, K.C., and Mr. A. T. James appeared for the appellants, and submitted the following propositions :—

(1) A workman whose injury no longer prevents him from earning full wages in the open market cannot have compensation merely because industrial conditions prevent him from obtaining employment.

(2) If he is no longer prevented from earning some wages, but is unable to earn his old wages, he is not deprived of partial compensation merely because industrial conditions terminate his employment.

(3) A workman whose injuries prevent him from obtaining any employment is not deprived of compensation because industrial conditions would have prevented him in any circumstances.

(4) A man whose injuries are such that he is unemployable, unless his old employers choose to employ him, is, if they do not employ him, not deprived of full compensation merely because industrial conditions would have prevented him from obtaining employment if he had been uninjured.

Mr. Wingate-Saul, K.C., Mr. Shakespeare, and Mr. Langman appeared for the respondents in the various appeals and submitted that the question was one of fact for the County Court Judge. If men were out of work for economic reasons, not because they had been injured, but because there was no work for them to do, they were in no better or worse position than workmen who had not been injured.

The further arguments of counsel and the numerous authorities referred to are set out in the judgments.

The Master of the Rolls delivered the following considered judgment:—The first case, that of Lewis, is a request for an arbitration and award. The other three cases are requests of the workmen for reviews of the agreements recorded on awards made. The County Court Judge has made a note that it was agreed that, but for industrial and economic conditions which caused the pits to close down, all the workmen would have continued in the work on which they were last employed. [His Lordship stated the facts, as set out above, and continued.]

The four cases thus raise the question how far the compensation payable to the workman is affected by economic or industrial conditions and the possibility of the workman's obtaining employment under them. The learned Judge asks what, if any, compensation ought to be given to Lewis in respect of his injury under the conditions of the labour market that he describes. He adds that in order to answer that question he must deal with the question of rate of compensation at some length.

It is, in my judgment, necessary to begin at an earlier stage, and to decide what are the basis and nature of the compensation granted to the workman. Section 1 (1) of the Act of 1897 is as follows : "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The effective words of this section are the same in the Acts of 1908 and 1925. In the Act of 1897, the employments to which it applied were limited by section 7, and in the subsequent Acts that limitation was abandoned. Upon the happening of an accident, therefore, the employer became liable to pay compensation to the workman to be ascertained at that time, and upon the facts as they then stood, during the incapacity ; subject to the right of review expressly given both to employer and to workman under the Act. See *Lysons v. Andrew Knowles and Sons, Limited* (17 *The Times* L.R., 156 ; [1901] A.C., 79), where Lord Halsbury makes it plain that this right is given by the Act and is not cut down by the schedule which directs how the quantum payable is to be measured. See also *per* Lord Dunedin in *Woodilee Coal and Coke Company v. M'Neill* (34 *The Times* L.R., 10 ; [1918] A.C., 43). The nature of the compensation given to the workman was pointed out clearly by Lord Sumner, then Lord Justice Hamilton, in *Harwood v. Wyken Colliery Company, Limited* (29 *The Times* L.R., 290 ; [1913] 2 K.B., 158) and was contrasted with the damages that are recoverable for injury caused to a plaintiff workman by the tortious negligence of the employer or his servants. "The object of the Act," he said ([1913] 2 K.B., at p. 170), "is to give an injured workman a livelihood so long as an injury arising from the accident incapacitates him from getting his living." He pointed out that the Act makes no reference to the possible supervention of other causes of incapacity. "The Act," he said, "is a guarantee of workmen against the risk of accident. It is not founded on indemnity, and the ideas of retribution for wrongdoing and of *restitutio in integrum* are foreign to it."

Interpreting the Act upon that principle, the Court of Appeal in that case held that the workman was entitled to compensation for incapacity arising from a permanent injury to his knee, and not less so because heart disease had supervened, which would have made it impossible for him to do his work if his knee had been sound. Lord Wrenbury, then Lord Justice Buckley, said (at p. 165) that "the compensation which the Act gives is not a compensation for the injury, but a compensation for the consequences resulting from the injury, such consequences disclosing themselves in the form of inability to earn wages due to the injury sustained." That case, binding upon this Court, decides that it would be wrong to read "solely" into the Act ; that a supervening physical infirmity does not vary the rights given to the workman under the Act ; that the consequences which form the basis of the measurement of the damages are to be found in the inability to earn wages due to the injury sustained ; and that the date of the application for the compensation is the critical date.

The decision in that case has been followed in a number of others where a supervening cause of incapacity has been disregarded. In *Stowell v. Ellerman Lines, Limited* (128 L.T., 823), old age and other intervening causes were held not to disentitle the workman to such an assessment of compensation for incapacity as could be traced and attributed to the accident. Indeed it has been applied in the case of *McNally v. Furness, Withy and Co., Limited* (29 *The Times* L.R., 678 ; [1913] 3 K.B., 605), where a workman was imprisoned for theft and was therefore disabled from earning wages, while his employers were prevented from giving him light work. This last decision is binding upon this Court ; and, if it is held to be sound in the House of Lords, it carries the irrelevance of a second cause to the limit that, even if it is due to the act of the man himself, it ought nevertheless to be disregarded. I have laid emphasis upon the words of Lord Justice Buckley quoted above—"inability to earn wages due to the injury sustained," for they appear to me to be the keynote of the measure of the compensation recoverable. The injury sustained by the accident is what is to be regarded. He had expressed the same view in *Radcliffe v. Pacific Steam Navigation Company* (26 *The Times* L.R., 319 ; [1910] 1 K.B., 685), where he said that fluctuations in the (labour) market ought not to be taken into consideration, and in *Cardiff*

Corporation v. Hall (27 *The Times* L.R., 339 ; [1911] 1 K.B., 1,009) his words were ([1911] 1 K.B., at p. 1,027) :—"Inability to earn for the purposes of Schedule I., paragraph 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market." Further, in *Gafney v. Chorley Colliery Company, Limited* (92 L.J., K.B. 1), it was decided by this Court that the condition of the labour market was not to be taken as a factor into the problem. Lord Sterndale, M.R. (92 L.J., K.B., at p. 4), said : "The Judge must be careful to see that any loss of earnings is due to the physical condition of the man and not to the state of the labour market." Lord Justice Scrutton said (92 L.J., K.B., at p. 5) : "I think this case must go back to the Judge, not to be dealt with on the footing of total incapacity, but to assess the compensation due by reason of the partial incapacity, the loss of earning capacity. He is *not* to reckon this as due to the fall in the labour market, especially as this is largely due to the action of the miners themselves in letting the pits be flooded."

The rules thus laid down appear to be these :— The workman is entitled to compensation if the accident disables him from earning wages such as he was capable of earning previously to the accident ; the compensation is to be measured by the disability that is due to the injury sustained, and that compensation is to be turned into money value according to the state of the normal market at that time, without taking into account abnormal and ephemeral conditions ; and particularly the workman ought not to be allowed to rely upon conditions of the labour market which he has contributed to produce, or upon absence of employment due to his own act, or to the acts of those associated with him, for which he shares responsibility. This latter statement appears justified by *Bromley and Drew v. Staveley Coal and Iron Company, Limited* (129 L.T., 620), and by *Hamilton v. Shelton Iron, Steel and Coal Company, Limited* (43 *The Times* L.R., 97), decided in this Court on November 24, 1926. In the case of *Portland Colliery Company, Limited v. Murray* (39 *The Times* L.R., 579 ; [1923] A.C., 566), Lord Dunedin repeats (at p. 575) what had been said in *Harwood v. Wyken Colliery Company, Limited* (*supra*) that "the right of compensation rests not on the schedule, but on the first section of the Act." The schedule deals with the fixing of the amount of the compensation and provides the limits between which it is to be paid. "It is not," he says, "a statutory termination or interruption of the state of incapacity. When the words can no longer be applied, then there is no bar to the right which the injured man has to be compensated for partial incapacity." The workman is affirmatively entitled to compensation for partial incapacity, as shown above, and is not deprived of it merely because industrial conditions prevent him from obtaining any employment.

There is another factor to be borne in mind. The measure of the compensation is on a statutory and artificial basis. The state of the labour market is not to be taken into account ; but a rise of wages, as in *Woodilee Coal and Coke Company v. M'Neill* (*supra*), or a fall, as in *Black v. Merry and Cunninghame, Limited* ([1909] S.C., 1150), and in *Bevan v. Energlyn Colliery Company* (28 *The Times* L.R., 27 ; [1912] 1 K.B., 63), is to be taken into account in adjusting the amount between the maxima for the purpose of correcting and adjusting the figures apparent at the time when the award is made. For under the Act of 1906, Schedule I. (3), the words are introduced that the weekly payment is to "bear such relation to the amount of that difference [between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is actually earning] as under the circumstances of the case may appear proper." By this means a discretion is given to the Judge to prevent too large or too small a figure from being reached owing to a difference—it may be a temporary difference—in the true figures of what the workman "is earning or is able to earn."

The learned Judge, after taking full time for consideration, delivered a careful and thoughtful judgment ; but I cannot accept his reasoning or his conclusions. The questions that he propounds appear to me to be contrary to the basic conception of compensation to the workman as laid down in *Harwood v. Wyken Colliery Co., Limited* (*supra*), *Ball v. Hunt and Sons, Limited* (28 *The Times* L.R., 428 ; [1912] A.C., 496), Lord Dunedin's judgment in *Woodilee Coal and Coke Company v. M'Neill* (*supra*), and in *Portland Colliery Company v. Murray* (*supra*). His second, or alternative, statement of the question involves holding that the judgments of Lords Justices Moulton and Buckley in *Cardiff Corporation v. Hall* (*supra*) were wrong, and that the judgment of Lord Cozens-Hardy, M.R., was right. On page 29 of his judgment he definitely adopts this view, and says that the true principle of compensation is that the actual loss of wages resulting from the incapacity for work caused by an accident, as distinct from the mere amount of personal or physical incapacity for work resulting from it, is the true criterion for the assessment of compensation.

This criterion is, in my opinion, not right. It is in conflict with the cases already cited. *Cardiff Corporation v. Hall* (*supra*) has been accepted as good law and has been acted upon many times in the Court of Appeal, and was definitely approved by Lord Loreburn and Lord Shaw of Dunfermline in *Ball v. Hunt and Sons, Limited* (*supra*). It was followed in this Court in the recent case of *Palmer v. Crawshay Brothers* (*Cyfarthfa*), *Limited* (42 *The Times* L.R., 490), which is binding upon this Court and upon the learned Judge whose decision is now under review, and not less so because it was his decision that was appealed from in *Palmer v. Crawshay Brothers* (*Cyfarthfa*), *Limited* (*supra*). *Cardiff Corporation v. Hall* (*supra*) stands as an authority that the compensation to which the workman is entitled is that which is to be apportioned to his injury, in a normal market, apart from the difficulties superadded by industrial conditions.

The learned Judge has been careful to express his finding that none of the workmen was an "odd lot," in the sense that he was to be treated as totally incapacitated, unless the employer discharged the onus which in such cases lies upon him of proving that there was work available for the workman which the latter refused to accept and do. Not being "odd lots," and having been employed until their work ceased owing to supervening, that is to say economic, causes, the workmen must be considered as workmen capable of being employed under normal conditions. Indeed, of Lewis the learned Judge says : "He is now a partially disabled man : he is physically able to do the form of light work he has been doing—a well-known and necessary form of light work at a colliery—and, in my opinion, he is able to do other forms of light work necessary at a colliery. . . . Lewis is therefore a class of man who is able to do established forms of light employment, and, under ordinary industrial conditions, has a good market for

his labour with his old employers ; but under exceptional industrial conditions he is apt to lose this market, and to find himself in the position that there is no other market for such established lines of work as he is able to do."

The case of Lewis must go back for reconsideration by the learned Judge, who must direct himself in accordance with what was said by the majority in *Cardiff Corporation v. Hall* (*supra*) and the other cases to which I have referred. Upon the facts found by him, Lewis is entitled to compensation for partial loss of capacity on the basis that he is still employable, even if at the present time it is not easy for him to find employment.

The other three cases are applications for review. These applications appear to be not unfounded, for there has been a change of circumstances since the weekly payments were awarded, or agreed to, within the wide interpretation of that phrase now permitted. See *Macdonald or Duris v. Wilsons and Clyde Coal Company, Limited* (28 *The Times* L.R., 431 ; [1912] A.C., 513), *Ball v. Hunt and Sons, Limited* (*supra*), and *McAlinden v. James Nimmo and Co., Limited* ([1920] A.C., 39). I have some doubt whether there has been a change of circumstances in Ingram's case. But as I disagree with the basis of the learned Judge's judgment, which embraced all four cases, it will be better that Ingram's case should be reconsidered. It may be that there has not been any change of circumstances entitling Ingram to a review. That is a question of fact for the County Court Judge. His task in these cases, as in so very many cases under the Workmen's Compensation Acts, is not an easy one, but the cases to which I have referred, and particularly *Gafney v. Chorley Colliery Company, Limited* (*supra*) and *Portland Colliery Company, Limited v. Murray* (*supra*), mark out the lines that are to be followed.

The appeals will be allowed in all four cases, with costs, and the cases will be remitted to the learned Judge for reconsideration.

Lord Justice Scrutton.—These four cases raise the troublesome question of the amount of compensation to be paid to a man who has been physically injured so as to affect his earning capacity, and who is also affected by labour conditions reducing employment and, apart from any accident, affecting his earnings. The County Court Judge has refused all four applicants any compensation, and they appeal.

The cases are not made any easier by the way in which the County Court Judge has dealt with them. He has given a very long and careful judgment in the case of Lewis, and has added short passages dealing with the other three cases. But he has treated the case of Lewis entirely under the Act of 1906 and referred repeatedly to Rule 3 of Schedule I. of that Act as justifying his action. He has overlooked the fact that, as Lewis's accident happened in 1904, the Act of 1906 does not apply to it at all. The Act of 1897 is the relevant one ; and Schedule I., paragraph 2, of that Act is in quite different words from paragraph 3 of the Act of 1906, and in particular does not contain the words on which he relies in his judgment. These words were probably inserted in 1906 as a result of the judgment in *James v. Ocean Coal Company* (20 *The Times* L.R., 483 ; [1904] 2 K.B., 213) ; and decisions under the Act of 1906—see especially *Bevan v. Energlyn Colliery Company* (28 *The Times* L.R., 27 ; [1912] 1 K.B., 63) and *per* Lord Dunedin in *Woodilee Coal and Coke Company v. M'Neill* (34 *The Times* L.R., 10 ; [1918] A.C., 43) —call pointed attention to the change of language. The result is that the whole of the principal judgment is based on the wrong Act. Its main conclusion is that the judgment of the majority of the Court of Appeal in the well-known case of *Cardiff Corporation v. Hall* (27 *The Times* L.R., 339 ; [1911] 1 K.B., 1,009), being inconsistent with two decisions of the House of Lords in 1917, namely, *Heathcote v. Haunchwood Collieries, Limited* ([1918] A.C., 52) and *Woodilee's* case (*supra*), is no longer law, and has not been law presumably since 1917. As the majority judgment in the *Cardiff Corporation* case (*supra*) was expressly approved by Lord Loreburn and Lord Shaw of Dunfermline in *Ball v. Hunt and Sons, Limited* (28 *The Times* L.R., 428 ; [1912] A.C., 496), and the case was not cited or referred to in the two cases in the House of Lords which are supposed to have made it "no longer law," and as it has been repeatedly followed and acted upon in the Court of Appeal since 1917, it seems to me it is hardly the function of a County Court Judge, or even of the Court of Appeal, to declare it no longer law. Further, in his exhaustive inquiry into the authority of the *Cardiff Corporation* case (*supra*), and incidentally into the validity of a decision of the Court of Appeal in *Palmer v. Crawshay Brothers* (*Cyfarthfa*), *Limited* (42 *The Times* L.R., 490), reversing a decision of his own, the County Court Judge seems to have omitted to consider a very important series of decisions of the Court of Appeal beginning with *Harwood v. Wyken Colliery Company, Limited* (29 *The Times* L.R., 290 ; [1913] 2 K.B., 158) and ending with the group of Scotch cases in the House of Lords, of which *Portland Colliery Company, Limited v. Murray* (39 *The Times* L.R., 579 ; [1923] A.C., 566) is the first, in which the effect of independent causes, each producing the same result, in whole or in part, is considered, with the result that an incapacity in fact from the accident is not rendered sterile of compensation by the fact that another independent cause would produce the same result. These deficiencies and errors in the judgment below excuse me from criticizing its argument closely, and I propose to deal with the matter independently.

The three applications to review must be decided under the Act of 1906 ; the original application of Lewis under the Act of 1897.

Under either Act it is necessary to appreciate the nature of the compensation to be awarded. As pointed out by Lord Justice Hamilton in *Harwood v. Wyken Colliery Company, Limited* (*supra*), it is not indemnity but a kind of insurance. The employer, who has to pay the workman something in respect of accidents for which he, the employer, is not blameable, has to pay an amount which does not represent the workman's loss, but only part of it, a part quantified by certain statutory rules, subject to some discretion in the arbitration. The workman has to bear part of his loss himself. If the compensation were indemnity, and there were no statutory rules, and the compensation were to be fixed from time to time, one would expect the assessment to proceed on these lines. An undamaged man can earn, say, 60s. a week ; this damaged man can by reason of his damage earn only 40s. a week ; his loss is 20s. a week. If conditions improved so that an uninjured man could earn 80s. a week, and this damaged man only 50s. a week, his loss would be 30s. a week. But the Act does not proceed on these lines. To deal only with partial incapacity, the matter involved in the present four cases, the weekly payment is (1) not to exceed 50 per cent. of the workman's average weekly earnings during the 12 months before the accident, (2) not to exceed £1, (3) not to exceed

the difference between (*a*) the amount of the average weekly earnings before the accident, and (*b*) the average weekly amount which he is earning or able to earn in some suitable employment after the accident. The result is that, however much wages rise, he cannot get more than 50 per cent. of his pre-accident wage, and if wages rise so that as a damaged man he is making after the accident as much or more than as an undamaged man he was making before the accident, he can get nothing, although the damage from the accident is preventing him from earning considerable sums. The rise of wages relieves the employer from liability, and the fall of wages similarly may involve him in liability.

But the arbitrator, while he has regard to these maxima, under the Act of 1906 may, within them, vary the compensation, which "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." In particular the House of Lords has decided in the *Woodilee* case (*supra*) (a case of rise of wages), approving *Bevan v. Energlyn Colliery Company* (*supra*) (a case of fall of wages), that the arbitrator, in fixing compensation, may have regard to the general rise and fall of wages. In *Bevan's* case (*supra*) the man earned before the accident 59s.; after the accident only 36s.; but if undamaged he would only have earned 40s. The Judge held that he was not entitled to consider the general change of wages and gave 11s. 6d., half 23s. (59s., less 36s.); the Court of Appeal said that he had ignored the direction to give effect to the circumstances of the case, and should have given 2s., being half the difference between undamaged wages 40s. and damaged wages 36s. Why half the difference was applied to this comparison is not clear, except in the view that the employer and the workman are each to bear half of the loss, and 4s. was the proved amount of loss attributable to the accident. But the real loss would be the difference between 36s. damaged wages and the amount that an undamaged man would then earn, though the third maximum prevented the whole of this amount from being given. This was approved by the House of Lords in the *Woodilee* case (*supra*). I do not think, however, that Sir H. Cozens-Hardy, Master of the Rolls, was completely accurate when he said (at p. 68) that if wages are going up that is a provision which may tend very much to the benefit of the workman. No doubt he gets more wages than he would otherwise, but he may get less or no compensation if his new damaged wages are raised to the level of his old undamaged wages. In the *Woodilee* case (*supra*), the workman's pre-accident wages were 40s.; his post-accident wages (damaged) were 27s. 6d.; but if he was undamaged his wages would be 55s. The difference between the actual pre-accident and post-accident wages was 12s. 6d., and the arbitrator, considering what the workman had actually lost, the difference between 55s. and 27s. 6d., gave him the whole statutory difference, 12s. 6d. This was approved by the House of Lords. On these lines the workman in *Bevan's* case (*supra*) should have had 4s., the difference between 36s. and 40s., not 2s., as awarded. These cases seem to decide that the arbitrator may consider the actual damage to the man by the accident, and may award him the actual amount of the damage, so far as he can do so without infringing the statutory maxima. In both these cases the workman was "earning." *Heathcote's* case (*supra*), the other case referred to by the County Court Judge, raised the question of "able to earn." There the workman earned before the accident 35s. a week. After the accident he was in fact earning 30s. a week as a carter, and the Judge made a finding, on the meaning of which the whole case turned, that, working in a suitable employment as a packer or loader as he might have done, he would have earned 7s. 5d. a day; "he can now earn 7s. 5d. a day." The majority of the Court of Appeal took the view that this was a finding of ability to earn at least 35s. a week, and that consequently there was no difference between pre-accident and post-accident wages, and therefore no compensation. I understand the House of Lords to have taken the view that, if this were the true meaning of the finding, the majority were right; but to have held that the real finding was that the man could not earn 7s. 5d. a day, and therefore was not "able to earn"; in which case I am sure the majority in the Court of Appeal would have decided the other way. I do not understand what this case has to do with the question before us, but I gather that the County Court Judge has taken the view that these cases enable him to say, however damaged the man is, and however much his damaged condition would affect his ability to earn wages as compared with sound men of his class, that if some other condition, such as labour difficulties or the state of trade, would also prevent him from earning wages, he can have no compensation. In other words, though owing to the accident he would not be able to earn wages, yet if another cause also would prevent him from earning wages, he cannot have compensation for his damaged and loss of wage-earning condition through the accident.

This brings me to the class of case which the Judge below seems not to have considered, the cases where loss of wages would follow from either of two independent causes, of which damage from the accident would be one. The principle is firmly established by the Court of Appeal decisions and can only be altered by the House of Lords.

They begin with *Harwood's* case (*supra*), where a workman was permanently incapacitated by an injury to his knee, and after being paid compensation for some time he was discovered to be also permanently incapacitated from work by heart disease not due to the accident. The County Court Judge decided that the employers need pay no compensation, and his decision was reversed by the Court of Appeal, who gave the workman full compensation, as the accident prevented him from working. Lord Justice Hamilton put it on the ground that the Act does not say "results solely from the injury," and it would entitle the workman to compensation if the accident by itself would cause the loss, even though another cause had not had the same result. This case has been followed where the concurrent inability was from old age, *Jamieson v. Fife Coal Company, Limited* (40 Sc. L.R., 704); *Stowell v. Ellerman Lines, Limited* (128 L.T., 823), and in a case of independent affection of the eyes (*Walker v. Cadzow Coal Company*, [1925] W.C. and Ins. Rep., 156). It has also been followed with severe logic, where the workman was interned as an alien, *Cargo Fleet Iron Company v. Funck* (9 B.W.C.C., 318), and even where he was sent to prison, *McNally v. Furness, Withy and Co., Limited* (29 *The Times* L.R., 678; [1913] 3 K.B., 605). It may be permissible to doubt whether in the latter case the imprisonment might not have been treated as a self-imposed disability, as in the case where a workman unjustifiably refuses to work. A voluntary strike deprives the workman of compensation (*Bromley and Drew v. Staveley Coal and Iron Company, Limited*, 129 L.T., 620), and the same result appears to have followed where, though the man was willing to work, a rule of his trade union

prevented him (*Thompson v. Richard Johnson and Nephew, Limited*, [1914] 3 K.B., 694, and *Williams v. Oakwood Colliery Company*, 88 L.J., K.B., 878).

These latter cases appear to have been decided on the ground that the man could physically do the work and the reason why he did not was not the accident but the trade union action. He was "able to earn." Lastly, in the Scotch cases reported under the heading of *Portland Colliery Company, Limited v. Murray* (*supra*), the House of Lords gave the workman compensation to the extent of his physical incapacity, though there was also a heavy fall of wages due to economic causes which had the same result. A similar order was made by the English Court in *Gaffney v. Chorley Colliery Company* (92 L.J., K.B., 1). See also *Bromley and Drew v. Staveley Coal and Iron Company* (*supra*). These cases appear to establish that, if a physical disability due to the accident would in the absence of any other cause effect a loss of wage-earning capacity, the fact that an independent cause would have the same result does not deprive the workman of compensation.

The case of *Cardiff Corporation v. Hall* (27 *The Times* L.R., 339; [1911] 1 K.B., 1,009) has been obscured by the prominence given in subsequent cases to the observations contained therein about the effect of being an "odd lot," which, as the man in that case was held not to be an "odd lot," were all *obiter dicta*. The man was partially incapacitated by an accident, and 9s. 2d. compensation was paid to him. The corporation applied to review on the ground that his physical condition had improved. The Judge found that it had improved and that he was able to do any kind of light work, and that the improvement was a change of circumstances, and reduced the compensation to 8s. The workman proved that he had applied for some kinds of light work and could not get them. On these facts the Court were divided, Lord Cozens-Hardy, M.R., desiring to give the man compensation for total incapacity, because he could not get light work, and the other members of the Court holding that he was only entitled to compensation for the partial incapacity due to his injury, and, as he was fit for all kinds of light work, that if he could not get them the result was due not to the injury but to economic causes. They distinguished the case of a man so injured that he could never get employment in any circumstances, but only a compensation job from a compassionate employer, usually the employer liable to pay compensation. They labelled such a man "an odd lot," and said that in such a case, if an employer wished to avoid paying for total incapacity, he must prove that employment was available. In the three cases other than that of Lewis, the applicant must show a change of circumstances. If there is no change of circumstance in the sense explained by the House of Lords and referred to hereafter, the application is really an appeal from the original award and is therefore unjustified, *Pope and Pearson, Limited v. Gamble* (129 L.T., 684).

But the House of Lords has interpreted change of circumstance to include cases where, though there is no change in physical condition, subsequent events have rendered it possible to prove more clearly its effect on earning capacity. In *M'Alinden v. James Nimmo and Co., Limited* ([1920] A.C., 39) Lord Finlay said ([1920] A.C., at p. 42) that "the amount may be reviewed if there has either been a change of circumstances, or if further events have put a different complexion on the case"; in the case in question, if they had shown that the effect of the accident on wage-earning capacity was greater than had been supposed. Lord Shaw of Dunfermline said ([1920] A.C., at p. 44) "that there has been more light thrown by the applicant upon the results of his injury and upon the effects on the labour market which the having of such an injury causes to him." In *Macdonald or Duris v. Wilsons and Clyde Coal Company* (28 *The Times* L.R., 431; [1912] A.C., 513) there was no change in the condition of the workman, but his employers were reducing their staff for business reasons, and he could not get other suitable employment, and the House of Lords held, reversing the Courts below, that this gave rise to a claim to review. The decisions under the title of *Portland Colliery Company, Limited v. Murray* (*supra*) are to the same effect.

These being the principles to be applied, the facts in the three review cases are as follow (His Lordship stated them, and continued):—

No doubt the state of facts found by the Judge that men, not odd lots, because they are capable of any kind of light work, are yet only likely to get work from their old employers, because each employer keeps his compensation jobs for his own compensation men, deserves careful consideration, and it will be very useful if a superior tribunal, considering its own decisions and those of the Court of Appeal, can throw any light on the matter. Similarly the practice by which, when ordinary labour strikes, the light-job men, who used to come out on strike till they found that they lost compensation by doing so, have changed their course of action and stay in and demand work with the more readiness because they know there would be none for them, and then claim compensation for total incapacity, also requires consideration.

In my opinion all the appeals should be allowed with costs and the cases remitted to the Judge to assess partial compensation on the lines above laid down.

The MASTER OF THE ROLLS stated that LORD JUSTICE LAWRENCE, having read the judgments just delivered, expressed his full concurrence with them.

[Solicitors—Messrs. Warren and Warren, for Mr. Edward Roberts, Dowlais, and Mr. A. Russell Jones for the appellants; Messrs. Watson, Sons and Room, for Messrs. Phœnix and Levinson, Cardiff, and Messrs. Peacock and Goddard, for Mr. D. W. Jones, Merthyr Tydfil, for the respondents.]

K.B. Div. (Avory, Swift, and Talbot, JJ.) 1927. Apr. 7.

REX v. COMMISSIONERS OF CUSTOMS AND EXCISE—EX PARTE PEGLER.*

Intoxicating Liquors—Tied house—Increase of duty—Apportionment by Commissioners of Customs and Excise—Tenancy entered into after the Act—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 46.

Section 46 of the Finance (1909-10) Act, 1910, which provides for the apportionment between landlords and tenants of "tied" houses of the increased licence duties imposed by that Act, does not apply to tenancies entered into after the Act came into force.

So *held* by Avory and Talbot, JJ. (Swift, J., dissenting).

This was a rule *nisi* for a *mandamus* directed to the Commissioners of Customs and Excise at the instance of Mr. Frederick Pegler, the licensee of the City Arms, Bell-lane, Gloucester, commanding them to hear and

* Reported by J. W. HALL, Esq., Barrister-at-Law.

determine, pursuant to the statutes in that behalf, an application by Mr. Pegler to determine the proportion of the increased duty payable in respect of his licence, occasioned by the Finance (1909-10) Act, 1910, upon the grounds (1) that the Commissioners were bound to determine his application under section 46 of the Finance (1909-10) Act, 1910; (2) that that section was not limited to such licences or licence-holders as existed at the date when the Act came into operation; (3) that the section applied whenever there was an agreement as mentioned in the section, whether the agreement was made before or after the date when the Act came into operation.

By section 46 of the Finance (1909-10) Act, 1910:—

"Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

Mr. Pegler originally became tenant of the City Arms from Messrs. Arnold, Perrett, and Co., Limited, under a lease dated August 31, 1911, containing a covenant by the tenant to pay

"all rates, tithes, taxes, charges, assessments, duties, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, which are now or may at any time hereafter be assessed, charged, or imposed upon the said demised premises or the owner or occupier in respect thereof, the landlords' property tax alone excepted."

There was also a covenant to purchase all liquor from the landlords. The lease was renewed to Mr. Pegler on April 15, 1912; to Mr. Pegler and his wife (owing to his war service) on November 4, 1916; and to Mr. Pegler on March 5, 1920, that being the subsisting lease and containing the same material covenants as the original lease.

The landlords' business was acquired in 1924 by the Cheltenham Original Brewery Company, Limited, who were now the landlords.

On April 28, 1926, Mr. Pegler, by his solicitors, applied to the Commissioners to determine the proportion of the increased licence duty payable under the Finance (1909-10) Act, 1910. The Commissioners declined to do so on the ground that the section only applied to agreements in existence at the date of the passing of the Act. Mr. Pegler then obtained the present rule.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. W. Bowstead showed cause for the Commissioners; Mr. Mitchell Banks, K.C., and Mr. Croom-Johnson, K.C., appeared for the landlords; Mr. Birkett, K.C., and Mr. Roland Burrows supported the rule.

Mr. Justice Swift.—In this case I have the misfortune to differ from the majority of the Court, and I need hardly, under these circumstances, say with what diffidence I express my own opinion; but I hold a strong view upon this matter and I think it my duty to give my reasons for coming to the conclusion at which I have arrived.

In this case Mr. Frederick Pegler, the licensee of the City Arms, Bell-lane, Gloucester, has obtained a rule calling upon the Commissioners of Customs and Excise to show cause why a writ of *mandamus* should not issue directed to them commanding them to hear and determine pursuant to the statutes in that behalf the matter of an application by him to determine the proportion of the increased duty payable in respect of his licence of the City Arms, Bell-lane, Gloucester, occasioned by section 43 of the Finance (1909-10) Act, 1910.

The facts are that on August 31, 1911, Messrs. Arnold, Perrett, and Co., Limited, granted a lease to Mr. Pegler of the publichouse, the City Arms Inn, Bell-lane, Gloucester, for 12 months from September 29, 1911, and thereafter from year to year, at a yearly rental of £40 "to be paid without any deduction except for landlords' property tax by equal quarterly payments." Such lease contained covenants by the tenant (*a*) "to pay unto the landlords the yearly rent hereinbefore reserved at the times and in the manner aforesaid without any deduction (except as aforesaid) and will also at all times during the said tenancy pay and discharge all rates tithes taxes charges assessments duties and outgoings whatsoever whether Parliamentary parochial local or of any other description which are now or may at any time hereafter be assessed charged or imposed upon the said demised premises or the owner or occupier in respect thereof the landlords' property tax alone excepted"; and (*b*) "that the tenant will deal exclusively and directly with the landlords or their successors in business or nominees for any wines spirits cordials liqueurs ales beers porter and cider whether in cask or in bottle cigars and all mineral or aerated waters which he may require for sale under the licence or licences attached to or to be held in respect of the said demised premises or under any occasional licence granted to him for sale elsewhere than upon the said demised premises the purpose and intent being that the draught ales stout and aerated waters sold by the tenant shall be such as are brewed or manufactured by the said landlords and that the wines and spirits cordials liqueurs and other goods shall be of such description and quality as is usually supplied by the landlords to their tied tenants and that in all cases the landlords shall be at liberty if they think fit to select the same; and will not on any pretence whatever (unless the landlords shall give express consent in writing) purchase take in or receive or have in his possession or directly or indirectly sell or dispose of or permit the sale or disposal of or the consumption either upon or off the said premises of any such articles other than such as shall have been purchased from or taken of the landlords or their successors in business or nominees; and further that if and whenever the tenant shall commit any breach of this clause he shall forfeit and pay to the landlords the sum of £20 recoverable for every such breach as and for liquidated damages and not in the nature of a penalty."

That lease was replaced by others, one of March 5, 1920, now being in force, which contains the same covenants. The reversion was assigned to the Cheltenham Original Brewery Company, Limited.

On April 29, 1910, before the granting of the first lease, the Finance (1909-10) Act, 1910, came into force. Part II. of that Act deals with duties on liquor licences, and section 43 fixes the duties of excise to be charged, levied, and paid for liquor licences according to a scale set out in the first Schedule to the Act.

The effect of that Act was to increase the amount

of duty payable in respect of liquor licences, and to prevent that increase falling unfairly section 46 provided for its distribution in certain cases amongst the parties interested in the trade done under the licence. That section provides : " Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

From 1911 to 1926 Mr. Pegler paid the whole of the excise licence duty, receiving no part of it back from his landlords. Up to 1917 he appears to have been under the impression, now apparently agreed to be erroneous, that he was receiving back a portion of the increase imposed by the Act of 1910 ; but from 1917 on he certainly had no such impression. From then until 1926 he apparently from time to time discussed the matter with his landlords' agents ; but until April 28, 1926, he took no steps to enforce his rights, if any, in the matter.

On April 28, 1926, his solicitors wrote to the Commissioners of Customs and Excise, Lower Thames-street, London. This is the letter : " We are instructed by a client to apply to you under section 46 of the Finance Act, 1910, to determine the proportion of the licence to be payable by him and the proportion to be paid by the brewers. We shall be glad if you will kindly let us have the necessary forms for the application together with information as to the procedure before you.—Yours faithfully, Lane, Martin and Co."

In reply to that letter they received a communication from the Surveyor of Taxes at Gloucester on May 15, 1926, who said : " Your letter of April 28 last with reference to the determination of the amount of licence duty payable under section 46 of the Finance (1909-10) Act, 1910, by a client of yours, addressed to the Commissioners of Customs and Excise, has been referred to me with directions to report the facts. In these circumstances please submit the full particulars of this case, with any representation you have to make, through me. I might mention that this section 46 does not apply to cases in which an agreement has been entered into after the passing of the Act."

In reply to that letter, Messrs. Lane, Martin and Co. wrote, on May 17, 1926, fully setting out the facts, and they received a reply dated May 18, from the Surveyor at Gloucester, saying : " I am in receipt of your communication of the 17th inst. respecting the licence of the City Arms, Bell-lane, Gloucester, which I am forwarding to the Commissioners of Customs and Excise. The view already communicated to you that section 46 of the Finance (1909-10) Act, 1910, does not apply to cases in which an agreement has been entered into after the passing of the Act is the opinion of the Commissioners as advised by their solicitors. My personal opinion may not be of much value, but it seems to me this section deals solely with existing licensees whose licence duty was increased by the Act. Persons becoming licence holders after the passing of the Act would be presumed to know the amount of licence duty payable in respect of the licensed premises, and their agreements would be based accordingly, and the question of increase in licence duty would not arise. There has been in fact no increase in licence duty so far as your client is concerned, as the rates have not been altered since he became the licence holder of the City Arms."

Messrs. Lane, Martin and Co. replied to that letter—I do not need to read it—and on June 14 they received a letter from the Commissioners of Customs and Excise stating : " The Commissioners of Customs and Excise have had under consideration the correspondence which has passed between yourselves and their Surveyor at Gloucester, relative to the construction applied to section 46 of the Finance (1909-10) Act, 1910, and they can only say that, while the point in question has not been subject to a decision of the High Court, they have been advised that the section does not apply to cases in which an agreement has been entered into since the passing of the Act."

This correspondence, in my opinion, amounts to a refusal by the Commissioners to determine how much of any increase in the duty payable in respect of the licence the applicant may, in accordance with the provisions of section 46, recover or deduct ; and it is with a view to obtaining an order that they shall so determine that this application has been made.

To the application for a writ of *mandamus* two answers are made : first, that on the facts of this particular case there is no duty imposed upon the Commissioners by section 46 ; and, secondly, that even if there were, the discretionary writ should not issue, having regard to the facts of this case.

With regard to the second of these points, it was contended on behalf of the respondents that there had been great delay in making the application to the Commissioners, and that the application, when made, was too vague and indefinite to amount to a request to determine.

As to this point, Mr. Birkett, for the applicant, made it clear that he only asks the Commissioners to determine the apportionment as for the year 1926. They could have no difficulty in doing that. The duty of the Commissioners did not arise, if at all, until the request from the solicitors in their letter of April 28, 1926, and from that date there has certainly been no undue delay in applying for the writ ; and looking at the correspondence, I am personally satisfied that the Commissioners knew quite well, or might have known quite well, what they were requested to do, but that they, acting perfectly properly upon advice, thought that they had no duty in the matter and pursued in this case the policy set out in paragraph 6 of the affidavit sworn in these proceedings by Mr. Bertenshaw, their assistant secretary, in which he says : " Since the passing of the Finance (1909-10) Act, 1910, the said Commissioners have consistently and steadfastly refused to determine under section 46 of the Finance (1909-10) Act, 1910, between any licence holder and his landlord the proportion recoverable by the licence holder of any increase in licence duty occasioned by the said Act in cases where the licence holder holds the premises under a lease or agreement made after the passing of the said Act."

I think, therefore, that upon this point the respondents fail and that the real point to be decided is the first one—namely, does section 46 apply where the agreement is entered into after the passing of the Finance (1909-10) Act, 1910 ? If it does, the Commissioners are under a duty to determine ; they have declined to do so, and the rule should be made

absolute. If it does not, they are under no such duty, and in declining to consider the matter they have done nothing improper, and the rule should be discharged.

In determining whether or not an agreement made after the passing of the Act is outside the scope of section 46, the words of that section are, I think, the only matters which can properly be considered. We have to ascertain the intention of the Legislature in regard to the matter, but we have to ascertain that intention from the language used. As Lord Haldane said in the case of *Watney, Combe, Reid and Co. v. Berners* (31 *The Times* L.R., 449; [1915] A.C., 885, at page 891), "The intention must be found in the language finally adopted in the statutes under construction, and in that language alone. No doubt general words may in certain cases properly be interpreted as having a meaning or scope other than the literal or usual meaning. They may be so interpreted where the scheme appearing from the language of the Legislature, read in its entirety, points to consistency as requiring the modification of what would be the meaning apart from any context, or apart from the purpose of the legislation as appearing from the words which the Legislature has used, or apart from the general law. In the statutes before us Parliament has thought fit, in the first place, by section 46 of the Act of 1910, to enable the licence holder of a house in respect of which a tie exists to claim over for a deduction against the person entitled to the benefit of the tie."

Considering the language of this section, I find nothing to limit its operation to agreements made before the Act was passed. It says: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons." I read these words to mean no more and no less than this: where a person is a tied tenant or the tied occupant of a house, not necessarily tied to his landlord, but where he is under some obligation to take his liquor from a particular person, then the section becomes operative.

Now here we have clearly got a tied tenant; the covenant that I have read from the lease in explicit terms binds him to take the whole of his intoxicating liquor, and indeed the whole of the liquor of any sort which he sells upon the premises, from his landlords. It seems to me to come expressly within the first four lines of the section, and he being a tied tenant, the section goes on to provide that he, being the licence holder, shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt or deduct from any sum due from him to the person to whom he is tied a proportion of the increase, a proportion which either may be agreed upon between the parties or in default of agreement shall be fixed by the Commissioners of Customs and Excise.

Now it appears to me that if the respondents' contention is right in this case, it is necessary to read into that section some words which are not there; some words such as "Where the licence holder is at the time of the passing of this Act bound by any covenant"—that is to say, to read into the words of the description of the person who shall be entitled to recover a portion of the increased duty the words "who shall be a tied tenant at the time of the passing of this Act and he shall not be entitled to relief unless he is a tied tenant at that time"; or, if the words are not read in there, then in order to support the Solicitor-General's contention they must be read in after the word "agreement"; and then it would read: "A licence holder shall be entitled notwithstanding any agreement made before the passing of this Act to the contrary." But the Legislature has not inserted these words, and I find no warrant for adding such words. If the Legislature had wished to do so, nothing could have been more simple than to have put them in. In the Finance Act of 1912, dealing not with the case of the tied tenant but with the different case of the holder of a lease who was not tied, and desiring to grant relief to such persons, the Legislature gave a measure of relief to them, but it expressly limited it to those leases which were in existence in the year 1910, and the fact that in this section 46 it leaves it at large seems to me to show that there was no intention on the part of the Legislature to limit the person who holds the licence on an agreement under which he buys the liquor to any particular date or to the date at which the Act was passed.

Section 2 of the Act of 1912 is relied upon as showing that Parliament thought that section 46 only applied to agreements made before 1910. I cannot think so. It shows that when dealing with non-tied houses Parliament thought it proper to relieve only those which had leases before 1910. To my mind it shows nothing as to what they meant to do in 1910 with quite a different class of tenant, with whom they were dealing in quite a different way. If agreements made with tied tenants after 1910 are excluded from the operation of section 46, the design of the Legislature could be easily defeated. Tied tenants, in the vast majority of cases, are tenants on short leases, and there would be nothing easier, when the Act of 1910 passed, than for brewers to have given tied tenants all over the country notice to quit their tenancy and require a new agreement to be made which would have excluded them from the benefit of the relieving provisions of section 46.

I think that section 46 means what it says, and that a tied tenant is entitled to the relief it gives "notwithstanding any agreement to the contrary," the word "any" applying as much to the date as to the form, consideration, duration, or other incidents of the agreement.

I am to some extent fortified in my view by the facts in the case of *Watney, Combe, Reid and Co. v. Berners* (*supra*). I am far from saying that the speech of the Lord Chancellor in the House of Lords is a binding authority upon me, because I do not for a moment suggest that it was intended to decide this point. But it is helpful to me to realize that the exact point, so far as the facts could raise it, was raised by the statement of facts by the Lord Chancellor. In that case "The publichouse was, by an agreement dated January 4, 1911, sublet by the appellants to one Saile at a slightly increased rent. Saile agreed to purchase the liquor he required for his business as a publican from the appellants, so that the house which in their hands was free became as between them and him a tied house. Saile holds the licence. The duty payable by the licensee was, prior to the Finance Act of 1910, £30. It is now £64." Then the Lord Chancellor says this: "Under section 46 of the Act of 1910, Saile, being bound by the tie to the appellants as to supply of liquor, could recover from them so much of the increase of his licence duty as was proportionate to the increased rent of the licensed premises, or the increased prices of intoxicating liquor supplied, or any other benefit obtained by them from the tie. No question arises as to the appellants' liability under that section to their sub-tenant, Saile."

No question arose, and therefore I do not for a moment suggest that the Lord Chancellor was decid-

ing the question, but it is helpful to me to know that he dealt with facts similar to those I am now discussing, and I cannot conceive that it would not have been present to his mind, if there had been any substance in it, that Saile in fact was not entitled to the benefit of section 46 because the agreement which he entered into was after the passing of the Act of 1910.

For these reasons I think the Commissioners were wrong when they declined to determine the proportion in this case because the agreement between Pegler and his landlord was made after the passing of the Finance (1909-10) Act, 1910; and, in my opinion, this rule should be made absolute.

Mr. Justice Talbot.—In this case a rule was obtained by Frederick Pegler for a *mandamus* to the Commissioners of Customs and Excise calling upon them to show cause why they should not be commanded by *mandamus* to hear and determine the matter of an application by him to determine the proportion of the increased duty payable in respect of his licence of the City Arms, Bell-lane, Gloucester, occasioned by section 43 of the Finance (1909-10) Act, 1910.

The Act of 1910 brought into operation a new schedule of duties of excise licences for the sale of liquor, involving in many, if not all, cases substantial increases. By section 46 a licence holder bound by what is commonly called a tie, who is entitled to the benefit of the section, is given a right to recover, either by action or deduction, a proportion of any increase of the licence duty occasioned by the Act, from the person to whom he is tied—that is, the person from whom he is bound by any obligation, direct or indirect, to buy liquor.

Mr. Pegler is, and has been, either alone or with his wife, since August, 1911, the licence holder in respect of the City Arms, Gloucester. He, or he and his wife, have held the house under four successive leases from the brewers, the first of which is dated August, 1911, each of which binds the lessee to buy liquor from the lessors.

The Commissioners have intimated to Mr. Pegler that they have no power to make an apportionment under the section, inasmuch as he was not bound by a tying obligation when the Act came into operation in April, 1910; and the question is whether this is right. I assume that there has been a sufficient application and refusal to justify a *mandamus* if the refusal is wrongful.

In my opinion, though I recognize that the point is one of considerable difficulty, the Commissioners are right. The question depends on the first words of section 46. The words "is bound" are words ambiguous, capable of meaning "is hereafter bound," or "is bound now," that is, at the passing of this Act, as the Commissioners contend, or "is bound now or at any future time," as the prosecutor contends. Which meaning is right is to be determined by the context and by the opinion to be derived from a perusal of the Act as to the scope and object of the section. The object appears to me to be to protect a licence holder who has made a contract with his landlord as to rent, and as to the terms on which he is to buy liquor from him, on the footing of having to pay licence duty of a certain amount, from having an increased duty put upon him while he remains bound by the terms of his agreement.

Parliament appears to have thought that the lessor who benefited by the fact of his tenant being also his customer for the liquor, or that a person from whom the licence holder was bound to buy liquor, ought in fairness to bear part of the increased cost of the licence which enabled the tenant to sell, and therefore to buy, the liquor. I see no reason, other than the fact that the tenant is bound by a lease made before the increase, for making the lessor share the increase and not the whole of the licence duty; but as to any contract entered into after the passing of the Act I see no ground for making the landlord bear a share of the increase which would not equally justify making him share the whole. It is not to be presumed that the lessor and lessee, when they know the amount of duty, are not capable of making or have not made a fair bargain.

The design of the section is to prevent one party only from being burdened by a new impost which neither party could foresee and with reference to which they did not contract. I think the words "notwithstanding any agreement to the contrary" refer primarily, I do not say exclusively, to the ordinary lessee's covenant to pay the licence duty, which appears in the leases of these premises.

The opinion which I have formed from a consideration of section 46 gets some support from the language of section 2 of the Finance Act, 1912, since repealed. That section gave similar, though not identical, protection to lessees of licensed premises which are not tied, and it did so only in the case of premises held under leases or agreements made before the passing of the Act of 1910. No satisfactory reason for this has been suggested other than that Parliament, believing that section 46 of the Act of 1910 related only to licence holders bound by tying agreements in force at the passing of that Act, intended to put lessees of free houses, who were equally caught, if I may so put it, by the increased taxation of 1910, under like protection.

I feel, I need scarcely say, the force of the argument that the insertion of a very few words would have put what I conceive to have been the intention of Parliament beyond a doubt; but after all, this is not the only statute of which the language is ambiguous, and in all such cases the Court is obliged to interpret the words by what appears to be the reason and purpose of the enactment. Moreover, it is for the party who claims the benefit of the section to show that he comes within its terms.

I do not think that the case of *Wooler v. North Eastern Breweries* (26 *The Times* L.R., 129; [1910] 1 K.B., 247) has any real bearing on the case before us. That was a case on the construction of section 3, subsection 3, of the Licensing Act, 1904, relating to the compensation charge imposed by that Act. The subsection is as follows: "Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge." The decision was that the words "notwithstanding any agreement to the contrary" covered agreements whether made before or after the passing of the Act. It was quite clear there that any person who at any time made the payment mentioned was entitled to make the deduction; and the words preventing the defeat of this protection by agreement were held to operate so long as this protection itself endured.

The question which we have to decide, which is not as to the meaning of the same words, "notwithstanding any agreement to the contrary," in section 46 of the Act of 1910, but of earlier words by which the whole operation of the section is governed, is obviously quite different.

In the circumstances it is not necessary to refer to

the other points raised. Upon the ground which I have stated I am of opinion that the rule should be discharged.

MR. JUSTICE AVORY.—The question to be determined in this case is whether section 46 of the Finance (1909-10) Act, 1910, is to be construed as applying only to licence holders who, at the time of the coming into operation of that Act, were under agreement or obligation to obtain a supply of intoxicating liquor from any person, usually called tied tenants, or whether it applies to licence holders who thereafter come under such an obligation.

It appears by the correspondence exhibited that the Commissioners of Customs and Excise have, since the passing of the Act, consistently acted on the view that the section does not apply to licence holders who thereafter enter into such agreement or obligation, and that view has not hitherto been challenged. This is not in any sense conclusive ; as Mr. Birkett has reminded us, something more than courage is required to litigate a new question of law with a Government Department.

I do not think that we derive any assistance from the decision in the cases which were quoted of *Wooler v. North Eastern Breweries* (26 *The Times* L.R., 129 ; [1910] 1 K.B., 247) and *Watney, Combe, Reid and Co. v. Berners* (31 *The Times* L.R., 449 ; [1915] A.C., 885). In the former case the words in the Act, "any licence holder who pays a charge under the section," clearly referred to the future ; and in the latter case the point now in question under section 46 was not in issue.

It must be admitted, I think, that the initial words of section 46, "Where the licence holder is bound by any covenant," &c., are capable of either construction ; but having regard to the context and the circumstances in which the Act was passed, I have come to the conclusion that the intention of the Legislature was to give relief to a licence holder who is called upon under the Act to pay an increased duty beyond that which he had paid before the Act, and that the words "as may be agreed upon" contemplate a tenancy agreement prior to the Act, because it may be assumed that any tenant who becomes such after the Act, knowing the amount of duty which will have to be paid, will make terms accordingly with his landlord.

This view is, I think, confirmed by reference to section 2 of the Finance Act, 1912, which appears to me to have been intended to put the free tenant on the same footing with regard to the duty as the tied tenant had been put in the Act of 1910. The fact that the Act of 1912 was repealed by section 18 of the Finance (No. 2) Act, 1915, does not, in my opinion, affect the construction of it.

It is also, I think, worthy of observation that section 47 of the Act of 1910, which empowers the Commissioners to allow a reduction from the duty in cases where a capital sum has been paid for monopoly value on the grant of a new on-licence, apparently applies only to cases which have arisen before the Act. The words in that section, "Where a capital sum has been paid," in my view clearly refer to cases where a new on-licence has been granted and a monopoly value fixed before the Act came into operation.

Further, I think that the observations of Baron Parke in the case of *In re Knight* (1 Ex., 802), observations which are quoted in the case of *Wooler v. North Eastern Breweries* (*supra*), although under a different statute, are applicable here and afford support to the view which I have expressed on the construction of section 46. In that case of *In re Knight* (*supra*) Baron Parke was dealing with a statute which provided for the rebuilding of a church and empowering trustees to levy rates upon all houses in the parish, one half to be paid by the landlord and the other half by the tenant, and providing that the tenant was to pay the whole rate in the first instance and to take a moiety out of the rent, the landlord being required to allow such deduction notwithstanding any agreement to the contrary. Baron Parke said: "The words in the local Act may be reasonably construed to mean notwithstanding any agreement subsisting between the parties at the time of the passing of that Act. The parties could not foresee that the expense of building a church would be imposed upon the parish. But if the agreement is made after the passing of the Act then the party who enters into the agreement has no good ground for not paying these expenses." These observations appear to me to apply to this case, to the case of a tenant who has entered into an agreement before the passing of the Act.

For these reasons I think the rule should be discharged ; and having come to that conclusion upon the main question, I need not consider whether there was in this case any demand made upon the Commissioners of Customs and Excise sufficiently explicit to found this application ; nor is it necessary to consider whether the delay which has undoubtedly taken place since the year 1917 would have been fatal to it.

I agree with my brother Talbot, therefore, that the rule should be discharged.

[Solicitors—The Solicitor of Customs and Excise ; Messrs. Godden, Holme, and Ward, for Messrs. Haddock and Pruen, Cheltenham ; Messrs Maitland, Peckham and Co., for Messrs. Lane, Martin and Co., Gloucester.]

Chan. Div. (Russell, J.) 1927. Apr. 13.

WILLIAMS v. BARTON.*

Trustees—Profit from trust—Rule prohibiting—Valuation of estate — Work performed by trustee's employers — Resulting profit to trustee.

The defendant, who was in the employment of a firm of stockbrokers, on the terms of half-commission for work introduced, was one of the two trustees of a will, and on the death of the testator these stockbrokers were employed, at the suggestion of the defendant, to value the testator's securities, and they paid to the defendant half the fees so earned by them, the defendant not taking, however, any part in the work or in fixing the fees. In an action against the defendant by the other trustee to make the defendant accountable to the trust estate for the money so received,

Held, that as the defendant, though he honestly believed himself to be entitled to do what he had done, had increased his remuneration by virtue of his trusteeship, the rule that a trustee may not make any profit out of his trust applied to the case, and the action succeeded.

HIS LORDSHIP delivered judgment in favour of the plaintiff in this action brought by Mr. Coventry

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

Williams, one of the two trustees of the will of the late Sir John Roper Parkington, against his co-trustee, Mr. George Henry Barton, by which it was sought to make the latter accountable to the trust estate for moneys received by him from a firm of stockbrokers. The basis of the claim was that in retaining such moneys the defendant was making a profit out of his trusteeship.

Although holding that the defendant was accountable, MR. JUSTICE RUSSELL said that it was conceded that the defendant was not guilty of any moral obloquy, and that he had done nothing which he did not honestly believe he was entitled to do.

Mr. Spens, K.C., and Mr. R. M. Pattisson appeared for the plaintiff; Mr. Gavin Simonds, K.C., and Mr. F. McMullan for the defendant.

MR. JUSTICE RUSSELL, in the course of his considered judgment, said:—The defendant was formerly a stockbroker, but ceased to be a member of the Stock Exchange in 1919. In 1920 he entered the employ of a firm of stockbrokers, George Burnand and Co., and has continued in such employment to the present time. The terms of his employment are that, on his side, he is bound to give the firm his services in connexion with Bank of England transfer work; on the firm's side, they agree to pay him half the commission earned by the firm on all such work introduced by him to the firm as the firm is willing to carry out.

On the death of the testator, Sir John Roper Parkington, in 1924, it became necessary to have his securities valued, and it was at first proposed to employ for this purpose a firm of stockbrokers who had usually acted for the testator, but, as I gather from the correspondence, at the instigation of the defendant George Burnand and Co. were in fact employed to do the work. On the subsequent death of the tenant for life a similar valuation became necessary and was in fact done by George Burnand and Co.

For the work so done the stockbrokers charged fees which were paid to them out of the testator's estate, and, in accordance with their contract with the defendant, they paid over to him one-half of the fees so earned and paid to them. The defendant took no part in making the valuations or in fixing the fees to be charged. It is claimed by the plaintiff that the moneys so paid over to the defendant and any half-commission which may have been paid to him in respect of sales and purchases of trust investments must be paid to the estate.

It is a well-established and salutary rule of Equity that a trustee may not make a profit out of his trust. A person who has the management of property as a trustee is not permitted to gain any profit by availing himself of his position, and he will be a constructive trustee of any such profit for the benefit of the persons entitled to the property. On the same principle a trustee has no right to charge for his time and trouble. The rule is thus stated in *Bray v. Ford* (12 *The Times* L.R., 119; [1896] A.C., 44, at p. 51):—

"It is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

It was argued for the defendant that the case was altogether outside that rule of Equity because the sums received by the defendant were merely parts of his salary paid to him by his employers under the contract of service and were not of a character for which he was liable to account.

The point is not an easy one, and there is little, if any, authority to assist in its determination. The situation is an unusual one and the contract of service presents the following peculiar features. The remuneration has no relation to the services which the defendant has to render to his employers. The defendant, while bound to render the services, might get no remuneration at all if he introduced no work or introduced none which was acceptable to his employers. The amount of his remuneration depends (subject to his employers' acceptance of orders) upon his own efforts, but upon efforts not in relation to the work which he is engaged to do. Any increase of his remuneration rests with him.

From this it seems to me evident that the case falls within the mischief which is sought to be prevented by the rule. The case is clearly one where his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the stockbrokers to act for the estate; as the recipient of half the fees to be earned by George Burnand and Co. on work introduced by him his obvious interest is to choose or recommend them for the job.

In the event that has happened they have been chosen, and chosen because the defendant was a trustee, with the result that half of what the estate pays must necessarily pass through them to the defendant as part of his remuneration for other services rendered, but as an addition to the remuneration which he would otherwise have received for these self-same services. The services rendered remain unchanged, but the remuneration for them has been increased. He has increased his remuneration by virtue of his trusteeship. In my opinion this increase of remuneration is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee.

Much reliance was properly placed on the decision of the Court of Appeal in *In re Dover Coalfield Extension Limited* (24 *The Times* L.R., 52; [1908] 1 Ch., 65), but that case seems to me very different. At the request of the Dover Company Mr. Cousins had entered into a contract with the Kent Company to serve them as a director, the Kent Company paying him remuneration for his services. The necessary qualification shares were provided by the Dover Company, and in respect of these shares he became a trustee for the Dover Company. He had not, however, used his position as a trustee for the purpose of acquiring his directorship. He had, in fact, been appointed a director before he became a trustee of the shares. The profit which he gained was not procured by him by the use of his position as trustee, but was a profit earned by reason of work which he did for the Kent Company and which would not have been earned by him had he not been willing to do the work for which it was the remuneration. It was not (as in the present case) a profit acquired solely by reason of his use of his position as trustee and a profit in respect of which no extra services were rendered.

The plaintiff is entitled to the declaration asked for. If necessary, an inquiry must be directed, but if the amount can be agreed it may be inserted in the order and an order made for the payment of the agreed amount.

[Solicitors—Messrs. Parker and Thomas; Messrs. Ellis & Willes and Ingpen & Armitage.]

K.B. Div. } 1927.
(Salter and Acton, JJ.) } Apr. 28.

DE VRIES v. SPARKS.*

Landlord and Tenant—Restrictions—Agreement to surrender—Whether a notice to quit—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 4.

An agreement made by a tenant with his landlord for good consideration to give up possession cannot constitute a notice to quit within s. 5 (1) (*c*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted for the original section by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923), so as to entitle a landlord, who on the strength of the agreement has contracted to sell the premises, to recover possession of the same.

This was the defendant's appeal from the Brentford County Court.

The defendant, Mrs. Mary Sparks, had for many years occupied a dwelling-house, No. 38, Dale-street, Chiswick, upon a weekly tenancy. In May, 1926, her husband and one of her sons died and she then became minded to leave the house. She wrote a letter in which she stated that she would give up possession in or about September, 1926, and the landlord, Mr. Ysbrand De Vries, then agreed to give her £30, £10 to be paid forthwith and £20 upon her giving up possession. He told her that she might occupy the house rent free in the meantime. The £10 was paid and the defendant signed a receipt in the following terms :—

"May 31st, 1926.

"Received £10, on account of £30 for giving up possession of 38, Dale-street, Chiswick, on or before September 25, 1926.—M. SPARKS."

The landlord thereupon contracted to sell the house. The defendant subsequently changed her mind and refused to give up possession. The landlord brought an action to recover possession and the defendant relied upon the protection of the Rent Restriction Acts.

The county court Judge held that the agreement between the plaintiff and the defendant, whereby the defendant undertook to give up possession on or before September 25, 1926, although inoperative to deprive the defendant of any of her rights under the Rent Restriction Acts, was nevertheless operative as a notice to quit ; that in consequence of such notice the plaintiff had contracted to sell the premises ; and that he would be seriously prejudiced within the meaning of section 4 (1) (*c*) of the Rent and Mortgage Interest Restrictions Act, 1923, if he could not obtain possession. The county court Judge accordingly made an order for possession.

The defendant (the tenant) appealed.

Mr. C. Doughty, K.C., and Mr. H. S. Schultess-Young appeared for the appellant ; Mr. W. E. P. Done for the respondent.

Mr. DOUGHTY submitted that there had been no notice to quit given by the defendant. The document of May 31, 1926, was nothing more than an agreement between the parties. It could not be regarded as a notice to quit because it was not certain, in that there was no date fixed for the determination of the tenancy. He referred to *Barton v. Fincham* (37 *The Times* L.R., 386 ; [1921] 2 K.B., 291) and *Standingford v. Bruce* (42 *The Times* L.R., 122 ; [1926] 1 K.B., 466).

Mr. DONE contended that there had been a valid notice to quit. There had been a definite indication by the tenant of her intention that the tenancy should expire on September 25, 1926, accompanied by a permission from the landlord that she could leave on an earlier date if she wished. In *Gilbert v. Jordan* ([1920] W.N., 309) a notice of an intention to quit resulting in an agreement between landlord and tenant had been held to be equivalent to a notice to quit.

MR. JUSTICE SALTER, in giving judgment, said that the question for the determination of the Court was whether there was before the county court Judge any evidence on which he could rightly find that the tenant had given notice to quit. It was plain that under section 4 (1) (*c*) of the Rent and Mortgage Interest Restrictions Act, 1923, the notice to quit might be either a notice by a common law tenant given while the common law tenancy still subsisted, or a notice by a statutory tenant given after the relation of the parties had become statutory.

It was not necessary to consider the kind of notice to quit that had to be given by a statutory tenant, because here the tenant, if she gave a notice to quit at all, gave it while she was still a common law tenant. A notice to quit within the meaning of section 4 (1) (*c*) was one that would be valid at common law and one which would have the effect of determining an existing common law tenancy against the will of the landlord.

In the first place, there did not appear to have been a notice to quit at all, but merely an agreement between the parties that the subsisting common law tenancy should determine, at the latest, on September 25, 1926. A notice to quit and an agreement to surrender or determine a tenancy were essentially different in their nature. An agreement depended on the consent of the parties, while a notice to quit was a notice given by one party to the other of an intention to exercise a right given by the contract, whether the other party liked it or not.

The case of *Gilbert v. Jordan* ([1920] W.N. 309) was very briefly reported. It was true that when the facts were looked at reliance had been placed on circumstances which somewhat resembled an agreement to determine the tenancy on a certain date. Lord Trevethin, then Mr. Justice A. T. Lawrence, however, did not treat those circumstances as constituting an agreement, but as a notice to quit. That might have been an inaccurate view of the facts, but it was far from laying down the proposition that an agreement between the parties could of itself constitute a notice to quit.

Further, if the agreement in the present case was to be regarded as a notice to quit, it was invalid for two reasons—first, because the notice was not one to determine the tenancy on any fixed date, the words used being merely "on or before September 25" ; and secondly, because there was no evidence to show that the notice expired on the day of the week on which the tenancy began.

For those reasons the county court Judge had been in error in law, and the appeal must succeed.

MR. JUSTICE ACTON concurred.

[Solicitors—Mr. H. B. I. Schultess-Young ; Mr. Lewis W. Taylor.]

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

K.B. Div. (Wright, J.) } 1927. Apr. 8.

B. LIGGETT (LIVERPOOL), LIMITED v. BARCLAYS BANK, LIMITED.*

Bankers—Cheques—Company's cheques to be signed by two directors—Payment of cheques not so signed—Negligence—Trade creditors of company—Equity for bank to stand in place of creditors.

The defendant bank negligently and in breach of the instructions given by their customer, the plaintiff company, paid cheques drawn on the company's account signed by one director only. All the cheques were paid to the company's trade creditors.

Held, (1) that the bank being put on inquiry and being negligent (as the jury found) were not entitled to rely on the rule in *Royal British Bank v. Turquand* (6 E. and B., 327) and assume that a signature purporting to be that of a new director was that of a person duly appointed ; (2) that whether the plaintiff company's account was in credit or in debit at the time of the payments to trade creditors the bank were, on the equitable doctrine under which a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment, entitled to credit for the cheques paid in discharge of the debts of the plaintiff company.

An inquiry was ordered into the circumstances of payment of each cheque.

This was the further consideration of an action tried at Liverpool Assizes before Mr. Justice Wright and a special jury. The facts appear from the judgment.

Sir Walter Greaves-Lord, K.C., and Mr. N. B. Goldie appeared for the plaintiffs ; Mr. J. E. Singleton, K.C., Mr. Wooll and Mr. Moelwyn Hughes for the defendants.

Mr. Justice Wright.—This case comes before me on further consideration. I tried it with a special jury at the last Liverpool Assizes and the jury gave certain findings of fact. The question I have to determine now is, What is the result which follows from the facts before me and which flows from the findings of the special jury ?

The action was brought by B. Liggett (Liverpool), Limited, against Barclays Bank. It is a company which was registered on October 4, 1923, and which was formed to carry on the business of retail provision merchants in Liverpool. The business had been carried on by Mr. B. Liggett as his own business, but a Mr. Melia had bought a half share in the business for £5,000 in cash and thereupon a company was formed, and according to the Articles of Association of the company there were to be not less than two nor more than three directors. The first directors were to be George Frederick Benjamin Liggett and Edward Melia, and the directors were to have power at any time to appoint any other qualified person to be a director of the company either to fill a casual vacancy or as an addition to the board. The qualification for each director was to be a holding of not less than £500 nominal value of shares. That qualification was to be acquired in one month from the appointment of a director, and it was provided that the quorum of directors for transacting business should, unless otherwise fixed by the directors, be two. These are the provisions of Articles 23 to 28, which, as will appear later, are material for the purposes of this case.

Now the company, according to the evidence heard at Liverpool, was not solvent when it was registered and was at no subsequent period solvent. Mr. Melia did not take an active part in the management of the business. He was not only appointed as a director, he was also secretary, Mr. G. F. B. Liggett being not only a director but chairman. Mr. Melia, so far from taking any active part in the conduct of the business from 1924, does not seem to have concerned himself in the management of the affairs of the company ; what, however, he did was to keep the control of the banking account of the company. When the company was formed Barclays Bank, Limited, were appointed as bankers to the company and they were instructed to honour cheques or bills provided that they were signed by any two directors for the time being. These instructions of the directors were dated October 19, 1923. They were signed on behalf of B. Liggett (Liverpool), Limited, by Mr. Liggett and Mr. Melia, and specimen signatures of those two gentlemen were appended to those instructions. The branch of the defendant bank at which the company's account was opened was at Walton-road, Liverpool. With the appointment and the instructions there were enclosed the certificate of the incorporation of the company for inspection by the bank manager and a copy of the Memorandum and Articles of Association. Mr. Jones, the bank manager, read those documents. As I have said, Mr. Melia, while leaving the conduct of the business to Mr. Liggett, kept control over the banking account. His signature was necessary to any cheque before the bank would honour it. In the course of 1925 he became doubtful about the way in which the business was being carried on and consulted his solicitor and an accountant ; and he already had reason to think that demands were being made to induce the bank to pay out moneys on cheques without his signature. For that reason, about July 19 or 20, 1925, he interviewed the bank manager. According to his evidence he told the bank manager that he was having trouble with his fellow director, who was not doing his duty, but what he did insist upon and made clear to the bank manager was that no cheques were to be paid unless they bore not only the signature of Mr. Liggett but his own signature. By a letter which is undated but which is said in fact to be of July 20, 1925, he reiterated those instructions. The letter is in these terms, addressed to Mr. Jones, Barclays Bank, Walton-road, Liverpool, and signed by Mr. Melia : "By way of confirming our interview I would state that I wish no cheques to be paid out of the above account unless duly signed by Mr. Liggett and myself, as called for in the original authority. Thanking you sincerely for your kind attention to me," and then he signed it. He was occasionally absent from Liverpool, but either at that date or possibly at some earlier date he gave to the bank manager his address and his telephone number in Liverpool so that if any question arose about the payment of cheques he could at once be communicated with, and that was entered in the bank ledger where the company's account was entered up. From time to time cheques were drawn and issued by Mr. Liggett signed only

* Reported by J. W. Hall, Esq., Barrister-at-Law.

by himself, and about the time with which I am now dealing, the end of July or August, it was arranged that if these cheques were presented they should not be paid until Mr. Melia had been communicated with, and had been consulted about them, and on a number of occasions about the end of July Mr. Melia did attend at the bank, having been notified by telephone, and there he affixed his signature to cheques which had come in with only one signature attached, and those cheques were thereupon met. The last occasion, according to Mr. Melia, when he followed that course was August 27 or 28. Mr. Melia at that date had just come back from Ireland, and on August 27 and the first days in September he was at his Liverpool address. The bank manager, as I have said, was Mr. Jones. He went away on his holiday in the early part of August and he was absent on holiday until September 9. During his absence the affairs at the bank were in charge of the assistant, a Mr. Hicks, who, according to his evidence, was fully conversant with the arrangement which had been made with Mr. Melia. Mr. Hicks was in charge from August 11 to September 9. According to Mr. Hicks's evidence, about the end of August Mr. Liggett came down and saw him and said that Mr. Melia had gone to Ireland, and that he had trade cheques which had to be met, and he said to Mr. Hicks : "Meet them, and I will get Mr. Melia to sign them." Mr. Hicks said : "I will pay them and I will get the duplicates properly signed for the other cheques," that is to say, cheques not properly signed which had come back through the Clearing House. In fact that course was adopted as regards three cheques respectively dated August 20, 25 and 25, 1925. These amount in all to a sum of £661 12s. 9d., and they were paid on August 27 and 28. Mr. Melia, having come down, signed the cheques ; these three cheques formed the first item claimed in the action, and that part of the claim has been withdrawn and I need say no more about it. In addition to that, certain cheques were paid by the bank with only one signature. They are three cheques, two dated August 25, 1925, and one dated August 26, 1925, amounting in all to a sum of £470. These were paid on August 27, 28, and 31, and were paid on one signature alone. Mr. Hicks had been asked to do this, and he was willing to do it apparently because Mr. Liggett had pointed out to him a difficulty that would arise if trade cheques were not honoured, a number of cheques in rotation, and he would be obliged by Mr. Hicks obtaining the second signature later, which at that time Mr. Hicks must have thought was the signature of Mr. Melia. On September 1 Mr. Hicks received at the bank a notice. It is written on the plaintiff company's paper dated September 1, 1925, addressed to the manager of Barclays Bank at Walton-road, Liverpool, and signed *per pro* B. Liggett (Liverpool), Limited, (signed) B. Liggett, chairman, and it is in these terms : "I have to inform you that (Mrs.) Eleanor May Liggett has been appointed an additional director of the above company and we accordingly enclose herewith the new director's specimen signature. The instructions with reference to the regulation of the bank account will remain the same as hitherto, viz., 'That cheques should be signed by any two directors for the time being.'" That was received by Mr. Hicks, and without any further inquiry he accepted it as a binding notice and acted upon it. He said that he looked up the Articles of Association and then thought that it covered all that was necessary. The article required not less than two nor more than three directors, and he said that he presumed that the new director had been appointed by the chairman. It did not occur to him to ask whether a quorum was present, and he thought that Mr. Melia was in Ireland and was in Ireland at the time when he paid the three cheques which I have just referred to as having been paid on one signature. That being the position Mr. Hicks went on honouring cheques, and when the manager returned he followed the same practice and cheques were honoured from time to time bearing the signature of Mr. Liggett and Mrs. Liggett. No inquiry was made of Mr. Melia : he was not told what the bank were doing or that they were deviating from the practice which he had established, namely, that no cheques should be paid if they came in with one signature, and if they came in he should be communicated with and his signature obtained before the cheques were met. Cheques were accordingly paid with these signatures between the period of August 27, and, practically speaking (except two small cheques which were paid in October), till the end of September. At the end of September Mr. Melia's accountant came to the bank and said that he had ascertained that cheques were being paid on the signatures of Mr. and Mrs. Liggett, and pointed out that that was entirely improper ; and thereupon, except in a few isolated instances of two small cheques which had been drawn in September and which apparently were not presented until the end of October, the bank made no further payments. In addition to the cheques dealt with in this way there was also a bill accepted by Mr. and Mrs. Liggett which was drawn on September 12, 1925, and was paid on September 15. Two bills were paid in August, one on August 14 and the other on August 21, on the signature of George Frederick Benjamin Liggett alone. It is admitted by the defendants in this action that they are liable in any case upon those bills, and they have paid into court without a denial of liability the amount of those two bills, which is £106 5s. 7d., and no question arises in this action as to those two bills.

The question which does arise is with reference to all the cheques paid on the signature of George Frederick Benjamin Liggett and Eleanor May Liggett. These cheques, which are considerable in number, amount in all to £5,981 2s. 1d. As regards the first three cheques, they, as I have said, were drawn on August 25 and 26, and they were paid, one on August 27, one on August 28, and one on August 31, and when they were paid they bore no signature but that of Mr. Liggett. I do not see how there can be any answer on the part of the bank to the payment of those cheques, because they were clearly paid without any authority or any pretence of authority. As regards the three cheques, the further event which happened was obviously most irregular, because when Mrs. Liggett came to the bank on September 2 Mr. Hicks, who was, as I have said, in charge of the bank, obtained her signature to those three cheques. They had been both drawn and paid before there had even been a semblance of an appointment of her as director. In addition to those cheques there was another cheque drawn on August 29, and certain others, seven in number, drawn on August 31, 1925. These were paid, one on the 2nd, and the others at various dates between September 4 and 9, and in each case either before they were paid or immediately after they were paid, having been originally signed by only George Frederick Benjamin Liggett, the signature of Mrs. Liggett was obtained to those ; and the bank thereupon treated them as being in order ; in other words, she signed cheques, or purported to sign cheques, as director which were

drawn at a date before she was appointed a director. The remaining cheques had various dates from September 1 to 30, and they all bore the signature of Mr. and Mrs. Liggett.

Now the action is brought by the plaintiffs for money had and received and they claim that they are entitled to have repaid to them the amount of those cheques on the ground that the defendant bank had no authority to pay those cheques and, therefore, could not debit the plaintiff company with the amount of those cheques as they were claiming to do. That is the issue. The main defence, the primary defence set up by the defendant bank, is one based upon an application of the well-known rule which is often referred to as the rule in *Royal British Bank v. Turquand* (6 E. and B., 327), a rule which has been applied in a great many cases to which I have been referred, for instance in *Mahony v. East Holyford Mining Company* (L.R., 7 H.L., 869); *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company* ([1895] 1 Ch., 629); and quite recently discussed in the case of *Houghton and Co. v. Nothard, Lowe and Wills, Limited* ([1927] 1 K.B., 246), and even more recently in the case of *Kreditbank Cassel v. Schenkers, Limited, and Others* (43 *The Times* L.R., 237). The rule as relied on by the defendant bank is that the defendant bank having had the Articles of Association were entitled to assume that the notice of September 1, 1925, sent to them by the chairman was a valid and proper notice because according to the Articles of Association it was possible, if the proper steps in the matter of internal management had been taken by the directors of the company, that Mrs. Liggett might have been duly appointed an additional director as the notice stated. I am relieved from any examination of the exact definition of this very respectable but perhaps somewhat ambiguous rule of law because the plaintiff company in answer to that contention have alleged that the defendant bank in any case is not entitled to the benefit of that rule by reason of the fact that the defendant bank were put on inquiry by the circumstances of the case and were negligent in not investigating the position before they accepted and acted upon the notice of the appointment of a new director. On that issue I put two questions to the jury, and the questions were these: "Was the bank put on inquiry as to whether the appointment of Mrs. Liggett was in order?" The jury answered: "Yes"; "Secondly, whether the bank was guilty of negligence in paying the bills and cheques complained of," and again the jury answered "Yes." Whatever may be the exact scope of the rule in *Turquand's* case (*supra*), I think it is quite clear on the authorities to which I have already referred that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the *prima facie* presumption, then it is clear, I think, that he cannot claim the benefit of the rule; and if, therefore, the answers of the jury to the questions which I put to them stand, it is clear, I think, that this defence will not avail the defendants here.

Mr. Singleton has submitted that there was no evidence upon which the jury could give the answers which they did give. He also submitted when the plaintiffs' case ended that there was no evidence to go to the jury at that stage and that I ought to have withdrawn the case from the jury. I did not think so, nor do I think that the contention is sound that there was no evidence to go to the jury on the questions which I asked them. I should even go further. If I had been trying the case without a jury I should myself have come to exactly the same conclusion as the jury arrived. Mr. Singleton, in the course of his argument, gave as one of the reasons why effect should not be given to the answers of the jury, this circumstance, that when I was summing-up to the jury I drew their attention to the fact that the directors according to the Articles were to be not less than two nor more than three, that I drew their attention to the fact that the quorum of directors for transacting business should be two, but that I did not draw their attention specifically to the fact that there was a term in the Articles that that quorum might be otherwise fixed by the directors. The special jury had the Articles before them and they heard the addresses of counsel, and I have no doubt that that point was present to their minds. So far as I am concerned, I did not attach for this purpose any importance to that matter. The substantial ground on which the jury must have held, and I think have properly held, that the defendant bank was put on inquiry was this: that Mr. Melia was known to them to be a shareholder and a director of the company and he was known to be very anxious that no cheques should be paid without his signature. He had given special directions to that effect and had taken steps to ensure that his signature should be obtained, if it was not originally on cheques, by arranging that the bank could communicate with him. I think under those circumstances the defendant bank ought, before they acted upon an instruction such as that contained in the letter of September 1, 1925, to have communicated with Mr. Melia and ascertained if his concurrence had been obtained to the change, because he had been at the bank as recently as August 26 or 27, and this notice was only dated September 1, and, indeed, it was sent at a time when it was thought that Mr. Melia was actually in Ireland. The point to which the attention of the jury was directed was this, that the defendant bank ought to have taken steps to ascertain whether Mr. Melia was concurring in the appointment of a new director. Whether that concurrence was given by his voting for the appointment with the other director, Mr. Liggett, or whether it was given in the more indirect way first by his voting that the quorum of directors should be one instead of two and thereby vesting the power in Mr. Liggett, was a matter of minor importance for practical purposes because if the change was going to be made it could only be made in either way by the concurrence of Mr. Liggett and Mr. Melia. Indeed, I have very grave doubt whether a new director could be appointed without the direct concurrence of both the existing directors. However that may be, the jury had all the circumstances before them and they came, as I think, to a clear and proper conclusion, and I entirely dissent from the argument that there was no evidence on which they could come to the conclusion to which they did come. That being the position, I think the defence based upon the rule to which I have referred fails, and, if the matter stopped there, there would be judgment for the plaintiffs for the whole amount claimed.

But a further and somewhat difficult point is then raised by the defendant bank, and that point I have now to decide. The various cheques and the bills were originally all drawn in favour of ordinary trade creditors of the plaintiff company and the proceeds of those cheques were all applied to the payment of goods supplied to the company. The position was as from the end of August, 1925, that

Mr. Melia withdrew completely from any active part in the management of the business. He had already withdrawn substantially, but his final withdrawal took this form : that he told Mr. Liggett that he would not sign any more cheques. He seemed to have thought that that would put a stop to the conduct of the business altogether. The business, as I have said, was insolvent from the outset, and Mr. Melia and his advisers were anxious, if possible, to close it down. They might, however, have taken a much more definite step for that purpose. In particular Mr. Melia received on the morning of September 1 a notice that a directors' meeting of the plaintiff company was to be held at 10 o'clock on the morning of the 4th, and on the agenda one of the matters mentioned was the appointment of an additional director. Mr. Melia had been advised by his solicitor that it was unnecessary for him to take any action on that notice, obviously on the view that as there were only two directors and a quorum was two, unless otherwise ordered by the directors, it could not be done without Mr. Melia's concurrence, and after he had absented himself nothing could be done in his absence ; technically that was very sound advice. He took no notice of the meeting, and, indeed, he apparently took no further action or cognizance of what was being done. Mr. Liggett, however, who had conducted the business up to that time, continued to do so. He continued to order goods for the purposes of the business, which was a retail provision business, and those goods were delivered, and they had to be paid for, and they were in fact paid for from time to time by the cheques in question and the bills in question, so that every cheque represented a legal liability incurred by the company because the people who supplied the goods had no notice that the position had in any way been changed. Mr. Liggett was conducting the business, and not only were the company liable, but the company received the goods, which were paid for and which were supplied to them for the purposes of the business. Under those circumstances it is contended by the defendant bank that they are entitled to credit for the amounts so paid—that is to say, for all those cheques—in discharging the debts of the company, and they rely upon the equitable doctrine under which a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment. I take the statement of that equitable doctrine in these terms from the language of Lord Justice Scrutton in the case of *A. L. Underwood, Limited v. Bank of Liverpool and Martins* (40 *The Times* L.R., 302 ; [1924] 1 K.B., 775). The question which has been debated, and which is not at all an easy question, is whether on the facts of this case that equity applies. It was said by Sir Walter Greaves-Lord and Mr. Goldie that in law the position here would simply be this, that the bank for this purpose is in the position of a stranger who without the authority of the plaintiff company has paid off the debts of the plaintiff company, and that being so the payment was a purely voluntary payment so far as the company was concerned, and hence the company, even if it took the benefit, could not be in any way made responsible for the payments so made. For that rule of common law, which is a rule that no one questions, reliance is placed, amongst others, on the authority of *Exall v. Partridge* (8 Term Rep., 308). But the matter must now be decided in a Court which takes cognizance of principles of both law and equity, and the question now is whether the equitable principle does apply to the facts of this case. The equitable principle has been applied beyond question over and over again to cases where an agent not having the authority of his principal has borrowed money as on behalf of his principal. Under those circumstances at common law the principal cannot be sued and cannot be made to repay the amount so borrowed, but in equity it has been held that to the extent to which the amount so borrowed has been applied in payment of the debts of the principal, the *quasi* lender is entitled to recover from the *quasi* borrower. The rule is very clearly stated by Lord Selborne in the case of *Blackburn Building Society v. Cunliffe, Brooks and Co.* (22 Ch.D., 61). At page 71 the noble and learned Lord says : "And I think the consistency of the equity allowed in the *Cork and Youghal Railway Company's* case (L.R., 4 Ch., 748) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is : has the transaction really added to the liabilities of the company ? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity ; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." That principle is well established in respect of borrowings made without authority, and I may refer to the cases of *Baroness Wenlock v. River Dee Company* (3 *The Times* L.R., 603 ; 19 Q.B.D., 155) and *Bannatyne v. MacIver* ([1906] 1 K.B., 103), where the principle was applied to a case where the agent who had purported to borrow without authority was the agent, not of a company, but of a private individual, and in that case the equitable right of the lender to recover to the extent that I have stated was fully recognized. The ground is sometimes put in this way, that the lender or the *quasi* lender is subrogated to the rights of the creditor who has been paid off. That, obviously, is not precisely true, because no question of subrogation to securities can arise in such a case. The principle has also been applied in *Reversion Fund and Insurance Company, Limited v. Maison Cosway, Limited* ([1913] 1 K.B., 364) to the case where the plaintiff, the *quasi* lending company, actually knew that the *quasi* borrowing company had no authority to borrow. If this were a case in which the plaintiffs' account was in debit throughout to the defendant bank, then each of the cheques in question when presented would constitute a request for a loan and the payment of that cheque would constitute the granting of that loan, and as the cheque and the request were unauthorized the case would be precisely within the authorities to which I have just referred. There was some evidence in this case that at the relevant dates the position of the plaintiff company's account at the defendant bank was that it was in debit and that there was an overdraft ; to the extent that that is so, the position will be, in my judgment, exactly as in the cases to which I have referred, and the position will be precisely covered by the authority of those cases. But it is

not clear that that was so throughout or, indeed, at all. I have to consider, therefore, what the position is if when any one of these cheques was presented the account was in credit. The position then would be that in paying one of these cheques without authority the defendant bank was taking money which belonged to its customer and paying that away without authority. In other words, the defendant bank would be in possession of a credit balance belonging to the customer, and without the customer's authority it would be misapplying that credit balance. The question is : Does the equity to which I have referred extend to a case of that character ? There is only one authority to which I have been referred, and I know of no other, which seems to throw light on this question, and that is the case of *A. L. Underwood, Limited v. Bank of Liverpool and Martins* (*supra*). The claim by the plaintiff company there was for conversion of cheques. The plaintiff company was a one-man company, and the one man, the sole director, endorsed certain of the company's cheques and then paid them to his own account with the defendant bank. The learned Judge and the Court of Appeal held that that constituted a conversion because they were not entitled to collect the proceeds of those cheques and to appropriate the proceeds to the personal account of the sole director, and that being so they were misapplying the property of the plaintiffs and were liable for conversion. But it was either shown or indicated with sufficient clearness to justify an inquiry that the proceeds or some of the proceeds of those cheques were used to discharge the liabilities of the company, and the Court of Appeal ordered an inquiry to ascertain if that was so. The Court of Appeal did not expressly say, as I read their judgment, what would be the position if that were so ; but as I read their judgment they were disposed to the opinion that in such a case the equity, to which I have already referred as being well established as between *quasi* lenders and *quasi* borrowers, would apply. Lord Justice Scrutton states the position in this way : " But I am not sure that the learned Judge had in his mind the equitable doctrines under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments," and he refers to *Bannatyne v. MacIver* (*supra*) and *Reid v. Rigby and Co.* (10 *The Times* L.R., 418 ; [1894] 2 Q.B., 40). That statement of the equity is, I think, wide enough to cover the question which I have to decide in this case, and although there is and must be a technical difference between a claim in conversion and a claim for money had and received such as I have to deal with in the present action, I do not think that that distinction is of such a nature as to prevent the application in the case before me of the same principles as would apply if the claim had been a claim in conversion. The relationship of a banker and customer, as Mr. Goldie very clearly and forcibly pointed out, is that of debtor and creditor ; that is, when the customer's account is in credit the banker is the debtor of the customer and, therefore, it is only by a figure of speech that the banker misapplies money of his customer which he has in his possession. That statement would be perfectly true if what the banker had in his possession was a bag of valuable coins or a bundle of notes and if acting upon an authority which was invalid the banker quite honestly although erroneously took a number of coins out of a bag or a number of notes out of a bundle and paid them on the faith of such an authority he would be guilty of conversion and, if I understand the judgment of the Court of Appeal in *Underwood's* case (*supra*), in that event the banker would be entitled to the benefit of the equity. If that be so, and in principle it seems to me that it ought to be so, I cannot see why the same result should not apply in a case like the one before me, where the banker does not handle actual cash or notes, chattels capable of conversion, but by reason of the present system of banking facilities everything is done by way of credit or debit balances. In such a case there is obviously no conversion, but there is misapplication, under an honest mistake as to the validity of the authority, of the credits which constitute the medium of exchange in place of cash. Under these circumstances I think that the equity to which I have been referred ought to be extended even to the case where the cheque which was paid was paid out of the credit balance, and was not paid by way of overdraft. If that is so, the banker will be entitled to the benefit of that payment if he can show that that payment went to discharge a legal liability of the customer. The customer in such a case is really no worse off, because the legal liability which has to be discharged is discharged, though it is discharged under circumstances which at common law would not entitle the bank to debit the customer.

There are in this case two further factors which I have to notice. It is said that the company, which was insolvent throughout, went into liquidation on September 2, 1925, and some of the payments which have been made to customers might amount to undue preference, but I see no reason for thinking that that would be so. The payments were made by the company, which was a going concern, in respect of current deliveries of goods, and the particular suppliers who were paid were people who supplied goods from time to time in the ordinary course of business and, in fact, with three small exceptions, are creditors, I understand, of the plaintiff company in respect of goods supplied towards the end and not paid for.

Then there is a further point which does appear to be too remote. It is said that the desire of Mr. Melia was that the company should close down its business operations and that that would have been inevitable if the bank had not honoured those cheques in the way in which it did, but as the result of further trading the financial position of the company was prejudiced and was worse at the end of September than it was at the beginning. I think that is too remote. Indeed, although it was mentioned, it has not been pressed by the learned counsel for the plaintiff company.

The result is that I must order an inquiry because I have not the facts before me sufficiently to come to a conclusion whether the rule of equity which I have stated does apply, and if so to what extent. The inquiry that I order will be addressed to some referee who will report to me. I shall retain seisin of the case and shall deal with all questions of costs and make such final order as the report which follows on the inquiry may seem to require. The inquiry will be as to the exact circumstances under which each one of the cheques and bills complained of was paid, that is to say, what was the state of the plaintiff company's account with the defendant bank at the date of each payment ? Was it made in respect of goods supplied and was it made in the ordinary course of business ? I have said that I do not attach any importance to the suggestion that the position of the company is prejudiced. This case may go to another Court, and as there is an inquiry I think it desirable that the referee should also report on that question ; and if in the course of the inquiry, having regard to what I have said in my judgment, it appears to the learned counsel that there are other relevant facts

which may assist the Court they will, of course, elucidate those facts as well as they can. I suggest that the inquiry should take place with as little formality as possible, that the matter should be laid before the referee as far as possible with documents and without regard to the strict rules of evidence, and that the report should come back to me at as early a date as possible, and I shall reserve all questions of costs. The only question remaining is to whom the inquiry is to be directed.

After discussion the order was for a referee to be agreed or in default of agreement the District Registrar at Liverpool.

[Solicitors—Mr. G. H. Brabner, Liverpool ; Messrs. Rutherfords, Liverpool.]

K.B. Div. (Lord Hewart, C.J.) 1927. Apr. 13.

CARLING v. LEBBON.*

Negligence — Damages — Amount — Claim by widow in respect of husband's death—Widow's contributory pension—Whether to be taken into account in assessing damages—Fatal Accidents Act, 1846 (9 and 10 Vict., c. 93)—Fatal Accidents (Damages) Act, 1908 (8 Edw. VII., c. 7), s. 1—Widows', Orphans' and Old Age Contributory Pensions Act, 1925 (15 and 16 Geo. V., c. 70), ss. 1, 3.

A contributory pension payable to a widow under the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, is not a "sum paid or payable on the death of" her husband "under any contract of assurance or insurance" within s. 1 of the Fatal Accidents (Damages) Act, 1908, and the value of it must, therefore, be deducted from any damages to which she may be entitled in an action brought by her under the Fatal Accidents Act, 1846, in respect of the negligence which resulted in her husband's death.

Judgment was delivered in this action, tried at Leeds Assizes, in which Mrs. Vera Florence Eugenie Carling, of Middlesmoor, Lofthouse, near Pateley Bridge, Yorkshire, as widow of Walter Carling, claimed from the defendant, John William Lebbon, of Harrogate, damages in respect of her husband's death which, she alleged, was due to the negligent driving by Lebbon of a Post Office motor mail van.

Mr. William Stewart and Mr. H. H. Maddocks appeared for the plaintiff ; Mr. Mortimer, K.C., and Mr. Russell Vick for the defendant.

The Lord Chief Justice.—This was an action tried before me at Leeds Assizes on March 31, 1927. The plaintiff sued the defendant under Lord Campbell's Act for damages for the death of her husband through injuries received by him in being knocked down and run over by a van belonging to the Post Office and driven by the defendant, the accident being due to negligence on the part of the defendant.

The action was brought for the benefit of the plaintiff, of her son aged three years, and of her daughter aged nine months. It was abundantly clear that the death of the plaintiff's husband was caused by the negligent driving of the defendant.

The only question which remained for argument was whether, in computing the sum of the damages payable to the plaintiff, regard ought, or ought not, to be had to the pension to which, after the death of her husband, the plaintiff became entitled under the provisions of the Widows', Orphans' and Old Age Contributory Pensions Act, 1925. I have come to the conclusion that, strange as it may seem, that pension must be taken into consideration in the assessment of the plaintiff's compensation.

I think that that conclusion is made plain as well by the terms of Lord Campbell's Act itself as by the decision in *Baker v. Dalgleish Steam Shipping Company* (38 *The Times* L.R., 245 ; [1922] 1 K.B., 361). It is quite true that by the Fatal Accidents (Damages) Act, 1908, it is provided that "in assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act." It was contended, not without ingenuity, that the contributory scheme of pensions provided for in the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, is, in substance if not in form, contractual. I have carefully considered the matter and I cannot take that view. I do not think that a widow's pension under the Act of 1925 satisfies either of the requirements of the Act of 1908. I do not think that it is accurate to describe it as a "sum paid or payable on the death of the deceased," nor do I think that it can truly be said to be a sum "payable . . . under any contract of assurance or insurance."

I am, therefore, driven to the conclusion that this contributory pension, whatever its true value may be, must be taken into account in the sense of reducing the damages which would otherwise have been payable to the plaintiff for herself and her infant children.

The result is interesting and anomalous. If a man who is insured for £20,000 is killed in a railway accident his widow and children can recover from the railway company damages which are not diminished to the extent of one penny piece by the circumstance that on the death of the deceased there became payable the large sum assured. But when a man dies in circumstances in which his widow and children become entitled to the little pension—to which the deceased man himself has contributed—under the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, the value of that pension must be deducted from any sum which the widow may recover in an action under Lord Campbell's Act. I should have decided the matter the other way if it had been possible for me to do so, but, in my opinion, as the law stands, there is no course open to me except to diminish the damages by taking that pension into account. Whether that is a desirable state of the law is a matter on which I am not called on to express any opinion.

It is exceedingly difficult to place anything like an accurate figure on the value of this pension. It is impossible to say how long it is likely to continue. I have to perform the kind of task which is habitually performed with great success by the members of a jury. I have come to the conclusion that a fair sum

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

for the plaintiff to recover is £1,800—£900 for herself and £450 for each of the two infant children.

Judgment was entered accordingly, with costs.

[Solicitors—Messrs. Collyer-Bristow and Co., for Mr. Alfred Masser, Leeds ; the Solicitor to the Post Office, for Messrs. Plackett and Smale, Harrogate.]

Court of Criminal Appeal. (Lord Hewart, C.J., Sankey and Salter, JJ.) } 1927. Apr. 11.

REX v. CAIRNS.*

Criminal Law — Procedure Appeal — Notice of appeal — Complaint of summing-up — Particulars.

On an appeal to the Court of Criminal Appeal substantial particulars of misdirection and of any other objections to the summing-up must be included in the notice of appeal or must be sent to the Registrar of the Court with the notice of appeal.

The Court refused the application for leave to appeal against his conviction of Alexander MacWilliam Cairns, who was convicted in March at Leeds Assizes of the murder of Stanley Dalton, a manservant, at Limestone Bank, Northumberland, on September 11, 1926, and was sentenced to death.

Mr. Osbert Peake, for Cairns, said that Cairns had been tried twice, the jury at Newcastle Assizes in February not having been able to agree on a verdict. It was a case in which it was open to the jury to accept the whole of the evidence for the prosecution and still to find a verdict of "Not Guilty."

It therefore became very important for the prosecution to show that Cairns's evidence could not be believed. He was cross-examined to show that he had told untruths in a letter written to his sweetheart (who was a witness at the trial) nine days before Dalton's disappearance. Those questions tended to show that Cairns was a man of bad character and was not to be believed, but cross-examination to credit was limited by section 1 (*f*) of the Criminal Evidence Act, 1898, to matters which were relevant to the issue. Other questions tended to show that Cairns had matters in his past history which were to his discredit.

The Judge also misdirected the jury in not pointing out to them that there was no conflict of evidence, and that, if they accepted Cairns's evidence, he was entitled to be acquitted ; in not drawing attention to certain evidence as being strong corroboration of Cairns's story ; and in commenting on the fact that two men were not called by the defence, whereas it was Cairns's case that those two men had themselves committed the murder.

Mr. Mortimer, K.C., and Mr. J. Alan Bell, for the Crown, were not called on to argue.

The Lord Chief Justice, in giving the judgment of the Court, said that Dalton disappeared on September 11, and on September 24 his body was found in a plantation about 1½ miles from Walwick Hall, where he was employed. It was clear that his death had been caused by the firing of a shot-gun followed by a heavy blow on the head.

The evidence against Cairns was of that valuable kind which was known as circumstantial ; it depended on the joint effect of a great number of circumstances, all pointing in the same direction. Cairns was seen wearing Dalton's overalls, and after his arrest he wrote two letters the object of which was to get another person to dispose of certain things which were in his lodgings, including a cartridge of the kind that had been mentioned in the case. The evidence against Cairns was ample.

The questions which had been asked by counsel for the prosecution were most proper. Their object was primarily not to test Cairns's credit, but to show that he was ingeniously engaged in covering his tracks. The criticism of the summing-up was rather ungrateful, for nothing could have been more advantageous to the defence.

Particulars of the alleged misdirection had not been given until last Thursday. As long ago as June, 1918, in *Rex v. Wyman* (13 Crim. App. Rep., 163) it was stated that substantial particulars of misdirection and of other objections to the summing-up must always be included in the notice of appeal or sent to the Registrar of the Court of Criminal Appeal with the notice, and must not be kept back until a few days before the appeal. That warning had been repeated from time to time. In the future it would be acted on.

[Solicitors—The Registrar of the Court of Criminal Appeal ; the Director of Public Prosecutions.]

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

Court of Appeal. (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.) } 1927. Apr. 29.

IN RE PAGET—EX PARTE OFFICIAL RECEIVER AND BOARD OF TRADE.*

Bankruptcy — Public examination — Refusal to answer questions — Answers detrimental to debtor—Whether sufficient ground for refusal —Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 15 (8).

A debtor, on his public examination under s. 15 (8) of the Bankruptcy Act, 1914, is bound to answer all such questions as the Court may put or allow to be put to him, and the mere fact that it would be seriously detrimental to the debtor to answer them is not a sufficient ground for refusal.

The Court allowed this appeal by the Official Receiver in Bankruptcy from a decision of Mr. Justice Clauson, which raised a question of some public importance.

An application had been made to the Judge to commit the debtor, known under the name of Richard Paget, for refusing to answer certain questions, in particular, what was his real name and under what name he had enlisted in the Army in 1916 and had continued to pass until 1919. The Official Receiver regarded the establishment of the debtor's identity as essential in order fully to investigate certain transactions. On the debtor's refusal to answer, the Official Receiver reported the matter to the Court.

Mr. Justice Clauson interviewed the debtor in his private room and on returning into Court said that there were reasons why it would be seriously detrimental to the debtor to answer the questions and that he was not satisfied that the disclosure of the

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

name in which the debtor had enlisted in the Army in 1916 would lead to any further assets being secured to the creditors. He therefore refused to commit the debtor.

The Official Receiver and the Board of Trade appealed.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. Roland Burrows appeared for the appellants; the debtor appeared in person.

The SOLICITOR-GENERAL said that he did not dispute that the Judge had a discretion either to commit or to refuse to commit the debtor to prison. But he had not really exercised his discretion; the reasons he had given—namely, that it would be seriously detrimental to the debtor to answer the questions and that he was not satisfied that the answers when given would lead to further assets being obtained for the creditors—were quite insufficient.

The debtor said that in private and in confidence he had given the Official Receiver all the information for which he had asked. He objected to any public use being made of it.

The MASTER OF THE ROLLS, in giving judgment, said that the appeal must be allowed. It arose on a matter of public importance, but too great significance should not be attached to it. The debtor came up for public examination in December, 1926, under the provisions of the Bankruptcy Act, 1914, the purpose of the examination being not only the collecting of debts on behalf of the creditors, but also the protection of the public. It would be a mistake to concentrate too much on the aspect of debt-collecting and distribution of assets.

His Lordship read section 73 of the Bankruptcy Act, 1914, showing that it was the duty of the Official Receiver to investigate the conduct of the debtor and to report the result to the Court. It was plain that the duty was a wide one and the correlative duty of the debtor, after the report had been made, was to show that he was entitled to his discharge, and he could not do so unless he made a full disclosure of all the facts. It had been decided by Mr. Justice Phillimore in *In re Atherton* (28 *The Times* L.R., 339; [1912] 2 K.B., 251) that a debtor was bound to answer all questions put to him, or allowed by the Court to be put to him, touching his conduct, dealings, and property, even though the answers might tend to incriminate him.

In the present case the debtor, under his name of Richard Paget, made certain answers in his earlier examination in December, 1926. In February, 1927, he made a statement in writing, in which he said that his full name was Vivian Percy Broughton and admitted his identity with a person of that name who was charged with an offence at Brighton in 1908 and sentenced to a term of imprisonment. He said that he had been known as Richard Paget for the last 25 years or so.

Inasmuch as his original statements were incomplete, inaccurate, and, as to some of them, untrue, it was very necessary for the Official Receiver to investigate the true facts, and it was alleged that the debtor was concerned in a large transaction, which required investigation, as to the sale of a ship.

He refused to produce any evidence that he was ever in the Army and said that the name under which he had enlisted was entirely his own affair. On those facts it would be quite impossible for a proper report to be made by the Official Receiver unless the gap in the history of the debtor's life from 1916 to 1919 was filled in. Mr. Justice Clauson, no doubt from motives of compassion, tried to see if the debtor could be excused from answering the questions and made some examination of him in the absence of the Official Receiver, who was not only entitled, but whose duty it was, to be there.

By section 15 (8):—

"The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over either to or by the debtor and signed by him, and may thereafter, save as in this Act provided, be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times."

The Court thought that the Judge, who, apparently, had not had his attention called to the decision in *In re Atherton* (*supra*), failed to appreciate the situation. The reasons which he gave were not a complete survey of the rights and duties of the Official Receiver and excluded a side of bankruptcy law with which this Court was constantly dealing. It was not only the creditors but also the public that must be safeguarded.

The proper course was to remit the case back to Mr. Justice Clauson to be dealt with. It was quite plain that the questions ought to be answered, and the debtor could not rely on the reasons for refusing to do so which he had given before—namely, that it would inconvenience him or might even incriminate him to answer them. The Judge should allow a few days to elapse before the resumption of the public examination to give the debtor an opportunity of considering the matter and of making a full disclosure, such as was most desirable in the debtor's own interest, of all his proceedings.

LORD JUSTICE SARGANT and LORD JUSTICE LAWRENCE concurred.

[Solicitors—The Solicitor to the Board of Trade.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1927. May 3.

MERTZ AND OTHERS v. SOUTH WALES EQUITABLE MONEY SOCIETY, LIMITED.*

Moneylenders — Registered name — Taking security in another name—Money-lenders Act, 1900 (63 and 64 Vict., c. 61), s. 2 (1) (*c*).

The defendant society, which had formerly been a loan society, became incorporated as a limited company and began to carry on business as moneylenders and were registered as such, and they made an advance to the plaintiffs, who signed a promissory note agreeing to pay the amount to the secretary of the defendant society, which was mentioned by name in the note as the society of which he was secretary. In an action for a declaration that the transaction was void on the ground that the defendants had taken a security in a name other than their registered name, contrary to s. 2 (1) (*c*) of the Money-lenders Act, 1900,

Held, that as no one could sue on the note except the secretary, the security had been taken in a name other than the defendants' registered name, and the plaintiffs were entitled to the declaration claimed.

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

This was the plaintiffs' appeal from the judgment of Mr. Justice Wright at the Glamorgan Assizes held at Swansea.

The plaintiffs claimed a declaration that a certain promissory note and all transactions arising thereout were null, illegal, and void.

The declaration was sought on the ground that the promissory note was taken by the defendant society as a security for money in the course of their business as moneylenders otherwise than in their registered name, in contravention of section 2 (1) (*c*) of the Money-lenders Act, 1900, which provides that—

"A moneylender as defined by this Act . . . . (*c*) shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender, otherwise than in his registered name."

The defendants, the South Wales Equitable Money Society, Limited, formerly a loan society, had been incorporated as a limited company, and they carried on business as moneylenders and were registered as such. On April 28, 1924, the plaintiffs and one Barry obtained an advance from the defendant society of £190, for which they signed a promissory note dated April 28, 1924, as follows :—

"Cardiff, 28th April, 1924.

"£190.

"On demand we jointly and severally promise to pay William Arthur Horey or other the secretary for the time being of the South Wales Equitable Money Society, Limited, the sum of one hundred and ninety pounds, value received.

"A. Pugsley (signed).
E. Mertz (signed).
Kate Anne Pugsley (signed).
John Walters (signed).
Charles Barry (signed).

"Witness to the signatures : L. W. Dean, 26, High-street, Cardiff."

Mr. Justice Wright held that as the registered name of the company appeared on the face of the promissory note, and the name of William Arthur Horey was coupled with the words "or other the secretary for the time being of the society," in truth and in fact it was the society which was taking the security —the promissory note—and was taking it in its own name within the meaning of the Money-lenders Act, 1900. He accordingly refused to make the declaration asked for, holding as a matter of law that there had been no infringement of the Act.

The plaintiffs appealed.

Mr. Richard O'Sullivan appeared for the appellants ; and Mr. Vaughan Williams, K.C., and Mr. T. W. Langman for the respondents.

Lord Justice Bankes, in giving judgment, said that what the Court had to decide was the interpretation of a single sentence in section 2 of the Money-lenders Act, 1900. The question was whether or not this particular transaction came within the mischief aimed at by section 2 (1) (*c*) of the Act.

By that subsection a moneylender, as defined by the Act—

"shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender, otherwise than in his registered name."

The moneylenders in this case were the South Wales Equitable Money Society, Limited, which began their business as a loan society registered under the Loan Societies Act of 1840. As long as they were registered under that Act they could use the form of promissory note set out in the schedule. The form of promissory note used by the society was the old form. But the society had entirely altered its character ; it had become a limited company and had registered as moneylenders under the Money-lenders Act, 1900.

The language of that Act was reasonably plain. It was impossible to say that the promissory note in this case was taken in the moneylenders' registered name. It was taken in the name of the holder of an office, namely, the secretary for the time being. No one was entitled to sue on the note except Horey, or, possibly, "other the secretary for the time being."

On the plain language of the subsection this was a case where a security had been taken in a name other than the company's registered name. Therefore the words of the subsection had been contravened. The appeal must be allowed and the declaration asked for must be made. The appellants must have the costs.

Lord Justice Scrutton and Lord Justice Atkin concurred.

[Solicitors—Messrs. Field, Roscoe, and Co., for Mr. A. Frank Hill, Cardiff ; Messrs. Bell, Brodrick, and Gray, for Mr. Stuart Hallinan, Cardiff.]

Judicial Committee of the Privy Council.
(Viscount Cave, L.C., Viscount Haldane, Viscount Finlay, Viscount Dunedin, and Lord Shaw of Dunfermline.)

1927. May 3.

WIGG AND ANOTHER v. ATTORNEY-GENERAL OF THE IRISH FREE STATE.*

Irish Free State—Transfer of Civil servants—Retiring allowances—Action against Attorney-General of Irish Free State—Competency—Calculation of pensions—Basis.

This was an appeal from an order of the Supreme Court of Saorstát Eireann, dated April 1, 1925, reversing a judgment of the Chancery Division of the High Court of Justice of Saorstát Eireann, dated July 18, 1924, in an action in which the appellants were plaintiffs and the respondent was the defendant. The question was as to the basis upon which Civil Service superannuation should be calculated under the Irish Treaty.

Mr. A. Alfred Dickie, K.C., of the Irish Bar and a member of the English Bar, and Mr. James Henry of the Irish Bar appeared for the appellants ; Mr. A. K. Overend, K.C., Mr. Charles Bewley, K.C., and Mr. Cecil Lavery, all three of the Irish Bar, for the respondent.

The appellants were at the date of the passing of the Government of Ireland Act, 1920, and at the date of the confirming of the Articles of Agreement for a Treaty, Irish officers of the British Government. They were transferred by virtue of the Provisional Government (Transfer of Functions) Order, 1922, to the Provisional Government, and the appellant Mr. Wigg was, on December 6, 1922, transferred by virtue of the Irish Free State Constitution to the Free State Government.

The appellants retired from the service of the Provisional Government. For the purpose of calculating

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

the compensation they elected to have it calculated on the basis of superannuation under the Superannuation Act, 1859. The application came before the Committee appointed to advise the Minister of Finance in regard to claims for compensation under Article 10 of the Treaty. The decision of the Minister, grounded on the advice of the Committee, was sent to the Secretary of the Office of Public Works, in which department Mr. Wigg served, in a letter setting out the amount of his compensation and the scale on which it was calculated.

The appellants did not agree with the mode of calculating the amount of their compensation, and they claimed that the compensation so granted was not fair compensation, and that, in any event, it was less favourable than that accorded by the Act of 1920. They issued a writ in the High Court of Justice of Saorstát Eireann claiming (*a*) a declaration that the compensation awarded to them respectively was not fair compensation inasmuch as part of it was put on a sliding scale ; (*b*) a declaration that bonus was part of the emoluments and salary formerly enjoyed by them, and that in calculating the superannuation allowance a fixed award should be made, and that no part of such allowance should be put on a sliding scale ; (*c*) a declaration that if any portion of the said allowance might be based on a sliding scale or cost-of-living figure the same should be based on the Irish and not the English cost-of-living figure irrespectively of the present residence of the plaintiffs or either of them ; (*d*) a declaration that in the computation of pension in respect of such bonus the same should not be limited by an overriding maximum, and that that limitation might be declared illegal ; and (*e*) a declaration that for the purpose of compensation and bonus April 1, 1922, was the date by reference to which a superannuation allowance or additional allowance should be fixed, and not the actual date of retirement.

The second appellant, Mr. Cochrane, claimed in addition a declaration that the supplementary additional allowance in respect of bonus awarded to the plaintiffs respectively was inadequate and had not been calculated in the proper manner ; that the award of such on 75 per cent. of the amount of bonus was contrary to law ; and that the same should have been awarded on the full amount of bonus.

The respondent contended :—(1) That no action could be brought under the Articles of Agreement for a Treaty ; (2) that the bonus claimed did not form part of the salary or emoluments ; and (3) that the decision of the Minister of Finance of the Provisional Government and of the Government of the Irish Free State respectively as to compensation payable was final and was not subject to review by the Courts.

Mr. Justice Meredith, before whom the action was heard, did not accept the contention of the respondent that the Court had no jurisdiction to decide the question, and gave judgment in favour of the appellants. He held that so much of the superannuation allowance as was attributable to the bonus was properly placed upon a sliding scale, but that such sliding scale should be based upon the Irish and not the English cost of living irrespectively of the present or future residence of the plaintiffs or of either of them. On appeal, the Supreme Court of the Irish Free State decided, by a majority, that no action lay and that no declaration could be given by the Courts on the questions arising in the action.

The Lord Chancellor, in delivering their Lordships' considered judgment, said :—This is an appeal by special leave from an order of the Supreme Court of the Irish Free State.

The appellants, who were formerly established Civil servants in the employment of the Crown in Southern Ireland, were, by the several instruments which effected or followed upon the establishment of the Irish Free State, transferred to the service of that State. They have since retired, and, being dissatisfied with the retiring allowances granted to them by the Minister of Finance, they brought this action in the High Court against the Attorney-General of the Irish Free State, claiming a series of declarations as to the allowances to which they are entitled. Mr. Justice Meredith, by whom the action was tried, granted part of the relief claimed ; but, on appeal to the Supreme Court, that Court, by a majority (Mr. Justice Johnston dissenting), held that the action would not lie, and dismissed it, with costs. Hence the present appeal.

On the argument of the appeal before this Board two distinct questions were discussed : first, whether the appellants are entitled to any legal rights in respect of which an action for a declaration will lie against the Attorney-General ; and, secondly, whether, assuming that such an action will lie, the appellants are, on the true construction of the statutes relating to superannuation or compensation for loss of office, entitled to the declarations which they claim.

The questions so raised are of considerable public importance, both as bearing on the effect to be given in the Courts of the Free State to the statutes and orders of 1922, and also as affecting the interests of a large number of former servants of the Crown.

Upon the first question the respondent relied in the first place on the decisions of the English Courts, which have laid it down that a servant of the Crown has no right under the Superannuation Acts to sue for his superannuation allowance ; and for this purpose reference was made to *Cooper v. The Queen* (14 Ch.D., 311) and *Yorke v. The King* (31 *The Times* L.R., 220 ; [1915] 1 K.B., 852). Their Lordships do not question the authority of those decisions, which, indeed, was recognized by the House of Lords in *Considine v. McInerney* (32 *The Times* L.R., 453 ; [1916] 2 A.C., 162) ; but those cases turned entirely upon the language of the Superannuation Acts.

Section 30 of the Act of 1834 (which has not been repealed) enacts that

"Nothing in this Act shall extend or be construed to extend to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under this Act,"

and section 2 of the Act of 1859 provides that any question as to a claim for superannuation shall be referred to the Commissioners of the Treasury, "whose decision shall be final" ; and, in view of these enactments, it was clear that no action could be brought to set aside or vary a decision of the Commissioners of the Treasury. But the claim of the present appellants rests not upon the Superannuation Acts taken by themselves, but upon those Acts as modified and applied by the Agreement for a Treaty between Great Britain and Ireland and the statutes and orders of 1922. By Article 10 of the Agreement for a Treaty it was provided as follows :—

"The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to Judges, officials, members of police forces, and other public servants who are discharged by it or who retire in consequence of the change of Government effected in pursuance hereof."

This article, taken by itself, might not have been

enforceable by an individual citizen in the Irish Courts ; but by a series of enactments following upon the Agreement for a Treaty, it has been made a part of the municipal law of the Free State. By the Provisional Government (Transfer of Functions) Order, 1922, Clause 7, it was provided as follows :—

" (i.) All officers who are on the day of transfer engaged or employed in the discharge of functions transferred under this order to the Provisional Government shall be transferred to and become officers of the Provisional Government. . . .

" (ii.) Where an officer is transferred to the Provisional Government under this order, he shall hold office by a tenure corresponding to his previous tenure, and if he is discharged by the Provisional Government, or if he retires in consequence of the change of Government effected by this order, he shall be entitled to receive compensation from the Provisional Government, and the terms of such compensation shall not be less favourable to him than such as are accorded in the like circumstances by the Government of Ireland Act, 1920."

By Act No. 1 of 1922—the statute by which Dail Eireann enacted a Constitution for the Irish Free State—it was enacted that the Articles of Agreement for a Treaty should have the force of law ; and Articles 77 and 78 of the Constitution provided as follows :—

" 77. Every existing officer of the Provisional Government at the date of the coming into operation of this Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Eireann), and shall hold office by a tenure corresponding to his previous tenure.

" 78. Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty."

The effect of these enactments, and particularly of Article 78 of the Constitution, was to give to every existing officer who was transferred to the Provisional Government, and afterwards to the Free State, a right by Irish law to the benefit of Article 10 of the Agreement for a Treaty, with a corresponding title to enforce that right in the Courts of the Free State.

But it was argued on behalf of the respondent that, even assuming that the statutes conferred a right, they gave the appellants no more than a right to put forward their claim to the Minister of Finance (to whom the functions of the British Treasury in respect of superannuation have been transferred) and to receive such compensation as he might award to them. In support of this view it was pointed out that at most the effect of Article 10 of the Agreement for the Treaty and Article 78 of the Constitution was to give to existing Civil servants transferred to the Free State the rights accorded by the 8th Schedule to the Government of Ireland Act, 1920 ; that under that schedule a Civil servant retiring under the statutory conditions would only have been entitled to receive such compensation as the Civil Service Committee set up by that Act might award to him in accordance with the rules contained in the schedule ; and that by section 56 (6) of the Act the determination of the Civil Service Committee of any claim or question which was to be determined by them under the Act was to be final and conclusive.

In consequence of the establishment of the Free State the Civil Service Committee has, so far as Southern Ireland is concerned, never been set up ; and it was argued that, this being so, the right to make an award under Schedule 8 of the Act of 1920 has reverted to the Minister of Finance as the successor to the British Treasury.

Their Lordships do not agree with this reasoning. It is true that the Civil Service Committee for all Ireland has lapsed, and that by Section 7 of the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), such a committee has been set up for Northern Ireland only ; but the effect is not to transfer the functions of that Committee as regards Southern Ireland to the Minister of Finance. The right of an existing officer retiring under the statutory conditions to receive compensation in accordance with the rules contained in Schedule 8 of the Act of 1920 remains, and is converted by Article 78 of the Constitution into a legal right ; and, the machinery provided by the statute for ascertaining the amount of the compensation having disappeared, the duty of ascertaining it falls, in case of need, upon the Courts.

In this connexion it is desirable to mention that, with a view to obtaining assistance in the duties falling upon him in this connexion, the Minister of Finance has set up a Compensation Committee whose duty it is to advise him as to the compensation to be awarded to retiring Civil servants. This Committee consists of a Judge of the Supreme Court, who is the chairman, two members appointed by the Minister and two appointed by the staff of Civil servants. The constitution of the Committee is eminently fair, and there can be no doubt that its advice is of value ; but it is an advisory committee only with no statutory powers, and it was not and could not be contended on behalf of the respondent that its conclusions have a binding effect.

Upon the first point, therefore, their Lordships are of opinion that the appellants have a legal right which may be asserted in the Courts of the Irish Free State. They see no objection to the form of the action which is brought against the Attorney-General for a declaration of rights and which is in accordance with the well-known decisions in *Dyson v. Attorney-General* (27 *The Times* L.R., 143 ; [1911] 1 K.B., 410 ; 28 *The Times* L.R., 72 ; [1912] 1 Ch., 158) and other cases.

Before dealing with the questions of amount it is desirable to state in a little more detail the position of the two appellants, the nature of the compensation awarded to them respectively, and the questions upon which disagreement has arisen.

Each of the appellants had many years of service to his credit, and each of them was entitled at the date of his retirement to a fixed salary and also to a supplementary salary (or bonus) varying with the cost-of-living figure. In each case the notice of retirement, which was given in accordance with the statutory conditions specified in the 8th Schedule to the Act of 1920, took effect after the passing of the Irish Free State Constitution Act, 1922 (Session 2). But there was this difference between the appellants : that whereas the second appellant, Mr. Cochrane, had elected to adopt the provisions of the Superannuation Act, 1909, the first appellant, Mr. Wigg, had preferred to remain subject to the provisions of the Act of 1859. Accordingly, while the first appellant was entitled, in accordance with the Act of 1859, to a superannuation allowance equal to one-sixtieth of his annual salary and emoluments for every completed year of service (subject to the notional increases of his salary and years of service prescribed by Part I. of the Rules contained in the

8th Schedule to the Act of 1920), the right of the second appellant was to a superannuation allowance equal to one-eightieth of his annual salary and emoluments for every completed year of service (subject to the notional increases above mentioned), together with an additional allowance of a lump sum equal to one-thirtieth of his annual salary and emoluments for every completed year of service, but not exceeding one and a half times the amount of such salary and emoluments.

In calculating the pensions to be awarded to the appellants the Compensation Committee, whose recommendations were adopted by the Minister of Finance, proceeded generally upon the above lines. They made the proper notional increases in the salary (both fixed and supplemental) and in the years of service of each appellant, and awarded to each of them a fixed pension representing the proper proportion of his fixed salary and a supplemental pension representing the proper proportion of his supplemental salary (or bonus) as so increased. But in each case they made it a condition of the award, (1) that the supplemental pension should be subject to reassessment quarterly with reference to the official cost-of-living figures from time to time declared; and (2) that at no time should the supplemental pension exceed its prescribed amount at the date of the retirement, which was referred to as the "overriding maximum." Further, (3) in calculating the lump sum allowance to be paid to the appellant Cochrane in respect of his supplemental salary or bonus, they calculated that allowance upon 75 per cent. only and not upon the whole of the bonus to which he was entitled at the date of retirement. It is with regard to these conditions numbered (1), (2), and (3) that the awards were questioned on this appeal.

In imposing the disputed conditions, the Advisory Committee followed the principles laid down in a minute of the British Treasury dated March 20, 1922, which was adopted by the Minister of Finance on May 11, 1922, and it is necessary to consider whether the minute is binding on the appellants. In their Lordships' opinion it is not so binding. The minute was the outcome of a long discussion between the Treasury and the British Civil servants as to the pensionable character of the bonus, and it is no doubt operative as to officers remaining in the service of the Crown in Great Britain; for, as to the pensions to be awarded to those officers, the Treasury has a wide discretion. But the minute cannot affect the rights of officers who at its date had been transferred to the Government of the Free State; nor could the Minister of Finance, who (as their Lordships have held) has no discretion as to the compensation to be allowed to officers in the position of the appellants, make the minute binding upon them by adoption. Their rights must depend upon the construction of the statutes without reference to any minute, and the question to be determined is whether and to what extent the disputed conditions are in accordance with the statutes.

As to the condition numbered (1), their Lordships are of opinion that upon a reasonable interpretation of the statutes dealing with superannuation allowances the supplemental pension can be made to vary (like the bonus on which it is calculated) with the cost-of-living figure. If a transferred officer were entitled on retirement to have his pension calculated upon his current bonus, without reference to any future variation, the effect might be that he would get more by way of pension than he could have claimed if he had remained in the British service, and their Lordships do not think that this was the intention of the Acts. The pension may be made to vary as the salary would have varied.

But on the same reasoning their Lordships do not think that the condition numbered (2) can be sustained. If the pension is made to fall with the cost-of-living figure it should also be capable of rising with that figure; and if the amount of the officer's salary at the date of his retirement is not conclusive for the purpose of preventing the application of the sliding scale under condition (1), neither should it be treated as an overriding maximum as prescribed by condition (2).

The condition numbered (3) raises a difficult question. The additional allowance payable under section 1 of the Superannuation Act, 1909, to an officer who comes within the provisions of that Act is to be "a lump sum equal to one-thirtieth of the annual salary and emoluments of his office, multiplied by the number of completed years he has served." There is an obvious difficulty in applying this formula to a salary which may vary up or down from year to year, and no doubt it was on this ground that the Treasury, in the minute above referred to, directed that this allowance should be calculated on 75 per cent. only of the current amount of the bonus. But in their Lordships' opinion there is no warrant in the statute for this rough-and-ready way of dealing with the matter.

The lump-sum allowance, as Mr. Justice Meredith pointed out, is not intended as a commutation payment for the purpose of investment, but as an allowance for meeting the increased temporary expenditure connected with the officer's retirement, and, accordingly, it is reasonable that it should be regarded as an accession to the first year's pension and be calculated on the same basis as that pension. Upon the whole, their Lordships are of opinion that this condition cannot be sustained.

The result is that their Lordships find themselves in agreement on every point with the judgment of the trial Judge, and they are of opinion that the order of the Supreme Court should be set aside and the judgment of Mr. Justice Meredith restored. The respondent shall pay the costs of the appeal to the Supreme Court, but, as on the appeal to this Board the appellants contended unsuccessfully against the application of a sliding scale to their pensions, there should be no costs of that appeal. Their Lordships will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Herbert Z. Deane and Co.; Messrs. Coward, Chance, and Co.]

K.B. Div. (Horridge, J.) } 1927. May 3.

MARBE v. GEORGE EDWARDES (DALY'S THEATRE), LIMITED.*

Contract—Theatrical engagement—Agreement to advertise the performer—Refusal by employers to allow performer to play the part—Payment of full salary—Action for breach—Implied obligation to allow performer to act—Damages for loss of reputation.

The plaintiff, an actress, was engaged by the defendants to play a certain part in a play for the period of rehearsal and for the run of the play, and there was a collateral agreement that

* Reported by W. E. Hubt, Esq., Barrister-at-Law.

the defendants would advertise her in a prominent position. The defendants refused to allow the plaintiff to play the part, but they paid her the whole of her salary down to the end of the run of the play. In an action for breach of contract the jury awarded to the plaintiff, over and above her salary already paid, damages for loss of reputation through her not being employed to play the part. The defendants contended that under the written contract they were under no obligation to give the plaintiff an opportunity of acting, and that the plaintiff was not entitled to damages for loss of reputation.

Held, that as there was an express agreement to advertise the plaintiff this necessarily implied an obligation to give the plaintiff an opportunity of acting, and the plaintiff was entitled, in addition to her salary already paid, to the damages awarded by the jury for loss of reputation.

This was an action in which Miss Fay Marbe, an American actress, claimed damages against George Edwardes (Daly's Theatre), Limited.

The plaintiff claimed £5,000 damages for loss of publicity and injury to reputation; loss of salary at £100 per week during the run of *Yvonne* at Daly's Theatre; and damages for libel contained in a letter written by the defendant company on July 29, 1926.

The special jury returned a verdict for the plaintiff, awarding her £3,000 damages for loss of reputation and £100 damages for libel over and above the £3,200 already paid by the defendants in respect of salary at £100 per week.

Sir Patrick Hastings, K.C., and Mr. Richard O'Sullivan appeared for the plaintiff; Mr. Neilson, K.C., and Mr. Croom-Johnson, K.C., for the defendants.

Sir Patrick Hastings argued that Miss Marbe was entitled to recover the £3,000 for injury to her reputation. Miss Marbe's contract was of a peculiar nature. What had been called the "surrounding circumstances" were unusual.

His Lordship said he did not suppose that Mr. Neilson would dispute that Miss Marbe was a prominent actress in America and that she was over here seeking an engagement which would give her a reputation in this country.

Mr. Neilson said that he was not prepared to go beyond the evidence, and they had only the plaintiff's own testimony as to her reputation in America.

Sir Patrick Hastings said that the defendants knew that Miss Marbe had her reputation to make here. She secured this engagement and said that she would not undertake it unless she was to be advertised in a prominent position.

His Lordship.—I do not think that if she did not play they were to advertise her. If she had been taken ill she could not have been advertised to play.

Sir Patrick Hastings said that the contract was that she was to rehearse and act the part of Lolotte in a West-end theatre at such times as the management directed, and the engagement was for the run of the play. There was also, in the schedule of regulations, the "barring" clause which contracted for her exclusive services.

His Lordship asked whether there was in the contract anything else which showed directly an obligation on the defendants' part to employ the plaintiff.

Sir Patrick Hastings said that there was nothing else. The four material things to consider were: (1) That this was a theatrical engagement in which public appearance was essential, because the future of the person employed depended upon her appearing regularly; (2) that Miss Marbe came to this country with an established reputation to establish a reputation here; (3) that her services were to be exclusive; and (4) that there was an agreement to "bill" her in a prominent position.

Mr. Neilson submitted that there was no evidence of malice on the issue of libel.

His Lordship said that he had made it as clear as possible to the jury that the writing of the letter did not in itself imply a motive of malice, but that he would have to rule that as far as the evidence of malice went there was sufficient to go to the jury.

Mr. Neilson said that on the subject of the £3,000 damages for injury to reputation he agreed with Sir Patrick Hastings that the foundation of the claim was the contract. The only term imposed upon the management was to pay Miss Marbe her salary within the prescribed dates, and if there was no contract expressly made to employ her his Lordship would be very slow to imply such a term. One could read the contract without importing or implying any right of the plaintiff to play the part. The Court had no right in a written contract to imply any stipulation unless the necessary implication arose.

The agreement in this case left the discretion in the manager of the theatre to say when the actress was to play, and he submitted that there was no implication that she had the right to play. Miss Marbe was not entitled to have the contract construed in her favour simply because she happened to be an actress. If, as he contended, she had no right to play, she had no right to be "billed." It was inconceivable that she should be "billed" in a prominent place if she were not playing. The obligation was to "bill" her only if she played, and if it were contended that there was an oral term to the effect that she was to be "billed" if she was not playing, it was so contradictory of the written contract that it could not stand. There was no right on the part of the plaintiff to play at all, and therefore there could be no right to recover damages.

Where there had been held to be a right to play there had been always an express condition to that effect, and it was not implied merely because the plaintiff happened to be an actor or actress. There was in the written contract in this case nothing which imported an obligation on the part of the defendants to allow the plaintiff to play, and any oral agreement must be consistent with the written document. This contract followed the standard form recognized by all the London managers. It could not be said, because there was an agreement to put an actress in a prominent position on the bill, that that changed a contract, from a contract with a liability to pay, but with no obligation to allow the actress to play, into a contract involving not only liability to pay but a liability for enormous damages. He submitted that no such construction could be placed upon the contract in the present case.

Sir Patrick Hastings, in reply, said that the defendants engaged Miss Marbe to play the part of Lolotte for the run of *Yvonne* and to advertise her in a prominent position during the currency of the play. He submitted that that implied an obligation on the part of the defendants to allow the plaintiff to play. He asked his Lordship to find that Miss

Marbe was an artist of position in America; that this was an important engagement for her as being her first opportunity of making her reputation in this country, Daly's Theatre being known as the home of musical comedy in England; and that in these circumstances the right to play was of great importance. He also asked his Lordship to find that it was not only important to Miss Marbe to play, but that it would be disastrous to her to have an engagement in this form and then not to be allowed to play. Having given the plaintiff the contract and "billed" her, the defendants would not allow her to play.

His Lordship, in his considered judgment, said that the claim was for (1) damages for breach of contract; and (2) damages for libel. As regarded the claim for libel he had held that there was evidence of publication to the typist, but that that did not do away with the privilege which would otherwise attach to the occasion of publication, and he therefore directed the jury that they must decide whether the document was defamatory and whether it was written with malice. The jury gave an affirmative answer on both these matters.

At the close of the case he held (1) that the only evidence of malice was that which appeared from the evidence of Mr. Paget that he had no belief in the truth of the matters stated in the document complained of, and (2) that on the plaintiff's case there would have been no evidence of malice. He (his Lordship) declined, however, to enter judgment for the defendants, the jury having found that the writer of the letter was actuated by malice, although the evidence of that malice appeared only from the defendants' case.

The other question was as to damages for breach of contract, and as to that the defendants contended that, as they had paid the plaintiff the whole of the salary which she should have earned during the run of the piece, no damages could be recovered by her in respect of the loss of reputation occasioned by her not being employed. That, no doubt, was the rule in an ordinary case of employer and employed (see *Addis v. Gramophone Company, Limited,* [1909] A.C., 488).

The jury assessed the damages at £3,000, and the question was then argued before him whether, in law, there was any obligation on the part of the defendants to employ the plaintiff to act in the character in which she had been engaged to play.

The contract in question was dated June 2, 1926, and under the provisions of it the plaintiff was employed to play the part of Lolotte in *Yvonne* for the period of rehearsal and for the run of the play. In his view, on the construction of the written contract, there was no obligation on the defendants to give the plaintiff an opportunity of acting. It was, however, contended before him that an agreement to give the plaintiff an opportunity of acting was to be implied from the nature of the employment coupled with the circumstances of the case. In *The Moorcock* (5 *The Times* L.R., 316; 14 P.D., 64) Lord Justice Bowen, at page 68, said:—

"I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

The following facts seemed to him (Mr. Justice Horridge) to have been admitted in the evidence for the defendants; but, if not, they were inferences of fact which he, by consent of both parties, was empowered to draw, and did draw, from the whole of the evidence:—

1. The plaintiff was, and was known by both parties to be, an American actress of position. 2. It was important, and known to both parties to be important, for her to have the engagement with the defendants at Daly's Theatre under the agreement. 3. It was important, and known by both parties to be important, for her to be played as Lolotte. 4. It would be disastrous, and it was known to both parties that it would be disastrous, to her, if, after its being publicly known that she was engaged to play the part, she was subsequently not allowed to do so.

In addition to the foregoing facts, the jury found that there was a collateral agreement that, in consideration of the plaintiff's entering into the agreement, the defendants agreed to advertise her in a prominent position.

Two questions seemed to him to arise—(1) Was there an implied agreement? (2) Did the agreement to advertise necessarily import into the contract within the authority of *Bunning v. Lyric Theatre, Limited* (10 *The Times* L.R., 583) an obligation to employ the plaintiff?

In the case of *Fechter v. Montgomery* (33 Beavan, 22) Sir John Romilly, M.R., held that there was imported into the agreement an obligation to give the defendant, an actor, a reasonable opportunity of playing. It was rather difficult to ascertain exactly the ground of that decision, but at page 26 it was stated:—

"But having regard to the situation of the parties, having regard to the nature of a contract of this description, and having regard also to the previous letter of June 21, 1862, written to Mr. Barnett, and the conversation which took place prior to this agreement being entered into, with respect to which conversation there does not appear to be much difference on either side, I am of opinion that it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery, during a reasonable time, to act at this theatre."

It seemed clear that, inasmuch as the contract was reduced into writing, these matters could not have been gone into unless there had been the following words at the end of the written contract:—"it being thoroughly understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter." If he (his Lordship) was right in this view, then there was clearly an antecedent agreement, set out at page 22 of the report, by which the plaintiff, Mr. Fechter, employed the defendant, Mr. Montgomery, to act; and the case would then have to be regarded as one in which the antecedent agreement formed part of the subsequent agreement.

In the case of *Turpin v. Victoria Palace, Limited* (34 *The Times* L.R., 548; [1918] 2 K.B. 539) Mr. Justice McCardie, in a careful judgment, held that the mere fact of the employment of an actor did not import into the agreement any obligation to give an opportunity of playing.

At page 545 he said:—

"Now I can see no reason at all in law to prevent a plaintiff, if the contract and circumstances be appropriate, from securing damages for the loss of advantageous publicity caused by a defendant's breach of contract."

In *Turner v. Sawdon and Co.* (17 *The Times* L.R., 645; [1901] 2 K.B., 653) Lord Justice Stirling, at page 659, said:—

"On the other hand, in the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of

displaying his abilities before the public, and it may be that there is an implied obligation on the part of the master to afford such an opportunity."

In the present case, however, in addition to the importance of being actually allowed to play, there was the express agreement, which was in fact carried out, to advertise the plaintiff in a prominent position. In his view, it was necessary, with the object of giving business efficacy to the transaction, to imply an obligation on the part of the defendants to give the plaintiff an opportunity of acting.

He was further of opinion that the case was governed by the decision of Mr. Justice Stirling in *Bunning v. Lyric Theatre, Limited* (*supra*). In that case there was a proviso that the name was to be announced in the *Standard* and *Daily Telegraph* and on bills and programmes. At page 584 Mr. Justice Stirling said :—

"It was expressly stipulated that the plaintiff's name should appear as musical director, and what was intended was, that such a state of things should exist that the defendants should be in the position truly to make such an announcement, or, in other words, that they should employ him in that capacity."

In the present case the jury had found that there was a collateral agreement that the defendants would advertise the plaintiff in a prominent position, and the defendants were therefore bound to employ her so that such an advertisement would be true. He thought that it was clear from what Mr. Justice McCardie said in *Turpin v. Victoria Palace, Limited* (*supra*), at pages 545, 546, and 551, that if an agreement to advertise had been proved in that case he would have followed the decision of Mr. Justice Stirling in *Bunning v. Lyric Theatre, Limited* (*supra*).

In his (Mr. Justice Horridge's) view, the plaintiff was entitled to judgment for the £3,000, and the £100 damages for libel, these sums being in addition to the moneys already paid her in respect of salary during the run of the play. The plaintiff must also have the costs of the action, including the costs of the further hearing.

Judgment was accordingly entered for the plaintiff for £3,100, with costs. A stay of execution was granted.

[Solicitors—Messrs. Deacon and Co.; Messrs. Speechly, Mumford, and Craig.]

Chan. Div. (Clauson, J.) } 1927. May 6.

AUTO-MART (LONDON), LIMITED v. CHILTON AND OTHERS.*

Restraint of Trade—"Stop" list—Motor Trade Association—Alleged infringement of price regulations—Publication of name of alleged infringers in "stop" list—Interim injunction refused.

The plaintiffs had been members of the Motor Trade Association, of which the members were not permitted to sell certain motor-cars except at certain prices. The association sent a person to buy a car from the plaintiffs, and, on the ground that their price regulations had been infringed by the transaction, and that the plaintiffs refused to pay a sum in the nature of a fine to the association's indemnity fund, the association caused the name of the plaintiffs to be published in their "stop" list so as to prevent the plaintiffs from obtaining supplies of goods from dealers or manufacturers. In an action against the officials of the association the plaintiffs applied for an interim injunction to restrain them from publishing the name of the plaintiffs in the "stop" list.

Held, on the authority of *Ware and De Freville, Limited v. Motor Trade Association and Others* (37 *The Times* L.R., 213; [1921] 3 K.B., 40), that there was no *prima facie* case for granting an injunction, and the action must go to trial.

This was a motion by the plaintiffs, Auto-Mart (London), Limited, of Finchley-road, Hampstead, in an action against John Chilton, Harry Arnold Bennett, Percy Ingram Denyer, and Motor Commerce, Limited, for an interim injunction to restrain the first-named defendants, officials of the Motor Trade Association, pending trial of the action, from publishing the name of the plaintiff company in a "stop" or "black" list, or from publishing any statement calculated to prevent any person, firm, or company from dealing with the plaintiffs.

Sir Henry Slesser, K.C., and Mr. Harold Simmons appeared for the plaintiffs; Mr. Harold Murphy opposed the motion.

Sir Henry Slesser, in support of the motion, read the affidavit of Mr. George Sims, manager of the plaintiff company, which carried on the business of motor garage proprietors and dealers in motor-cars and accessories. On or about January 27, 1927, the plaintiffs became members of the Motor Trade Association, which purported to encourage and protect the motor industry in the United Kingdom and throughout the world, and to watch over and protect the interests of manufacturers, wholesalers, retailers, and users of motor goods and the interests of all others having commercial relations with the motor industry. The deponent was informed that the business of the association was substantially owned and controlled by the defendants, Chilton, Bennett and Denyer, for their own benefit and profit.

On March 23, 1927, Mr. Sims answered a telephone call from a man who stated that his name was Mason. He asked the price of an Erskine motor-car which was offered for sale and was told that the price was £295, *plus* an extra charge for certain accessories. After some discussion he asked whether a reduction could be made and was told that it could not.

On March 25 a woman called and, referring to Mr. Mason's telephone call, asked to see the car. Mr. Sims showed it to her and told her that the price was £295, together with £12 10s. for extras. She said that Mr. Mason had stated that he was in a position to get a discount of 7½ per cent. from some other firm, but Mr. Sims told her that they could not allow that discount. She said that the other firm had offered 7½ per cent., but that they could not give immediate delivery and that she was most anxious to have the car at once as Mr. Mason was making her a present of it.

Ultimately, Mr. Sims agreed to make her a present of the cost of registration to December 31, 1927, and of the number plate, which totalled £13 13s. She called again next day and said that Mr. Mason had given her cash to pay the deposit. She accordingly paid £12 12s. and arranged to call on the following

* Reported by W. E. Hurt, Esq., Barrister-at-Law.

Monday with the balance and to take the car away. She signed the registration form in the name of Mrs. E. Gardiner, Flat E, 12A, Colville-square.

On the following Monday she paid the balance of the purchase price, £294 18s. A receipt was made out for that amount, but she asked for a receipt including the registration charge and the number plate and was given one for £308 11s. She thereupon accepted delivery of the car.

On the following day the plaintiff company received from the Motor Trade Association a letter which stated that facts had been brought to the notice of the association which would be brought before the Stop List Committee of the association. They were invited to attend a meeting of the committee on the following Wednesday to give an explanation and Mr. Sims went. The three first-named defendants were present and Mr. Denyer read out the charge against the company. Mrs. Gardiner was then called on and she testified as to the sale and purchase of the motor-car.

In reply to Mr. Sims's questions, she admitted that she was in the employment of the association and that the association had supplied her with the purchase-money. She also admitted that he had told her that he could not sell the car under trade price and had called her attention to the association's certificate hanging on the walls of the plaintiffs' premises.

On March 31 the plaintiffs received a letter from the association which said that the committee had fully considered the evidence and had come to the conclusion that the infringement of their recognized principles of price regulation was proved to their satisfaction.

The letter continued :—

"The committee under all the circumstances are prepared to recommend to the council that if you will pay a sum of £250 to our Indemnity Fund (which is applied towards expenses) to mark your regret and sign the enclosed undertaking for publication in *Motor Commerce* this shall be regarded on this occasion as a satisfactory ending of the matter.

"This recommendation will come before the council on Thursday, April 7, 1927, at 10.30 a.m., and if confirmed we will notify you. It is open to you to attend before the council if you so desire, in which case please notify us of your intention."

The signatory to the form enclosed in the letter undertook strictly to observe the protected prices of motor-cars. At the end were the words :—"We enclose herewith cheque value £250 as a contribution to your Indemnity Fund and the proprietors of *Motor Commerce* are hereby authorized to insert this undertaking once."

On April 2 the plaintiffs wrote to the association as follows :—

"We duly received your letter of March 31 which we read with astonishment. The matter was considered at a board meeting of the company yesterday and we quote you the resolution which was then passed :—

"'That the methods pursued by the Motor Trade Association for carrying into effect their object, as revealed to the directors of this company, at the meeting with the council of the Motor Trade Association on March 30, 1927, are repugnant to the directors of this company, and the company, therefore, resign their membership of the association forthwith.'

"We, therefore, give you notice that this company resign their membership of the Motor Trade Association as from to-day, and we must, therefore, ask you to take our names from the register accordingly."

The plaintiffs wrote again to the association on April 6 explaining that the person to whom they sold the car was in the employ of the association and acted throughout on its behalf, the sale, therefore, being really to a member of the association itself; further, that the whole thing was at most a technical offence into which they (the plaintiffs) were persuaded by the association's agent in order to catch them when off their guard. They contended that the car did not come within their agreement at all.

In reply the association wrote on April 9 that at its council meeting on the previous Thursday the recommendation of the committee was adopted and confirmed.

Upon receipt of that letter the plaintiffs put the matter in the hands of their solicitors, who wrote to the association on April 12 that it was not the intention of the plaintiffs to pay the £250 to the Indemnity Fund.

On April 30 *Motor Commerce* published a "stop" list in which the name of the plaintiffs was included. The effect of the publication was that the plaintiffs' business was practically at a standstill as it was impossible to get supplies of goods from dealers or manufacturers.

Mr. Sims added that the statements of Mr. Mason and Mrs. Gardiner were false and misleading and he submitted that the conduct of the defendants was fraudulent and illegal.

Mr. MURPHY, for the defence, read an affidavit of Mr. Percy Ingram Denyer, of 157, Great Portland-street, W., one of the defendants, and "stop" list superintendent of the Motor Trade Association, who said that the right of the association to publish the "stop" list had more than once been the subject of judicial proceedings, notably in the case of *Ware and De Freville, Limited v. Motor Trade Association and Others* (37 *The Times* L.R., 213; [1921] 3 K.B., 40), when the Court of Appeal decided in favour of the association as to the right of the association to publish the list. He denied that the association was owned or controlled by the individual defendants and went on to explain the circumstances which led up to the name of the plaintiffs being placed on the "stop" list. When Mr. Sims attended before the committee he made no attempt to deny the charge, but said that the members round the table were a lot of hypocrites.

SIR HENRY SLESSER argued that, *prima facie*, interference with any man's right to carry on business was unlawful if the means employed were unlawful. In this case the placing of the plaintiffs' name on the "black" or "stop" list was not a direct result of real adjudication. If the plaintiffs had been willing to pay the sum demanded the protection of the defendants' business would not have required the plaintiffs' being put on the list. The action of the defendants was really a threat or menace which the law did not allow. To put the plaintiffs' name on the list was not a *bona fide* necessity for the protection of the trade; for the defendants were willing to waive doing so if they could get the £250.

The injunction was sought because if relief was not given immediately there would be no business at all left to the plaintiffs; for no one would supply them with goods. In the case of *Ware and De Freville, Limited v. Motor Trade Association and Others* (*supra*) the point was not taken as to the employment of criminal means by the association; otherwise the decision of the Court of Appeal might have been very different. If the relief sought for now could not be granted he asked that the trial might be expedited.

Mr. Murphy said that he could not consent to the removal of the plaintiffs' name from the "stop" list in the interim.

His Lordship said that he appreciated the reason for that.

Mr. Justice Clauson, in giving judgment refusing the application for the interim injunction, said that the plaintiffs asked for an order that the defendants, their servants, and agents might be restrained until after the trial of the action from publishing the name of the plaintiff company in a "stop" or "black" list, or from publishing any statement calculated to prevent any person or company from dealing with the plaintiffs.

The notice of motion set out other matters in connexion with which relief was sought, but Sir Henry Slesser had agreed to stop at that point.

The circumstances quite shortly were that the plaintiffs had been members of the Motor Trade Association, which was a combination of persons under the Trade Union Acts, and which had for its object the protection of motor traders. In particular, they considered that traders required protection in the matter of keeping up prices. The members were not permitted by the association to supply certain motor-cars at other than certain prices. If the cars were supplied at less prices the consequence would be that the offending person would be brought up before the committee of the association, and if the committee considered it desirable so to do the offender would be placed upon what was called a "stop" or "black" list, and this meant that a notice would be published in the organ of the association stating that the person in question was not to be supplied with cars or dealt with by the remaining members of the association.

In the present case the association thought that they had reason to suppose that the plaintiffs were infringing the association's price rules. They therefore proceeded to arrange that what might be described as a "trap" order might be given to the plaintiffs. Someone was sent to offer to buy a car from them, and was sent with the cognizance of the association. It was said that the plaintiffs agreed to sell a car to that person in such a manner as to infringe the association's regulations. The plaintiffs were given an opportunity of a hearing before the committee. It was decided that the regulations had been infringed and that the plaintiffs should be put upon the "black" list.

In accordance with the practice of the committee an opportunity was given to the plaintiffs of obtaining a reversal of that decision if they were prepared to give an undertaking thenceforward to carry out the association's price regulations and pay a sum in the nature of a fine to what was called an indemnity fund. That opportunity was offered, but was not taken and, in the result, the plaintiffs' name appeared on the "black" list in *Motor Commerce* of last Saturday.

The facts as he had stated them were, for any purpose with which he had to deal, indistinguishable from those in *Ware and De Freville, Limited v. Motor Trade Association and Others* (37 *The Times* L.R., 213; [1921] 3 K.B., 40). In the present case the alleged breach of the price rules arose from a "trap" order. That might have some significance when the case came to trial, but apart from that point the facts were not distinguishable on the face of them.

Something, however, had occurred since the case of *Ware and De Freville* (*supra*). In a somewhat similar case in which the association was concerned (*Rex v. Denyer*, 42 *The Times* L.R., 452; [1926] 2 K.B., 258) it had been held in a criminal Court that the process of giving an opportunity to an offending firm to have the decision reversed if they would pay a fine and undertake to conform to the price regulations amounted to the criminal offence of extorting money by menaces.

The attention of the Court of Appeal in the *Ware and De Freville* case (*supra*) was not drawn to the possibility that action of that kind might constitute an offence against the criminal law. Sir Henry Slesser sought to distinguish the present case from the *Ware and De Freville* case (*supra*) by pointing out that in this case he happened to be in a position to show that one of the steps taken by the association was a step which involved criminality, and he suggested that, if in the *Ware and De Freville* case (*supra*) there had been a similar circumstance amounting to criminality and if it had been pointed out to the Court of Appeal, that Court would have come to a different conclusion.

It would not be proper for him (his Lordship) to express any independent view of law on the matter, because it seemed to him that in the present case his duty was laid down for him by what happened in the *Ware and De Freville* case (*supra*). He could not hold that there was a *prima facie* case here for granting an injunction. It was not open to him, he conceived, to go behind the decision of the Court of Appeal and say that that Court, if its attention had been drawn to another point, would or ought to have come to a different conclusion. It was on that ground that he was not at liberty to grant the plaintiffs the injunction which they claimed. His decision was that the *Ware and De Freville* case (*supra*), as a decision of the Court of Appeal, bound him to hold on the facts before him that the plaintiffs had no legal ground for relief, and therefore he made no order on the motion for an interim injunction.

If it were a case in which leave to appeal was required he would grant it, but he did not think that it was. As to procedure, it appeared that both parties were anxious to bring the case to trial as soon as possible, but the remaining defendants must enter an appearance at once. There was no reason why there should not be a summons for directions. There would be an order for pleadings in the action to be delivered within seven days; there would be a like time for the defence and seven days for reply. There would be a cross-order for discovery as soon as the pleadings were closed. There would be liberty to apply to advance the hearing as soon as the action was set down. The costs of both parties would be costs in the action, and there would be leave to appeal, if necessary. There would be no order on the motion.

[Solicitors—Messrs. Taylor, Willcocks, and Co.; Messrs. Engall and Crane.]

K.B. Div. (Swift, J.) } 1927. May 4.

CLEGHORN v. OLDHAM.*

Negligence — Spectator on golf course — Injury by player.

The plaintiff, while she was carrying the defendant's golf clubs on a golf course, was struck with a golf club by the defendant when

* Reported by J. W. Hall and T. R. F. Butler, Esqs., Barristers-at-Law.

she (the defendant) was demonstrating a stroke to the plaintiff's brother, with whom the defendant was playing. In an action for damages for personal injuries caused by negligence the jury found that the defendant was guilty of negligence which brought about the accident, and that the plaintiff was not guilty of negligence and did not take the risk of such an accident by going on the course as a spectator, and they awarded the plaintiff damages.

Held, that there was no reason why the defendant should be excused merely because the accident took place in the course of recreation rather than of work, and that, as the plaintiff had not agreed, by going on the course as she did, to take the risk of being injured by negligence, the plaintiff was entitled to judgment.

In this action Miss Jeanie Cameron Cleghorn, of 135, Osborne-road, Forest Gate, E., claimed damages for personal injuries from Miss Cicely Mary Oldham, of St. Clement's House, Bolsover-street, W. The plaintiff alleged that on September 7, 1925, she was negligently struck on the face by a golf club on the West Runton Golf Course by the defendant, who was demonstrating a stroke to the plaintiff's brother. As a result the plaintiff suffered severe injuries and was away from her work as a clerk in the actuarial department of an insurance office for 13 months. The defendant denied negligence, and pleaded contributory negligence.

Mr. Martin O'Connor appeared for the plaintiff; Mr. Croom-Johnson, K.C., for the defendant.

The plaintiff, giving evidence, said that Miss Oldham was playing with the witness's brother and that she (the witness) was carrying Miss Oldham's clubs. At the 12th or 13th tee Miss Oldham drove from the ladies' tee quite well. The witness's brother made a bad drive from the men's tee. Miss Oldham said: "This is the way to do it," and played a stroke at an imaginary ball. She struck the plaintiff at the end of the "follow through" and the plaintiff was knocked down and became unconscious. When she came round she heard Miss Oldham say: "What have I done? I am sorry." A doctor was found, who took her home in his car and attended her for a week. She returned to work, but became too ill to go on and was away from January 1, 1926, to January 24, 1927.

In answer to Mr. CROOM-JOHNSON, the witness said that she used to play hockey, but had never played golf.

Mr. CROOM-JOHNSON.—Is there not an element of danger in all games, which adds to the enjoyment?

MR. JUSTICE SWIFT.—You are not suggesting that people enjoy their golf more because they may be driven into? The language that one hears does not suggest that it is pleasurable.

The witness said that she and Miss Oldham were standing on the ladies' tee and saw Mr. Cleghorn's ball "trickling off to the right."

Mr. CROOM-JOHNSON.—A familiar sight, at least when I play.

The witness said that Miss Oldham did not address the ball before she made the stroke.

Mr. O'CONNOR, re-examining.—It is suggested that Miss Oldham spoke to an imaginary ball——

MR. JUSTICE SWIFT.—You do not speak to the ball before you drive; you speak to it after you drive. You are thinking of "addressing" a jury, which is one thing; "addressing" a ball is another.

After corroborative evidence had been given for the plaintiff,

Miss Oldham gave evidence. At the 12th or 13th tee she watched Mr. Cleghorn's drive, which was rather a bad one. She walked down from her tee and as she walked down she called out: "Look, this is how it should be done." She "addressed" an imaginary ball and played the stroke. She must have struck the plaintiff at the very end of the stroke. Her eye was on the "ball." She had no conversation with Miss Cleghorn as she walked from the tee and had no idea that she had followed. Naturally, she said that she was sorry, as anyone would do if he accidentally hurt someone in playing a game.

In cross-examination, Miss Oldham said that the plaintiff had been carrying her (witness's) clubs for some time and had walked along beside her, but she did not expect the plaintiff to follow when she walked back towards Mr. Cleghorn's tee. Witness never said: "I know I should have looked." "One does not always look," said the witness, "before striking; one expects people to get out of the way."

Mr. CROOM-JOHNSON submitted that a person who voluntarily took part in a game, even as a spectator, took the risks incidental to the game and could not bring an action, even if a player was negligent; to support such an action there must be deliberate violence or foul play. He referred to *Reid v. Mitchell* (22 Sc.L.R., 748); *Giles v. London County Council* (68 J.P., 10), Pollock on Torts, 12th ed., p. 164.

The questions left to the jury, with their answers, were:—

(1) Was the defendant guilty of negligence which brought about the accident?—Yes.

(2) Was the plaintiff herself guilty of negligence?—No.

(3) Did the plaintiff, by going on the course as a spectator in the way she did, take the risk of such an accident?—No.

(4) Damages, if any?—£150.

Mr. CROOM-JOHNSON submitted that the question whether there was or was not a duty upon the defendant to take care in the particular circumstances was a question of law and not of fact. The plaintiff had placed herself on a golf course and the risk of such a blow as she received was to be expected. On that view of the case, whether the plaintiff consciously assented to the risk or not, she could not be heard to complain if, after going on to a dangerous place, she was hit. It was true that in *Abbott v. Isham* (37 *The Times* L.R., 7) Mr. Justice Horridge had taken the view that the question whether a plaintiff had voluntarily incurred the risk or not was one of fact for the jury. On the question what amounted to a voluntary incurring of risk he referred to *Ilott v. Wilkes* (3 B. and Ald., 304).

MR. JUSTICE SWIFT.—In that case the plaintiff was a trespasser. Here, so far as the defendant was concerned, she was lawfully on the golf links and I think that she was there by invitation. When you and I were young, we should have called her the chaperon, but I understand that such persons do not exist nowadays.

Mr. CROOM-JOHNSON.—I contend that here there was no duty on the defendant to give any warning.

MR. JUSTICE SWIFT.—Is there any difference between negligence arising from the playing of games and negligence arising from any other transaction?

Mr. CROOM-JOHNSON.—My answer to that would be that in a game persons submit to the course of excitement arising during the game and to the normal incidents thereof, and, indeed, to everything except

violence or unfairness. There was no evidence of negligence on the part of the defendant to go to the jury. The question whether the plaintiff voluntarily undertook the risk did not arise, it being clear that she was on the course for the purpose of assisting in the game and knew that at any place a golfer might swing a club.

Mr. Martin O'Connor was not called on to argue.

Mr. Justice Swift, in giving judgment, said that counsel for the defendant had sought to draw a distinction between accidents arising from the playing of games and accidents occurring in other transactions of life, and it appeared to have been suggested that the ordinary rules of law in relation to negligence did not apply to the playing of games. He could not see that any such distinction existed. In playing games, as in other transactions of life, a person must abstain from doing what a reasonable person would not do, and if a jury came to the conclusion that a person had done something which a reasonable player in the circumstances would not have done and if injury had resulted therefrom, that person was liable in an action for negligence.

Games might be, and were, the serious business of life to many people. It would be extraordinary to say that people could not recover for injuries sustained in the business of life, whether that was football, or motor-racing, or any other of those pursuits which were instinctively classed as games but which everyone knew quite well to be serious business transactions for the persons engaged therein.

He could well understand that in the playing of games, as in other transactions of life, many accidents might happen for which no one could be held responsible, and the person who sustained the injury had then to bear the brunt of it. But where it could be proved that the accident was due to the negligence of the person who was sued as defendant, there was no reason why that person should be excused merely because the transaction in which the accident had taken place was recreation rather than work.

It had been suggested here that the plaintiff voluntarily undertook the risk. He had been inclined before his attention had been directed to the matter to think that the question was one of fact for the jury, and accordingly he left to them the question: "Did the plaintiff, by going on the course as a spectator in the way she did, take the risk of such an accident?" and they returned the answer "No." If, however, it were to be regarded as a question of law, he was equally of opinion that the plaintiff did not undertake the risk. A person who went on to a golf course, just as a person who crossed the street, took certain risks inherent to the place where he was. A ball might be driven without negligence and strike a spectator or player. A club might break without any fault on the part of the person using it, and someone might be injured by the flying head. But if negligence could never be brought home to anybody, an injured person could not recover. No authority had been cited for the proposition that a person ever took the risk of anybody being negligent unless there was an express agreement on proper facts to that effect.

There was here no ground for saying that the plaintiff voluntarily undertook the risk of an accident such as she met with. There was clearly evidence to go to the jury, and judgment for the plaintiff must be entered, in accordance with their verdict, for £150 and costs.

[Solicitors—Messrs. Berry Tompkins, and Co.; Messrs. Walker and Rowe, for Messrs. Close and Francis, Bagshot.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) 1927. Apr. 8.

TALLACK v. TALLACK AND BROEKEMA.*

Divorce — Jurisdiction — Husband's petition—Settlement by guilty wife on children—No property within the jurisdiction—Powers of English Court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 191 (i).

The petitioner, the husband, obtained a decree absolute for divorce against his wife, the respondent, and was awarded £1,000 damages against the co-respondent. Subsequently the respondent married the co-respondent, a domiciled Dutchman, and she was now resident in Holland. The respondent paid the damages into Court out of her separate estate, and she obtained leave to enter an appearance so that she might be heard on the question of their payment out. The petitioner, by leave, then presented a petition for an order that the respondent should make a settlement on the two children, and the respondent entered an appearance to this petition. The Registrar reported that the respondent had an income of £500 a year, mainly from foreign investments, and he submitted that the £1,000 damages should be paid out to the petitioner and that the respondent should be ordered to settle £100 a year on each child. The petitioner moved to confirm the report as to the damages and to vary it by an order on the respondent to lodge in Court £4,000 to be settled on the children. The respondent opposed the motion on the ground that the Court had no jurisdiction to make the variation asked for.

Held, that the £1,000 damages ought to be paid out of Court to the petitioner, but that, as the respondent was not domiciled in England and had no property in England, and as her appearance was not entered to meet the claim made on the motion and was qualified by a denial of jurisdiction, there should be no order on the respondent to settle money on the children or to lodge money in Court for the purpose of such a settlement.

This was a motion to vary the Registrar's report on a petition for a settlement of part of a wife respondent's property for the benefit of the children of the marriage. The petitioner, Reginald Grant Tallack, was married at the British Consulate, Cairo, on July 12, 1912, to Bernardine Christine Hermance Betz, spinster. There were two children of the marriage, a girl born on August 14, 1916, and a boy born on July 6, 1919. The wife left the petitioner in March, 1923. The husband, who was domiciled in England, on April 1, 1924, filed a petition for the dissolution of his marriage on the ground of his wife's adultery with Gerard Willem Broekema. On October 17, 1924, he was granted a decree *nisi,* which was made absolute on July 27, 1925, and was granted

* Reported by William Latey, Esq., Barrister-at-Law.

£1,000 damages against the co-respondent. The damages were paid into Court by the wife out of her separate estate, and on March 23, 1926, a summons was issued on her behalf for leave to enter an appearance in the suit, notwithstanding decree absolute, so that she might be heard on the question of payment out of Court of these damages and on the question of access to the children. Leave to enter an appearance so limited was granted. On April 8, 1926, a summons was issued on the petitioner's behalf for the payment out of Court of the £1,000 to himself and for leave to present a petition for a settlement on the children. This leave was granted, and on June 29, 1926, the petitioner presented a petition for this settlement, and to this the wife filed an answer asking that the £1,000 be settled on the children. The petition was heard by the Registrar on January 31 and February 9, 1927.

In his report the Registrar found that the petitioner's income was about £515 a year, and that the cost of the children's maintenance and education was computed at £300 a year. The respondent's property consisted mainly of foreign investments. The capital was about £9,000, bringing in £500 a year. The Registrar submitted that the £1,000 damages should be paid out to the petitioner ; that the respondent be ordered to settle £100 per annum upon each of the children of the marriage for life and that out of such sums the premiums upon the educational policies be paid ; and that the respondent pay the costs of the proceedings out of her separate estate. The petitioner moved to confirm the report as to payment out of Court of the £1,000 damages and as to the settlement to vary the report as follows : That the respondent be ordered to lodge in Court £4,000, half of which should be settled on each child for life, the educational premiums to be paid out of the income.

Mr. R. Ritson appeared for the petitioner ; and Mr. Cotes-Preedy, K.C., Dr. W. R. Bisschop, and Mr. C. C. Trotter for the respondent.

Mr. Cotes-Preedy raised an objection that the Court had no jurisdiction with regard to the proposed settlement. The respondent's domicile of origin was Holland, and since her marriage to the co-respondent, a Dutchman domiciled in Holland, in August, 1925, she had gone back to live in Holland and was domiciled there. The Dutch Court refused to recognize any judgment of a foreign Court against a Dutch national, and there was a special jurisdiction as to divorce in Holland. Moreover, the respondent's property was not within the jurisdiction. The respondent under the law of Holland had to provide for her second husband (a Delft undergraduate at the time of their marriage), and the Registrar had ordered her to pay too much. There was no case where an order had been made for a lump sum to be paid into Court. It was quite a novel proceeding to be required to pay money into Court before a settlement order was made. The respondent had appeared under protest to the settlement petition all along.

Dr. Bisschop addressed the Court as to the effect of foreign judgments in Dutch law. The general principle, he said, was laid down in Article 431 of the Civil Code, which said :—

"Except in such cases as are expressly mentioned by Statute no judgments rendered by foreign judges or courts are executable within the kingdom. Proceedings may be dealt with afresh and disposed of before the Netherlands judge.

"In the above-mentioned exceptional cases the judgments of foreign judges or Courts shall not be executed within the kingdom unless previously leave for execution has been petitioned for . . . and obtained from the Court in which such judgment is to be executed. When such petition is heard and granted the facts of the case itself are not newly considered."

Up to 1924 the Dutch Courts held that after foreign judgments the parties must proceed *de novo*. In a decision of the Dutch Supreme Court dated November 14, 1924, *In re Platt*, a Dutch creditor had sued his debtor in England, but failed to obtain a judgment. He then sued the same debtor before a Dutch Court. But the Dutch Supreme Court held that as the plaintiff had chosen the English forum he was bound by the English judgment. This decision created a doubt as to the position of an English plaintiff and a Dutch defendant in an English Court. In the Court of Appeal at Amsterdam, on October 16, 1926, a decision was given in the case of *Schenker v. Dexter, Ltd.* Judgment had been given against the Dutch defendant in an English Court. The English plaintiffs tried to enforce the judgment in Holland by an action in that country founded on the English judgment. The Court of Appeal held that this could not be done, as it would be a contravention of Article 431. By Dutch law the party in divorce who was granted custody of the children could secure maintenance for the latter from the other party only during their minority, but on reaching full age they could themselves sue for maintenance. Guardianship Councils assisted the Courts in every district in this respect, and it was their duty to take proceedings for maintenance under Articles 285 (*c*) and 374 (*g*) of the Civil Code.

If the English Court gave a decision in the present case as to a settlement of the respondent's property on the children, the Dutch Court would not recognize it. Moreover, settlements and trusts in these circumstances were not recognized by Dutch law. Article 286 of the Civil Code, on the other hand, provided that divorce should not deprive the children of any advantages secured to them by law or by the marriage articles of their parents.

Mr. Ritson submitted for the petitioner that under section 191, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court could order a settlement of this kind. The sub-section said :—

"If it appears to the Court in any case in which the Court pronounces a decree for divorce or for judicial separation by reason of the adultery of the wife that the wife is entitled to any property either in possession or reversion, the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage. . . ."

Counsel submitted that the petitioner could not now object to the jurisdiction, having entered an unconditional appearance. Under Divorce Rule 16 (*a*) an appearance under protest had to be accompanied with a concise statement of the grounds of such protest. The Court had power to make a personal order.

Lord Merrivale.—The respondent is not within the jurisdiction and you are asking the Court to bring her within the jurisdiction.

Mr. Ritson referred to *Lorriman v. Lorriman and Clair* (24 *The Times* L.R., 575 ; [1908] P., 282).

Lord Merrivale.—In that case there was a specific fund with a vested interest and the fund was within the jurisdiction. The crux of this case is that the property is entirely outside the jurisdiction.

MR. RITSON said that the respondent might in the future have some property in this country. If a personal order were granted the petitioner might sue on it when the opportunity occurred. He argued that the inference from the evidence as to Dutch law was not well founded.

LORD MERRIVALE.—I agree that it would be unjust to defeat the possibility of proceedings in Holland on the ground of *res judicata* in England, but process taken in Holland would not be prejudiced by a suspended state of proceedings here.

MR. RITSON in conclusion invoked the principle that the innocent party and children should not be adversely affected by the breaking up of the marriage, and referred to *Noel v. Noel* (10 P.D., 179) and *March v. March and Palumbo* (L.R., 1 P. and D., 440).

LORD MERRIVALE delivered a considered judgment as follows :—

The matters in question in this case arise under the power which was granted to the Court by the Matrimonial Causes Act, 1857, section 45, and the Matrimonial Causes Act, 1860, sections 6 and 7, to order a settlement of property of a wife divorced for adultery for the benefit of her husband or children. The sections in question are now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, section 191, subsection 1. Questions of difficulty arise which are not provided for in terms in the statutes, and as to which there is no authority in decided cases.

After reciting the facts leading up to the divorce and the payment of the damages into Court, the President said :—

The co-respondent was and is without means. The respondent had in 1912 investments of the value, as is said, of about £12,000. She has at present, as has been found upon inquiry in the registry, investments of a capital value of about £9,000 which yield an income of about £500 a year.

In April, 1926, some months after the dissolution of the marriage of 1912, the petitioner in the usual way issued a summons for directions as to the disposal of the money paid into Court in respect of damages. Without such an application this sum could not be appropriated. This money had been in Court since November, 1924. In March, 1926, the respondent had applied by summons for liberty to enter an appearance in the suit, notwithstanding decree absolute, "so that she might be heard on the question of payment out of Court of the damages and on the question of access to the children of the marriage." Leave to enter an appearance so limited had been granted. Each party filed evidence. The respondent alleged that the £1,000 in Court had been provided by her and paid into Court under an arrangement that the sum should be settled on the children of the marriage. This the petitioner and his solicitors denied.

The petitioner's summons came to a hearing and the petitioner then applied for and obtained leave to file a petition asking that the respondent should "make a settlement on each of the children of the marriage" and that the summons should stand over generally. A petition was in due course filed, the material allegations in which were that there were two children of the marriage, and that the respondent was possessed of stocks, shares, and other property of her own exceeding £12,000 in value, from which she derived an annual income of £600. No mention was made of the re-marriage of the respondent or of her domicil.

To this petition so filed the respondent in September, 1926, by the solicitors who had acted for her in the previous proceedings, entered an appearance. The appearance so voluntarily entered is relied upon by the petitioner as a submission by the respondent to the decision by the Court on claims of considerable variety made by the petitioner against the respondent *in personam* and in respect of her property. Stress is laid upon the fact of an unconditional appearance for reasons based on Matrimonial Causes Rules 15 and 16 ; these, however, apply as the context shows, to appearance in a suit. The rules as to petitions like the present are Rules 71 and 72.

The answer of the respondent to this petition for settlement was duly sworn and filed, and after setting out the state of her means, the terms of a settlement made by her upon her re-marriage, and the existence of insurance policies obtained at her cost by way of help toward the education of the children, it concludes by asking that the £1,000 in Court shall be settled upon them.

When the matters raised by the petition and answer came in the usual course before the Registrar for inquiry and report, counsel appeared for the respondent and objected that the Court had no jurisdiction to order a settlement of her property, she being domiciled in Holland and having property only in Holland, as is set forth in the report of the learned Registrar ; counsel stated that he "appeared to the petition for settlement under protest as to the jurisdiction of the English Court to order a settlement of the wife's property."

His Lordship proceeded to recite the report of the Registrar and the petitioner's present motion, and pointed out that the petition to which the respondent appeared did not contain the petitioner's present claim for the payment of £4,000 into Court to be settled on the children. His Lordship continued :—

At the hearing of the motion counsel appeared for the petitioner to support his new application. Counsel appeared for the respondent to protest against the exercise of the jurisdiction over the respondent's property in Holland, and to resist the application for payment out of the £1,000 in Court. On the respondent's behalf evidence was given of Dutch law in explanation of the effect of marriage in Holland upon property possessed by either spouse at the time of marriage, and as to a jurisdiction existent in Holland under which orders could be made against parents in respect of children, special local committees being entrusted with this authority. Information was given on both sides as to the details and whereabouts of the respondent's property.

Under the Dutch Code of Civil Procedure execution may not be had in Holland under foreign judgments except in cases expressly provided for by Netherlands law. Proceedings in other than the excepted cases must be taken anew before one of the local Courts. No suggestion was made before that the present case falls within any statutory exceptions. It was shown, however, that under Dutch law a citizen of the Netherlands who brings an action in England and fails on the merits, could be precluded from suing again in Holland in respect of the same alleged cause of action. It was also shown that notwithstanding an appearance and defence in an action brought in England against a Dutch citizen certain Netherlands tribunals hold themselves bound to refuse to enforce the judgment, as such, leaving the plaintiff, if he so desires, to proceed *de novo* in Holland to enforce his claim.

As regards settlement of property between spouses and disputes between parents as to their obligations towards their children, the evidence was that no jurisdiction such as that invoked in the present case exists in Holland, and that the "Guardianship Councils"

which are appointed by the State in each district, to deal with such questions, have power only to direct periodical payments for the maintenance of children.

The evidence given on the respondent's behalf satisfies me that as between Dutch spouses, whether during marriage or after divorce, no orders as to property such as are here sought by the petitioner could be made by any Court in the Netherlands, that no Judge or Court there would or could under the Civil Code give effect to an order made here in terms of the petitioner's application.

No evidence was given of the existence in England of any property of the respondent in respect of which an order of this Court could be enforced. In replying to the argument made on behalf of the respondent counsel for the petitioner accepted the conclusion that no such property exists, and so far as regards this claim for a settlement the petitioner relied upon a contention that the respondent had voluntarily submitted to the jurisdiction of the Court by her entry of an unconditional appearance to the petition, and that in a proceeding *in personam* such a submission binds the party to the acceptance of the eventual judgment of the Court.

The dispute which has arisen between the parties as to the sum of £1,000 paid into Court under the decree as to damages had been inconveniently, and perhaps not without intent, linked up by the petitioner's advisers for discussion and decision along with the question of settlement. I will dispose of it now. In view of the petitioner's evidence and the findings of fact in the report and the situation of the children of the marriage the proper order to be made is that proposed by the Registrar for payment out of the £1,000 in question to the petitioner.

The remaining questions upon the petitioner's motion depend upon the meaning and effect of the Supreme Court of Judicature (Consolidation) Act, 1925, section 191, subsection 1, construed as part of the English law of divorce. To what extent can an English Court consistently with the general principles of International law which govern national jurisdictions—apart from submission by the respondent—exercise jurisdiction *in personam* over a respondent domiciled abroad so as to bind him or her by its decree, or to establish a charge upon his or her property or alter his or her proprietary rights in property outside the jurisdiction? Does the appearance of a foreign subject before the Court for the purpose of disputing the jurisdiction empower the Court to adjudicate upon claims against him so as to bind him by a judgment *in personam*? Is the claim of the petitioner here a claim in an action *in personam*? If the Court has and ought to exercise jurisdiction *in personam* in such a case can it and ought it to assume power to alter the property in the respondent's assets not within its jurisdiction?

The relevant sections of the statutes are the first matter for consideration. Their effect is perhaps somewhat misunderstood. It is probably correct to say that section 45 of the Matrimonial Causes Act of 1857 neither created a cause of action nor set up a new right in equity. In 1857 and long afterwards a delinquent wife so long as she was covert could not be sued. Nor was any equitable tribunal empowered to treat her matrimonial offence as founding any pecuniary demand or interest in her property. The power given to the Court in divorce to redistribute and settle property of a wife because of a matrimonial offence was absolutely none. The jurisdiction was statutory and had no precedent in the Ecclesiastical Courts. It was anomalous in that nothing like it existed at common law or in equity. In some respects it was penal.

One of the difficulties in the present case could not arises under the Act of 1857, because the respondent, being a domiciled Englishwoman by reason of her marriage, was manifestly subject to the jurisdiction of the Court until after the decree of dissolution of marriage. A decree of dissolution was made under that Act upon the hearing of the petition. The decree *nisi* was introduced by the Act of 1860. The jurisdiction as to property remains a jurisdiction to be exercised when the decree absolute is made. The intervening period is available for any interlocutory proceedings which may be sanctioned. One unforeseen difficulty under the Act of 1857 was provided against under the Act of 1860, section 6, namely, that, notwithstanding any new coverture in the case of a divorced woman indentured as to her property, any instrument made pursuant to an order of the Court should be deemed valid and effectual. Bearing in mind that the jurisdiction in divorce is limited to England and Wales and is dependent on domicile, it cannot, I think, be said that the statutory authority invoked by the petitioner is, on the face of it, necessarily an authority which extends to a woman, whether *feme sole* or *feme covert*, not in fact domiciled here. It is perhaps not immaterial on this question of construction that the power which was conferred on the Court by statute for service of process out of the jurisdiction (Matrimonial Causes Act, 1857, section 42) is a power in relation to the petition in a suit and to a proceeding such as is under consideration here.

As to the property of a guilty wife which is subjected by the statute in question to the jurisdiction of the Court, it is sufficient to say generally that, *prima facie*, what is dealt with is property of a woman domiciled in England subject by reason of her domicile to the jurisdiction of English tribunals.

Apart from any submission by the respondent to the jurisdiction sought to be invoked and in the absence of express statutory provision which directs the exercise of the jurisdiction over a respondent not domiciled in England or in respect of property beyond the jurisdiction, the power of the Court to do that which is prayed by the petitioner depends upon general principles, based in part at least on the comity of civilized States. Sir Albert Dicey, in his work "The Conflict of Laws" (4th Edition, at pages 27 and 33), states two applicable principles in these words:—

"General Principle No. II.—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country: . . . (c) where the enforcement of such right involves interference with the authority of a foreign state within the limits of its territory.

"General Principle No. III.—The Courts of any country have jurisdiction over (*i.e.*, have a right to adjudicate upon) any matter with regard to which they can give an effective judgment, and have no jurisdiction over (*i.e.*, have no right to adjudicate upon) any matter with regard to which they cannot give an effective judgment."

Applying the first of the tests stated by Sir Albert Dicey, I think it is clear that the property in Holland of the respondent, a married woman and domiciled in Holland, cannot be partitioned by an English Court without infringing the authority of the Netherlands law over the domestic affairs of females domiciled in Holland. To apply the second test formulated by Sir Albert Dicey, this question must be answered: Can this Court give an effective judgment

as to the respondent's property so as to bind the property? It is not clear that the judicial tribunals of the Netherlands are able to give effect at all to judgments of foreign Courts, even in personal actions, against defendants living in Holland. But having regard to the terms of the Civil Code, and the statement of Dr. Bisschop, I am satisfied that a decree of this Court purporting to partition the property of the respondent would be an idle and wholly ineffectual process.

Reference may perhaps be usefully made on this part of the matter to the case of *Sirdar Gurdyal Singh v. Rajah of Faridkote* (10 *The Times* L.R., 621; [1894] A.C., 670).

The application of the petitioner for an order for the payment into Court was used as the basis of an argument that, even if a decree here for settlement of the respondent's property would be ineffectual in Holland, an order upon her for payment into Court of a sum of money with a view to an order later for a settlement would come within the description of a judgment *in personam*, and ought therefore to be made. The respondent, it was said, has appeared and is subject to a personal judgment; such a judgment should be granted *ex debito justitiæ*, even though she may not obey it and no execution upon it may be obtainable. This contention fails on various grounds. The prayer of the petition as filed set forth no cause of action which would found an action *in personam* properly so called. (*Sydney Municipal Council v. Cook or Bull*, 25 *The Times* L.R., 6; [1909] 1 K.B., 7.) The respondent's appearance to the petition was not an appearance to meet the present claim. I am not persuaded that an appearance to such a petition as the present, qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied.

I am satisfied that the proposed interlocutory order would not be enforced in Holland. I was referred by way of authority to cases in this Court where jurisdiction undoubtedly existed—*March v. March and Palumbo* (L.R., 1 P. and D., 440), *Noel v. Noel* (10 P.D., 179), *Lorriman v. Lorriman and Clair* (24 *The Times* L.R., 575; [1908] P., 282), and *Ponsonby v. Ponsonby* (9 P.D., 122).

Such cases throw no light on the question really at issue. There is some guidance perhaps in some old authorities where with regard to disputed jurisdiction the principle was discussed before the existing rules as to jurisdiction were formulated. In *Carteret v. Petty* (2 Swanston, 323) a defendant resident in Ireland who appeared before the Court of Chancery and demurred to the jurisdiction, was ordered to answer a bill for waste committed in Ireland, because wheresoever the defendant may by personal coercion be compelled to perform the Act decreed, there, after answer put in, the Court shall proceed to a decree. In *Foster v. Vassall* (3 Atkyns, 588) the same point is stated in respect of suits in equity as to matters outside the jurisdiction, in these words: "As the defendant is here the Courts do *agere in personam* and may by compulsion on the person and process of the Court compel him to do justice."

Lord Mansfield, in *Mostyn v. Fabrigas* (1 Cowp., 161), drawing the distinction as regards presence and absence of jurisdiction, and contrasting actions for personal wrongs and actions in respect of property abroad—in that case realty—used these words at p. 176: "The substantial distinction is where the proceeding is *in rem*, and where the effect of the judgment cannot be had if it" (*i.e.*, the proceeding) "is laid in a wrong place."

The compulsory process referred to in the Chancery cases is not available here at the instance of the petitioner. The respondent is beyond our reach. Nor has she appeared in a suit so framed with regard to a personal cause of action that after judgment attachment would be the penalty of default of obedience. I have purposely refrained from consideration of the proper order for settlement if such an order could properly be made.

It was ultimately urged on the petitioner's behalf that *ex debito justitiæ* some order ought to be made on the prayer of the motion with its amended claim, so as to enable the petitioner to take proceedings at his own risk in Holland, and alternatively it was submitted that no final judgment adverse to the petitioner's claim should be made in case hereafter he may find the respondent possessed of property within the jurisdiction. To the first submission I am unable to accede. As to the second, any inchoate rights which the petitioner may have under the statute will be sufficiently considered if I limit the operative order of the Court to that part of the Registrar's report which relates to the disposal of the damages, and as to the rest of the petition declare that in the absence of evidence of the existence within the jurisdiction of any property of the respondent subject to be dealt with thereunder the Court makes no order. The order to be drawn up will be framed accordingly.

[Solicitors—Messrs. Pearce and Nicholls; Messrs. T. D. Jones and Co.]

K.B. Div. (MacKinnon, J.) } 1927. Apr. 27.

SOUTH STAFFORDSHIRE MINES DRAINAGE COMMISSIONERS v. ELWELL AND SONS.*

Rating — Statutory body — Mine drainage — Power to levy rate—Mortgage of future rates — Cessation of drainage works — Survival of rating powers — South Staffordshire Mines Drainage Acts, 1873 to 1923.

A body of Commissioners was created by statute for the purpose of underground and surface drainage of a mining area, with power to levy rates upon occupiers of mines. Power was also given them to borrow money upon mortgage of the produce of future rates, and this power was exercised. Owing to financial and other difficulties the Commissioners ceased to carry on drainage operations in 1919. In 1926 they levied a rate upon the defendants as occupiers of mines in their area. In an action by the Commissioners for the amount of the rate,

Held, that they were entitled to levy the rate notwithstanding the cessation of drainage operations.

This was a claim by the South Staffordshire Mines Drainage Commissioners for £2,019 13s. 9d. arrears of drainage rates. The facts appear fully in the judgment of Mr. Justice MacKinnon.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Mr. H. H. Joy, K.C., and Mr. R. A. Willes appeared for the plaintiffs; Mr. L. J. Sturge for the respondents. Mr. Tristram Beresford held a watching brief for Lord Dudley.

MR. JUSTICE MACKINNON.—In this case the plaintiffs, who are a statutory body, sue the defendants for certain sums alleged to be due as rates pursuant to the statutory powers of the plaintiff body. That body was constituted by an Act of Parliament of 1873, called the South Staffordshire Mines Drainage Act. There is a series of eight Acts, beginning with that first one of 1873 and ending with the eighth, of 1923. It is provided by the first section of the Act of 1923 that this series of eight Acts shall be cited together as the South Staffordshire Mines Drainage Acts, 1873 to 1923.

The purpose of the original incorporation of the plaintiff body was with a view to providing drainage of water for the South Staffordshire Coalfield. The scheme of it was that the Commissioners were to provide drainage of two sorts—first, surface drainage, and, secondly, underground or mine drainage. They were, by certain machinery provided in this first Act, to divide up the whole of the South Staffordshire Coalfield into certain districts, which districts were to be treated as separate entities. It was provided by section 40 of the Act of 1873 that any particular district by a vote of its electoral members could contract itself out of the operations of the Commissioners as regards the underground mines drainage, though it remained liable to support the Commissioners and to pay rates in respect of the surface drainage. There were, as I understand, some five districts created under this first Act, and the one I am concerned with in this case is the Tipton District. The other four districts I think—I have not heard much about them because they are not primarily concerned—did contract themselves out of the underground operations of the Commissioners for the mines drainage, and only remained in the scheme as regards the surface drainage; the Tipton district came in, or remained in the scheme both as regards the mines drainage and the surface drainage.

In the history of the operations of the Commissioners, especially as regards the Tipton district, they were faced to an increasing degree as time went on with two difficulties—first, the difficulty of the water which defied their efforts to pump it or drain it, but, still more seriously, the increasing flood not of water but of indebtedness, and that arose more acutely as regards the Tipton district. The last five of the Acts I have referred to, the Acts of 1891, 1894, 1904, 1914, and 1923, are all concerned solely with the troubles of the Tipton district. Those difficulties, particularly as regards indebtedness, culminated in 1919 in this disaster. The Commissioners were unable, despite several schemes which in those successive Acts had been provided, to raise more money, and the water was becoming increasingly difficult to deal with, and in 1919, as regards the Tipton district, the whole of their pumps and apparatus for the underground mines drainage broke down and were disused, and as from August 31, 1919, there was no more pumping; but under provisions in several of these Acts the Commissioners have raised money by mortgaging the future produce of the rates they were entitled to levy and issued mortgage debentures to various people who lent them the money, and since 1919, though no mines drainage has been done in the Tipton or any other district by the Commissioners, they have continued to levy rates in the manner prescribed by the Acts in order to provide funds, not so much for paying off the capital sum of the indebtedness—because that is beyond their powers—but to keep down the ever-increasing burden of interest upon it.

Now the particular provision as regards the power of the Commissioners to levy rates was originally provided in sections 42 and 43 of the Act of 1873, as amended by section 23 of the Act of 1878, the second one. By the original sections 42 and 43 of the Act of 1873, the Commissioners were given power in respect of the surface drainage to assess and levy upon the occupiers of mines an annual rate, to be called the general drainage rate, to be assessed in respect of all minerals gotten from the mines within the drainage area, and, by section 43, as regards the mines drainage rate, they had power to assess and levy upon the occupiers of mines in the same words an annual rate in respect of all minerals gotten from such mines. The maximum amount of those rates was provided by various schedules, and the precise figure does not matter. That was, as I say, amended by section 23 of the Act of 1878, chiefly in the way of machinery, because it provided for half-yearly payments instead of the single annual payments. Now the Commissioners, purporting to act under the powers to levy rates thereby provided, have served notices of the making of the rate upon these defendants. The claim arises in this way: shortly after the great coal strike broke out in the early part of last year the defendants made an arrangement, to use a neutral term, with the agent of Lord Dudley, who owns large property in this South Staffordshire region and in this Tipton district. Certain letters passed between the defendants and the estate agent or the mineral agent of Lord Dudley. On May 3, 1926, Mr. Hutton, the agent, wrote to the defendants: "Confirming my conversation with you this morning, I am prepared to give you the sole right of the coal pickings from the Conygree and Foxyard area so long as the present strike lasts" with certain exceptions. "After giving full consideration to the question of price, I am prepared to accept 1s. 9d. per ton for the coal pickings, as I consider they are fully worth this figure." That the defendants agreed to by a letter of May 4; and those letters seem to deal only with coal pickings, which, as I understand it, mean not the winning of virgin coal but the collection of the remains around old pit-heads of coal which has been already won but has been wasted and dropped and otherwise not carried off. The operations of the defendants were extended by subsequent letters. On June 5 Mr. Clark, who I think is the mineral agent of Lord Dudley, wrote to them: "With reference to the interview you and your son had with Mr. Dudding and me at Dudley yesterday, enclosed I send you tracing showing the Foxyard area and Conygree area edged blue, under which you are to have the sole right of coal pickings," except certain parts. "As arranged yesterday the royalty payable by you for all coal and slack raised up to last night is to be 1s. 9d. a ton (2,240lb.), from thence onwards 3s. 9d. per ton (2,240lb.), you to supply the estates office each week with the tonnage of coal pickings taken away, and you to pay for the same each month. It is also understood that if Earl Dudley should wish to take any of the coal pickings, you agree to sell the same on the basis of cost of getting it plus some remuneration for your superintendence and haulage, if any. It is also understood that the numerous little shafts which you have sunk and will sink will have to be filled up again at your cost." There is a further letter on June 29 from the same gentleman, and in those letters the defendants acquiesced.

Pursuant to that arrangement with Lord Dudley's

people, what the defendants did was that they first of all arranged with a few men, about six of them, that those men should go out into this area from which the defendants were given the sole right to get coal, and get as much coal as they could, and the defendants would pay them 7s. 6d. a ton for slack, and 15s. a ton for coal, or that which you describe as not slack, loaded into carts. Then the defendants took away the carts, and, I suppose, sold the coal at as good a price as they could get. The six men were increased in numbers very considerably, and the system came to be one under which a certain number of foremen of gangs, called "stall men," used to deal with the defendants, work with their gangs, get paid for all the coal they won by the defendants, and, I suppose, settle with the inferior members of their gangs. Under this system, during the year 1926 until the strike came to an end the defendants won, took away, and sold for their benefit a very considerable quantity of coal and slack. I have not any evidence as to the precise amount and I am not concerned with it, but a member of the defendants' firm gave evidence and admitted that they got at any rate more than 100,000 tons. It is by virtue of those proceedings so carried out that the plaintiffs claim to be entitled under those rating sections to which I have referred to recover from the defendants the sums they claim here as being the rate assessed and levied on the defendants as occupiers of mines in respect of minerals gotten by the defendants from such mines.

Subject to a small point that I will deal with later, there is no question but that the machinery for rating the defendants has been complied with by the plaintiffs, and that proper notices of the assessment of these rates have been made. I should also add that there is machinery in one of the Acts providing for an appeal against the assessment of a rate by any person upon whom notice of it is served. The defendants did not appeal against these notices of assessment, and for the purposes of this hearing I take it, and I do not think it is disputed, that if the defendants are liable at all they are liable for the sums claimed in this action. I rather infer, partly from their reticence as regards the amount which they did win, and the general absence of any desire to go into that question, that the defendants have probably won a good deal more coal than that in respect of which these assessments have been made upon them.

To this claim made by the plaintiffs four defences by way of objection have been raised. The first one is that the defendants cannot be rated in respect of this mineral because that which they were occupying, if they were occupying anything, was not a mine within the meaning of the Act.

What the men who worked for the defendants and won the coal did was that they dug into the surface of this region where coal apparently is very near the surface; in some places apparently you dig straight into the coal—there is no overlying soil of any sort; in some cases, I imagine, they did little more than dig away the side of the hill and dug away coal in so doing; in other cases, as I gather, the majority of the cases, they dug down in the form of a pit or hole to a varying depth, apparently as much as 30ft. Having got down the hole they made a lateral heading away from the hole in four or five directions for some little distance, but in no case did they do any timbering to support the roof, and the result of that was that it was not safe, and they did not dare to carry these headings to any length; the utmost of their excavation probably was in the form of a downward hole of about 30ft. deep, and out of the bottom of that hole a series of galleries or headings going a short distance away in a sort of star-like form.

Now Mr. Sturge, who has argued the whole case for the defendants here with very great care, says that workings of this sort are not mines within the meaning of these Acts, and, putting it broadly, he says that "mines" within the meaning of these Acts mean the underground workings, that is to say, a tunnel-like excavation of the soil, over the top of which there is a roof of rock or soil or coal, and that a contrast has to be drawn between a mine in that sense and a quarry, which is an open-air excavation of ground at the side of a hill, over the top of which there is nothing but the sky. Broadly speaking, he says that these workings, though they might be properly described as a quarry, are not mines. To some extent it is a question of degree, but I think also that the question what is meant by mines in any particular connotation or any particular piece of legislation depends entirely upon the terms of the particular Act of Parliament or other document. There is no definition of a mine in these Acts. The only definition clause, I think, is in the first Act of 1873, section 3, and that does not define mine except in this way: "The expression 'mine' includes mines within the drainage area at work, or which might be worked if freed from water"—that does not really assist us at all. "The expression 'mineral' means and includes coal, slack, shale, ironstone, fireclay, limestone, or other saleable mineral." In the discussion of the term "mine" I have referred particularly to the case of *Lord Provost and Magistrates of Glasgow v. Farie* (4 *The Times* L.R., 781; 13 App. Cas., 657); I think, perhaps, in that case the most illuminating passage is one in the judgment of Lord Herschell, who points out on page 684: "The word 'mines' is, I think, in a secondary sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so, too, with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term 'slate quarry' is undoubtedly sometimes made use of, though the workings are underground. I think it is impossible to obtain any assistance from this use of the word 'mines' in construing section 18 [of the Waterworks Clauses Act, 1847]. It is no doubt exceptional to obtain coal and iron except by underground workings; but this is not so with slate, and the word 'mines' is used alike in reference to all these substances." I do not forget that in that particular case Lord Herschell was dissenting, but the authority of that case, if sought to be relied upon as a general exposition of the meaning of the word "mines" in any Act of Parliament, is considerably impaired, by reason of the fact that two years later, in the case of *Midland Railway Company v. Robinson* (6 *The Times* L.R., 100; 15 App. Cas., 19), the decision on very similar words was the other way. There are various considerations, I think, to be taken into account. I am told, and the evidence is all one way, that in this particular region the winning of coal has, I suppose, for all time not been so much a matter of concentrating in a limited number of big collieries, with big pit-heads and great underground workings, but the business has been split up amongst a great quantity of small workings and small collieries. That evidence is entirely confirmed by the fact that one of these Acts, the Act of 1894, gives in its first Schedule a list of the mines and minerals

belonging to the several collieries thereafter specified which may be charged under the powers of the Act. That comes under two headings, first of all, the name of the colliery, and secondly, the estimated area of the mines and minerals; there are an enormous number of them; it goes down to as low as 0.35 acres, and I should think the great majority of them were under 20 acres.

There is a long list of things specified as collieries, dozens and dozens and dozens of which are under 20 acres, and a vast number of them under 10, and I think, having regard to various passages in these Acts, and the nature of the locality to which they were being applied, that this land on which the defendants were, by this arrangement with Lord Dudley's agent, allowed to win coal as worked by them through these men by these holes which the men dug did constitute a mine within the meaning of the 42nd and 43rd sections of the Act of 1878 and the 23rd section of the Act of 1878.

Now the second answer made by the defendants is that they are not occupiers and therefore cannot be assessed under the section which empowers the plaintiffs to assess the occupiers of the mines. I need not deal, I think, with that at any length; I think under the arrangement contained in those letters between the defendants and Lord Dudley's agents the defendants clearly were the occupiers of these mines.

The third point raised by the defendants is, I think, the most difficult and the most formidable. The difficulty arises because, so far as the industry of counsel on either side has gone, they have not been able to find any authority that really assists me, and I am quite confident, in view of that industry, that there is not in existence any sort of authority upon the point. The point arises in this way: the defendants say that the whole justification for the existence of these Commissioners is, as is quite clear from the preamble to the first Act, and I think every one of the later Acts, that the Commissioners should first of all create, instal, and then carry on a system of draining this waterlogged mining region, and inasmuch as since 1919 they have not been doing any drainage in the Tipton area, then, say the defendants, the whole justification for their existence has disappeared, and while they no longer perform their statutory duties of draining, they cannot legally levy any rates. At first sight that sounds, as a matter of common sense, an attractive proposition, but one must bear in mind that it is not as though the plaintiff Commissioners were neglecting and abstaining from performing their duties and were still collecting rates and not doing anything according to their statutory powers with the money so collected; the truth is that under their legislative powers they have borrowed vast sums of money from mortgagees. The Acts recognized the rights of the mortgagees, not merely by empowering the Commissioners to borrow from the prospective mortgagees, but by recognizing and confirming the appointment of a receiver for the mortgagees. The Acts further, in several passages throughout them, recognize the duty of the Commissioners to apply part, at any rate, of the rates which they collect for the payment of their debt to the mortgagees. That begins as long ago as the first Act of 1873, because it is provided by section 45 of that Act: "All moneys received by the Commissioners in respect of rates shall be applied" first "in payment of salaries and expenses," and so forth. Then the second heading is given: "In payment of the interest from time to time payable by the Commissioners on the principal moneys for the time being borrowed by them by virtue of this Act."

Furthermore, I was referred, as illustrating that position, to the second subsection of section 21 of the 1878 Act, which is an amendment of the 40th section of the 1873 Act, and which allows districts to contract out. Section 21 provides: "The owners and occupiers within any district which shall exempt itself from the operation of the principal Act and this Act with regard to underground drainage shall be and remain liable to be rated for payment of all moneys previously to such exemption borrowed by the Commissioners upon the security of the rates of such district." The same liability of the Commissioners in respect of the mortgages is recognized in section 28 of the Act of 1891. What is perhaps still more significant is that in the year 1923, four years after the draining operations of the Commissioners had, as must have been perfectly well known, come to an end, Parliament passed this Act about the Tipton district, confirming an agreement which had been made in regard to a scheme for paying off these debentures, and so far from repealing any of the previous Acts, including those sections giving the Commissioners power to levy a rate, it referred to them and treated this Act as one with them, so that the whole eight should be cited together as the South Staffordshire Mines Drainage Acts, 1873 to 1923. As I say, really there is no authority at all. Mr. Sturge referred me to a case of *Aiton v. Stephen* (1 App. Cas. 456), but I do not think that has any bearing whatever. That was simply a case where a man by Act of Parliament was authorized to charge a certain toll as remuneration for rendering certain services, and it was said—I should have thought it might have been said without resorting to the House of Lords to have it determined—that if he did not render the services he could not exact the toll. That seems to me to be a very different thing from the suggestion that is here made, namely, that when the Commissioners have ceased to do pumping they cannot then further levy any rate for the satisfaction of the debts already incurred in carrying out their duties. It is entirely a point of first impression; but I see nothing which prevents the Commissioners from now saying that they are entitled to levy rates pursuant to these sections and to use the money in paying the interest on the mortgages.

Now the last and fourth point raised is a minor one and a highly technical one. The claim of the plaintiffs is for two separate sums: First, a sum of £638, as a rate for the year from June 24, 1925, to June 30, 1926; secondly, a sum of £1,381 for the following year, 1926-1927. This point does not arise as to the second sum, but it is taken as regards the first, namely £638. It arises in this way: it is said here that the demand which purported to be made was for an amended rate made under section 24 of the Act of 1878. It is said that you cannot make an amended rate under section 24 of the Act of 1878 unless you have made at the beginning of the year an original rate to be amended. They did not make an original rate at the beginning of the year 1925 to 1926, for the simple reason that the defendants were not doing anything at the beginning of that year, but only began their operations later on in the year, and it is admitted that the first rate, the original rating of the defendants, was not made as it purports to appear in the book, on June 24, 1925, but it was made somewhere in the early months of 1926; therefore it is said that, the original rate not being made at the beginning of the year, you cannot have an amended rate under section 24 of the Act of 1878.

I think the answer to that is that by the 30th section of the Act of 1891 the Commissioners may

assess new occupiers who commence their occupations after the general yearly assessment from time to time, and it is then provided that every such assessment shall in all respects take effect as if made at the time when the general assessment was made. Under that section 30 the Commissioners made four assessments on the defendants, 70, 71, 72, and 73, sometime, not, it is true, at the beginning of the 1925-1926 year, but towards its end. This having been done, that assessment under section 30 of the Act of 1891 was to take effect as if it was made at the beginning of the year, and so taking effect as if made at the beginning of the year, it can, I think, be amended as though it had been made at the beginning of the year pursuant to section 24 of the Act of 1878.

Finally, it is said that under section 30 the Commissioners are compelled to assess every occupier who may commence occupation, and it is suggested that the Commissioners did not assess every occupier. There is no proof of the existence of any named or specified individual whom they did not assess ; the suggestion is only made because it is said that there were many people who were digging for coal in this way during the strike, and probably some of them were not assessed. The answer of the representative of the Commissioners was : "It may be that some escaped us, but we assessed everybody of whom we knew."

First of all, I do not think there is any proof that they failed to assess any particular person ; secondly, I doubt whether, even if it were proved, that would affect the matter.

In the result, I think as regards these four defences which are raised each of them fails, and that the plaintiffs must succeed, and in the circumstances, as I have said, there is no dispute about the amount, and there will be, therefore, judgment for the amount claimed with costs.

[Solicitors—Messrs. Sharpe, Pritchard and Co., for Messrs. J. E. Underhill and H. Taylor, Wolverhampton ; Messrs. Greene and Underhill for Mr. J. A. Shephard, Tipton.]

K.B. Div. } 1927.
(Acton and Talbot, JJ.) } May 4.

GOOCH v. STRATMAN.*

Landlord and Tenant—Restrictions—Recovery of possession—Requirement for purpose in the public interest—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 4.

This was an appeal by the plaintiff, Mr. Lionel Shirley Gooch, of 55, Basinghall-street, E.C., from a decision of Judge Cluer at Whitechapel County Court in an action in which the plaintiff asked for an order for the possession of a cottage occupied by the defendant, Mrs. Johanna Stratman, at Breezer's-hill, St. George's-street, Stepney, so that he could erect wool warehouses on the site and improve the approaches to existing warehouses.

Judge Cluer held that the plaintiff did not require the premises for a purpose in the public interest, but merely for his own business, and that the extension of any trade, however useful to the public, was not a matter of public interest within section 5 (1) (*e*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as re-enacted by section 4 of the Rent and Mortgage Interest Restrictions Act, 1923.

Mr. H. U. Willink appeared for the appellant. The respondent did not appear.

Mr. WILLINK said that by section 5 (1) (*e*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as re-enacted by section 4 of the Rent and Mortgage Interest Restrictions Act, 1923, an order for the possession of a dwelling-house could be made when it was reasonably required "for any purpose which, in the opinion of the Court, is in the public interest," provided that reasonably suitable alternative accommodation was available. Judge Cluer had, he submitted, wrongly held that the development of trade was not a purpose "in the public interest," although it might be of the greatest public importance, since the "purpose" contemplated by the subsection must be public or quasi-public. He should have considered whether the purpose for which the dwelling-house was required was generally desirable from the point of view of the community or a substantial part of it.

The plaintiff owned some 57,000 square feet of land in Stepney on which were a number of wool warehouses and two cottages, one of which was that of which he desired possession. Possession was wanted so that the scheme in respect of the warehouses could be completed and the approaches to them improved. London was the greatest wool market in the world, and the wool trade was sufficiently important to be a matter of public interest within the subsection. Since 1925 there had been a scarcity of wool warehouses, and experts who gave evidence at the trial said that it would be advantageous to the wool trade as a whole that the plaintiff's warehouse accommodation should be extended.

Mr. JUSTICE ACTON, in giving judgment, said that the evidence called on behalf of the plaintiff in the county court was that he was engaged in a trade of the greatest importance to the country, and that it would be a great convenience to him to erect warehouses which would facilitate the purposes which he had in view. As a decision on a question of fact, the Judge came to the conclusion that the plaintiff did not require the premises for a purpose in the public interest, but merely for his own business. He went on, however, to say, perhaps unfortunately and certainly unnecessarily, that the extension of any trade, however useful to the public, was not a matter of public interest within the subsection. Mr. Willink, therefore, argued that he was entitled to assail the Judge's decision on the question of fact on the ground that he had misdirected himself on the meaning of the wording of the subsection.

He (his Lordship) did not, however, think that that sentence rendered untenable by the defendant the benefit of the decision which the Judge had given in her favour on the question of fact. The words in the subsection were very wide, and they must confer a very wide discretion on the county court Judges who had the responsibility of dealing with cases under the Rent Restriction Acts. The Judge's holding did not mean more than that the facts of the present case did not disclose a "purpose in the public interest" within the meaning of the subsection.

MR. JUSTICE TALBOT, in agreeing, said that it was the uniform practice of Parliament not to grant compulsory powers to purchase land to any person who was carrying on a business, however important it was, apart from undertakings authorized by Parliament and subject to Parliamentary restriction. A

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law

county court Judge might well apply some such general rule of practice as that in exercising his discretion under the subsection, although he was not entitled to make a rigid rule and apply it to all the cases that came before him.

The appeal was accordingly dismissed, with costs

[Solicitors—Messrs. Stibbard, Gibson, and Co.]

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore, and Lord Carson.)
1927. May 10.

NEWCASTLE BREWERIES, LIMITED v. INLAND REVENUE COMMISSIONERS.*

Revenue—Excess profits duty—Requisition of goods—Compulsory sale—Assessability of profit—Finance (No. 2) Act, 1915 (5 and 6 Geo. V., c. 89), ss. 38-45.

The profit resulting from the compulsory sale involved in a requisition under Regulation 2B of the Defence of the Realm Regulations is assessable to excess profits duty.

The goods were requisitioned in 1918 and a sum of money was then paid on account as compensation. The balance was awarded in 1921 by the War Compensation Court—a tribunal created by the Indemnity Act, 1920—but on the principle of Regulation 2B.

Held, that the change of Court did not alter the date when the right to payment arose, and that this balance, which was net profit, was a profit of the year when the goods were requisitioned.

Decision of the Court of Appeal (42 *The Times* L.R., 609) affirmed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 609) affirming an order of Mr. Justice Rowlatt (42 *The Times* L.R., 185), who reversed a decision of the Commissioners for the Special Purposes of the Income Tax Acts. The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of the Lord Chancellor.

The question raised by the appeal was whether in the circumstances of the case the appellants were, for excess profits duty purposes, liable to include as a profit of their trade or business arising in the accounting period ending October 30, 1918, a sum of £5,309 10s. awarded to them (as compensation for loss of rum requisitioned in 1918) in 1921 and received by them in January, 1922.

On an appeal by the appellants against an assessment of this sum to excess profits duty for the accounting period ending October 30, 1918, the Special Commissioners held on the authority of *Arthur Guinness, Son and Co. v. Inland Revenue Commissioners* ([1923] 2 I.R., 186) that the £5,309 10s. was not a profit of the trade and discharged the assessment.

Mr. Justice Rowlatt reversed the decision of the Special Commissioners. He held (1) that the £5,309 10s. was a price upon a sale by the appellants of the requisitioned rum, and (2) that the accounts for the period ending October 30, 1918, ought to be reopened so as to include this sum in the profits of that period.

The Court of Appeal (the Master of the Rolls, Lord Justice Warrington, and Lord Justice Sargant) affirmed the decision of the learned Judge.

Mr. Latter, K.C., and Mr. Cyril King appeared for the appellants; and the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. Reginald Hills for the respondents.

The Lord Chancellor.—My Lords: The appellants in this case are brewers and wine and spirit merchants, and they deal in rum, their practice being to buy raw rum, put it through a process of reducing and blending, and then sell the thing so produced. In the year 1918 they had a stock of raw Jamaica rum; and the Crown, acting under Regulation 2B of the Defence of the Realm Regulations, took possession of a large quantity of that rum for the use of the Forces. A question arose as to the price or compensation which should be paid to the appellants for the rum so taken. The Crown said that the price was to be regulated by Regulation 2B, and that under that Regulation the appellants were not entitled to the market price of the rum taken but only to a sum calculated on the cost and the pre-war rate of profit. The appellants, on the other hand, maintained that so much of Regulation 2B as purported to limit the price to be paid for goods taken was *ultra vires,* and they presented a petition of right claiming a declaration to that effect. Pending the dispute the Crown paid about £10,300 to the appellants without prejudice to any claim for a further sum. On the hearing of the petition of right Mr. Justice Salter decided in favour of the appellants, and declared that the part of the Regulation to which they had objected was not binding upon them and that they were entitled to the market price of the rum. Thereupon the Indemnity Act, 1920, was passed. That Act prohibited all legal proceedings in respect of the exercise of the Royal Prerogative during the war and swept away all pending proceedings and judgments, including the judgment of Mr. Justice Salter in favour of the appellants. The Act further provided that, if any person had suffered any direct loss or damage by reason of interference with his property or business through the exercise of any prerogative right, that person should be entitled, in any case in which a Regulation had purported to prescribe any special principle for assessment of any payment, including any price—a category which included the present case—to payment or compensation to be ascertained by the War Compensation Court in accordance with that Regulation. Accordingly, the appellants applied to the War Compensation Court, and that Court awarded to them a further sum of about £5,300, which was duly paid. The question is whether, for the purposes of excess profits duty, that sum of £5,300, or thereabouts, is to be treated as profit arising in the accounting year 1917-18. If it is, it is a net profit, for no deduction falls to be made from that sum in respect of outgoings, and accordingly excess profits duty would be payable to the extent of 80 per cent. of the amount. If it was not a business profit or did not arise in the accounting period 1917-18, then, as excess profits duty ceased to be payable at some date in the year 1920-21, no such duty would be payable on this sum.

My Lords, it has been held by Mr. Justice Rowlatt and by the Court of Appeal that the sum in question is liable to excess profits duty, and I agree with their conclusion.

Two points are made on behalf of the appellants. First, it is said that the £5,300 is not a profit from

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

the appellants' business at all, but is a sum payable by way of compensation for the compulsory taking by the Crown of a part of the appellants' capital. I cannot agree with that contention. It is true that the rum taken by the Crown had not been refined or blended and was not, therefore, in the state in which rum was usually sold by the appellants; but it was rum which they had bought for the purposes of their business, and the cost of the rum was no doubt treated as an outgoing of the business. If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the appellants' profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle. Both the sums received for the rum—the £10,300 and the £5,300—were in fact brought into the appellants' books under the heading "Sales of Rum"; and, although that entry may not be binding upon the appellants, it seems to me to have been correct. The transaction was a sale in the business, and, although no doubt it affected the circulating capital of the appellants, it was none the less proper to be brought into their profit and loss account. As to the authorities cited, there is nothing in the *Glenboig* case ([1922] S.C. (H.L.), 112) which is inconsistent with the view which I have taken; and if the *Guinness* case ([1923] 2 I.R., 186) says anything to the contrary, then I can only say that I do not agree with it.

Secondly, it is said that if the £5,300 was a business profit, at all events it was not profit which arose in the accounting year 1917-18. I think it did, and I cannot see in what other year it can be said to have arisen. The rum was taken in 1918, and the right to some payment arose at once, though there was delay in ascertaining the amount to be paid. It is true that the Indemnity Act, 1920, entrusted the duty of ascertaining the amount to a new tribunal, namely the War Compensation Court, but on the principle of the Regulation as it stood in the year 1918. The change of the tribunal which was to ascertain the amount and enforce payment did not create the right to payment, or alter the date when the right to payment in fact arose. An illustration was put in the course of the argument when it was asked whether, if a partner had been interested in the profits of the appellants' business for the year 1918, he would have had a right to share in this sum. I think the answer should clearly be in the affirmative; and just as the sum was part of the profits of the year so as to entitle a partner to share in it, so it appears to me that it was profit of the year so as to entitle the Government to take a share in the form of excess profits duty.

My Lords, my conclusion is that the sum in question was a profit arising in the accounting year 1917-18; and as it was not then either included in the appellants' return or valued, and consequently was not then the subject of assessment to excess profits duty, I think that it could be assessed to that duty in the year 1923 at its actual amount as then ascertained.

I think that this appeal fails, and I move your Lordships that it be dismissed, with costs.

Viscount Dunedin.—My Lords, I concur. As to the first point, I think the taking of the rum had no analogy with the embargo on working the clay fields in the *Glenboig* case ([1922] S.C. (H.L.), 112). The payment for the rum was in no sense a return of capital. It was simply a realization of a portion of the stock-in-trade at rather an earlier stage of the process than was the case with ordinary sales. *Guinness's* case ([1923] 2 I.R., 186) is not identical with this. If it were, then I think the judgment in it would have to be reconsidered.

As to the date, if I should read the Indemnity Act, 1920, as a statutory extension of the right which arose on the taking of the rum and the conferring of an entirely new right, then I should consider that the date was the date when the award was made by the War Compensation Tribunal. I do not so read it. I think it left the actual right to be paid where it was, but provided that that right could only be made effectual to the claimant in a certain way. Then the thing for which he was paid was the thing taken, and the date of the taking was 1918. The addition of the £5,000 odd is in the same position as the interim payment of £10,000 odd in the year 1918.

Lord Atkinson.—My Lords, I concur with the judgment that has just been delivered by my noble friend upon the Woolsack, and have nothing to add to it.

Lord Phillimore.—My Lords, I am of the same opinion. As to the first point I never had a doubt. It is quite usual in trade that manufacturers should from time to time for particular reasons dispose of the raw material which in ordinary course they make up for sale. The rum was purchased for trade purposes, and the particular sale was none the less a trade sale because the trade was forced upon the appellant company.

The second point has given me more trouble. I think, however, that if the Indemnity Act, 1920, had not been passed, and the appellants had been left to enforce their claim in accordance with the judgment of Mr. Justice Salter, the money which they should so recover would have represented profit earned in the year 1918, and that the taking away of this claim or right by the Indemnity Act, 1920, accompanied as it was *uno flatu* by the substituted remedy given by the same Act, did not create a new source of profit.

Lord Carson.—My Lords, I agree that this appeal fails. I do not think it necessary to express any opinion as to whether *Guinness's* case ([1923] 2 I.R., 186) decided by the Court of Appeal in Southern Ireland was rightly decided, as I do not think it has any application to the facts of the present case.

[Solicitors—Messrs. Godden, Holme, and Ward; the Solicitor of Inland Revenue.]

K.B. Div. (Fraser, J.) } 1927. May 10.

HARDIE AND LANE, LIMITED v. CHILTON AND OTHERS.*

Trade Unions — Representative action against members — Requirement of common interest —Summons adjourned into Court—Whether open to the Press—Rules of the Supreme Court, Order XVI., r. 9, Order LIV., r. 22.

The plaintiffs, who were motor-car dealers and agents, brought an action against the defendants, sued on their own behalf and on behalf of all other members of the Motor Trade Association, an unregistered trade union. The claims were for damages for the torts of con-

* Reported by J. W. Hall, T. R. F. Butler, and W. E. Hurt, Esqrs., Barristers-at-Law.

spiracy, fraud, and libel, and there was a claim in quasi-contract.

On the defendants' application the Master made two orders, (1) dismissing the action against the defendants in a representative capacity, and (2) amending the writ and subsequent proceedings by striking out the words which stated that the defendants were sued on behalf of the Association.

Held, on appeal, that since the persons to be represented had no common interest with the defendants, as required by Order XVI., r. 9, the order of the Master was right.

When a Judge adjourns a chambers summons into Court under Order LIV., r. 22, and does not direct that it is to be heard in Court as chambers, the matter is in Court for all purposes and is open to the Press.

When these summonses, adjourned into Court from chambers, came on, Mr. GIVEEN, for the defendants in their representative capacity, pointed out that a reporter was present. He did not object to the presence of legal reporters, but there was a lay Pressman in Court and, in his submission, the hearing was still technically in chambers. Order LIV., r. 22, provided :—

"In the King's Bench Division the Judge in chambers if he thinks it desirable that any summons, appeal or application owing to its importance or the length of the time likely to be occupied or for any other reason should be heard in Court may direct that the same be so heard or may adjourn the same to be so heard. Provided that any decision in Court on any such summons, appeal or application shall be deemed to be a decision at chambers."

SIR HENRY SLESSER, K.C., for the plaintiffs, submitted that "decisions at chambers" in Order LIV., r. 22, referred to matters of appeal and procedure, and that the hearing was in Court. There was a question of law to be decided of great importance, which he would like to see reported in the legal papers.

MR. JUSTICE FRASER said that he had been asked to adjourn the matter "into Court." He could see no reason why reporters should be excluded. He ruled that the matter was in Court for all purposes and that he could not exclude anyone who chose to be present.

The hearing of the applications, which came before the Judge on appeal from two orders of Master Jelf, was proceeded with. The action was brought by Messrs. Hardie and Lane, Limited, motor-car dealers and agents, against John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer, and the said John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer, sued on their own behalf and on behalf of all other members of the Motor Trade Association.

The statement of claim alleged that the association purported to carry on business for the purpose of encouraging and protecting the motor industry in the United Kingdom and throughout the world and to watch over and protect the interests of manufacturers, &c. The statement of claim went on to say: "The defendants Chilton, Bennett, and Denyer substantially own and control the business and undertaking of the association and such business is in truth and in fact carried on for their profit and benefit.

"Further or alternatively, the association is an unregistered association of motor dealers and of motor manufacturers. The defendants Chilton, Bennett, and Denyer are and were at all material times members of the said association and also are and were members of a committee conducting the affairs of the association on the members' behalf and are sued as representing the general body of the members. The said defendants are and were at all material times the trustees of the association and the funds of the association were vested in them as such trustees. The said funds are and were at all material times the property of the members of the association and vested in the said trustees upon trust for the members."

The statement of claim then stated that the plaintiffs became members of the association, and it alleged a conspiracy between the defendants and one Neale to induce the plaintiffs by fraudulent representations to break a by-law of the association with regard to the maintenance of prices. As the result of the alleged conspiracy the plaintiffs were induced to pay to the defendants the sum of £332 and to give an undertaking to maintain the protected prices. On March 17, 1926, the present defendants issued a writ claiming from the plaintiffs a further £100. The plaintiffs in that action were described as "John Chilton and Harry Arnold Bennett suing on behalf of themselves and all other members of the Motor Trade Association." That action was discontinued.

On April 5, 1927, Master Jelf, on the defendants' application in the present action, made two orders: (1) dismissing the action against the defendants in a representative capacity; and (2) amending the writ and subsequent proceedings by striking out the words "and the said John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer sued on their own behalf and on behalf of all other members of the Motor Trade Association," and also striking out the words of the statement of claim set out *verbatim* above.

The plaintiffs appealed.

Sir Henry Slesser, K.C., and Mr. Harold Simmons appeared for the plaintiffs; Mr. Giveen for the defendants in their representative capacity; and Mr. St. John Field for the defendants in their personal capacity.

SIR HENRY SLESSER said that the question was whether he was entitled to proceed with his action. The association was an unregistered trade union with a certificate from the Registrar of Friendly Societies. It was contended against him that this action was founded on tort. As to that he would submit that this action was founded on contract as well as on tort, but the most important question was whether, if the action was founded on tort, it was correct to say that a trade union could not be sued through its trustees. To that question the defendants said, (1) that it was unarguable; and (2) that the objection to the statement of claim was really a plea in abatement which, though formally abolished, survived in substance, and a summons to strike out was really the only way in which a defendant could be protected. Master Jelf had given a note of his opinion in these terms :—

"Although I think that the argument of the plaintiffs is wrong I do not think that it is "unarguable" within the meaning of *Evans v. Barclays Bank* ([1924] W.N., 97) (and the case there cited), in which the Court of Appeal decided that I should have let the action proceed.

"But I think that this case depends upon a different principle. Pleas in abatement having been abolished, I think that an application to strike out is the only appropriate remedy for the defendants. The Judicature Acts in abolishing pleas of abatement were only

dealing with a matter of form and not of the rights of the parties."

Counsel submitted that the first part of this note was a finding in his favour. If he had an arguable point, he was entitled to go on (*Goodson v. Grierson*, 24 *The Times* L.R., 364 ; [1908] 1 K.B., 761). On the question of abatement he cited *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (40 *The Times* L.R., 837 ; [1925] A.C., 112). Admittedly, an ordinary unincorporated society which did not depend for its validity on statute could not be sued, but a trade union was the creature of statute and could be sued either in contract or tort (*Walker v. Sur and others*, 30 *The Times* L.R., 171 ; [1914] 2 K.B., 930 ; *Mercantile Marine Service Association v. Toms* [1916] 2 K.B., 243 ; *Curle v. Lester and another*, 9 *The Times* L.R., 480).

Having submitted that the present action was founded on contract, counsel proceeded to the point that even if it were founded on tort the action was not precluded by the Trade Disputes Act, 1906. Section 16 of the Trade Union Act Amendment Act, 1876, contemplated three classes of trade unions—unions of workmen and workmen, unions of masters and masters, and unions for imposing restrictions on trade. The words used in section 4 of the Trade Disputes Act, 1906, were not new, but went back to section 16 of the Act of 1876. Many unions for imposing trade restrictions imagined, and possibly erroneously, that they were protected by the Act of 1906. But, notwithstanding the general definition in section 5, section 4 was expressly limited to the two classes of unions of employers and of workmen. His Lordship had not to decide whether that view was right, but whether he was entitled to raise the point.

There was a further point under section 4 (2) of the Act of 1906, whether the union could not be sued if its trustees were joined. Section 4 (1) being general in its terms, the trustees could be sued under section 4 (2) (except in the case of a trade dispute), if the tort was within section 9 of the Trade Union Act, 1871. It would be said that section 9 applied only to registered unions, but the observations in *Vacher and Sons, Limited, v. London Society of Compositors* (29 *The Times* L.R., 73 ; [1913] A.C., 107) seemed to show that it applied generally.

Summarizing his argument, Sir Henry Slesser said : (1) The distinction between a case which was unarguable and one which depended on abatement was misconceived. When he could show that he could sue in contract or tort, the whole remedy was open. The union had a certificate and was a creature of the register. The Master admitted that he ought to be allowed to argue subject to the plea in abatement. (2) The action could be said to be founded on contract or on tort. There was an agreement and consideration which had failed. The plaintiffs asked for the return of their money. That was a question for decision at the trial. There was certainly a constructive contract, and the matter was not wholly a tort within section 4 of the Act of 1906. (3) This union was one neither of men nor masters. (4) The plaintiffs were suing trustees and were entitled to proceed, even though the association was unregistered. He asked that the matter should go forward and be decided by the Court.

Mr. Giveen submitted that the Master was right. In the *Taff Vale* case (17 *The Times* L.R., 698 ; [1901] A.C., 426) the whole matter dealt with was interlocutory. In *Parr v. Lancashire and Cheshire Miners' Federation* (29 *The Times* L.R., 235 ; [1913] 1 Ch., 366) no interlocutory application was made. This case came under the old head of a plea of abatement. Since that plea was abolished, the procedure was by application to strike out.

After dealing in detail with the statement of claim, counsel argued that there was no sufficient indication of the defendants' being trustees within the Trade Union Act of 1871, and that the claim for money had and received could not be used to sue in contract on a claim really arising in tort (*Brocklebank, Limited v. The King*, 40 *The Times* L.R., 869 ; [1925] 1 K.B., 52).

The exiguous suggestion of contract was joined with claims for fraud, conspiracy, and libel. There was no case in which a money claim as distinct from an injunction had ever been maintained against an unincorporated society. If allowed in this case it would be the first time that this had ever been done in English law. Counsel dealt with the cases of *Mercantile Marine Society v. Toms* (*supra*) and *Walker v. Sur and others* (*supra*). Here the real wrongdoers were before the Court, and there was no need for a representative action. The *Taff Vale* case (*supra*) was a claim for an injunction ; here they were not suing a registered trade union, and the suggestion that unincorporated bodies could be sued in a representative action was *obiter*, and there were equally weighty *dicta* the other way. As an old-fashioned common lawyer he could not conceive how the judgment should be framed or how execution should be levied.

It was a little ominous for the plaintiffs' case if they had to rely on a case which was overruled by Act of Parliament. The more the *Taff Vale* case (*supra*) was in the plaintiffs' favour, the more the Trade Disputes Act, 1906, was against them. He had never before heard that "trade union" in section 4 of the Trade Disputes Act, 1906, did not include associations for regulating trade. Section 9 of the Trade Union Act, 1871, only applied to contract ; his very good authority for that was Sir Henry Slesser's book on Trade Union Law, at p. 54.

Sir Henry Slesser.—I appear to have overlooked the observations of Lord Haldane in *Vacher and Sons, Limited v. London Society of Compositors* (*supra*).

Mr. Giveen.—I do not think that much was overlooked in writing that book. The object of the Trade Disputes Act, 1906, was to protect the funds of a society from liability for the torts of its officials. Sir Henry Slesser now sought to say that one could exhaust the funds of the society by suing the trustees in a representative action.

Sir Henry Slesser, in answer to a question by Mr. Justice Fraser, said that he no longer contended that the defendants were being sued as trustees, and, therefore, the argument which he had based on section 4 (2) of the Trade Disputes Act, 1906, did not apply. He still contended that the defendants could be sued in a representative capacity.

Mr. Giveen summarized his arguments. He contended that the whole purpose of the Trade Disputes Act, 1906, would be evaded if, for a claim for money had and received which really arose in tort, there were substituted a claim framed in contract, *Brocklebank, Limited v. The King* (*supra*).

Mr. St. John Field, who appeared for the three defendants in their personal capacity, contended that the words alleging a representative capacity ought to be struck out of the statement of claim. They became embarrassing when associated with the defence of the three individuals. Such defence ought to be left to be dealt with on its own merits. Moreover, the persons who had been selected as representative of all the members might cease to be representative before the action came to trial.

Sir Henry Slesser, in reply, contended that the parties must be regarded as sufficiently representative of the whole body, inasmuch as they had themselves recently sued as plaintiffs in a representative action on the same subject-matter. They had pleaded that they owned and controlled the funds of the association. Again, if they did consider that they were not sufficiently representative, it was always open to them to issue a summons to join other members.

With regard to the question whether a representative action would lie at all, trade unions were of three kinds—a union of workmen, a union of masters, and a union whose object was the imposing of restrictive conditions on the conduct of business. It was clear that the defendants came within the last category. It was never the intention of the Trade Disputes Act, 1906, that exemption from common law liability should extend to that kind of trade union. Lord Macnaghten in the *Taff Vale* case (*supra*) had clearly expressed the view that an unregistered trade union could be sued, either in contract or tort, in a representative action. The present action was clearly an action for breach of contract, and entirely different from *Brocklebank, Limited v. The King* (*supra*). If it were regarded as an action for tort the onus still rested on the defendants to show that they were exempted from the provisions of the common law.

His Lordship, in his considered judgment, said that the first order was made on the application of Mr. Giveen for the defendants sued on their own behalf and on behalf of all other members of the Motor Trade Association, and the second order was made on the application of Mr. St. John Field for the defendants sued on their own behalf.

The Motor Trade Association was an unregistered trade union, and on June 3, 1914, it was certified by the Registrar of Friendly Societies to be a trade union under section 2 (3) of the Trade Union Act, 1913.

The statement of claim contained 31 paragraphs. Paragraphs 1, 2, and 3 were as follow :—

"1. The plaintiffs are agents for the sale of and dealers in motor-cars. The defendants, the Motor Trade Association, purport to carry on business for the purpose of encouraging and protecting the motor industry in the United Kingdom and throughout the world and further to watch over and protect the interests of manufacturers, wholesalers, retailers, and users of motor goods and all others having commercial relations with the motor industry. The defendants, Chilton, Bennett, and Denyer, substantially own and control the business and undertaking of the association and such business is in truth and in fact carried on for their profit and benefit.

"2. Further, or alternatively, the association is an unregistered association of motor dealers and of motor manufacturers. The defendants, Chilton, Bennett, and Denyer, are and were at all material times members of the association and also are and were members of a committee conducting the affairs of the association on the members' behalf and are sued as representing the general body of the members. The said defendants are and were at all material times the trustees of the association and the funds of the association were vested in them as such trustees. The said funds are and were at all material times the property of the members of the association and vested in the said trustees upon trust for the members.

"3. In or about February, 1920, the plaintiffs became members of the association. One of the by-laws of the association is as follows :—(1) On proof to the satisfaction of the council that any company, association, firm, or person has offered or advertised or sold any proprietary price-maintained article at a price above or below the price fixed by the manufacturer or concessionaire to which the association has granted protection the council may place the name of such person on a list to be called the "stop list" and give notice thereof to all members of the association or otherwise. This by-law shall cover hire and hire-purchase transactions in accordance with regulations issued from time to time by the council.

"The plaintiffs will at the trial of this action crave leave to refer to the objects, regulations, and by-laws of the association as though the same were here fully set out."

Counsel for the plaintiffs, Sir Henry Slesser, contended before me that the distinction between a case which was unarguable and one which depended on abatement was misconceived ; that an unregistered union could be sued in a representative action ; that this was an action which was founded in contract as well as in tort ; that the plaintiffs were suing trustees and were entitled to proceed to trial even though the association was unregistered ; and that in order to succeed on these appeals it would be sufficient for him to prove that he had an arguable point within the meaning of the judgment of the Court of Appeal in *Evans v. Barclays Bank* ([1924] W.N., 97).

In his (Mr. Justice Fraser's) opinion, however, there were two distinct and separate questions raised in these appeals to which different considerations applied.

He proceeded to deal with the ground of the first order—namely, that the statement of claim disclosed no matters giving ground for an action against the defendants as representing the Motor Trade Association or against the members thereof as represented by the defendants ; in other words, that this was not a case to which Order XVI., rule 9, was applicable. That rule said : "Having the same interest," *i.e.*, common interest. As had been pointed out by Lord Macnaghten, the rule was meant to apply the practice of the Court of Chancery to all Divisions of the High Court. That practice was to require the presence of all parties interested in the matter or suit in order that a final end might be made of the controversy, but that when the parties were numerous the rule might be relaxed and a representative suit allowed.

His Lordship referred to *Wood v. McCarthy* (9 *The Times* L.R., 447 ; [1893] 1 Q.B., 775, at p. 778). He said that the essential condition of a representative action was that the persons who were to be represented must have the same interest as the persons representing them in one and the same cause or matter (*per* Lord Justice Fletcher Moulton in *Markt and Co., Limited v. Knight Steamship Company, Limited* [1910] 2 K.B., 1,021, at pp. 1,038, 1,039 ; see also the observations of Lord Justice Vaughan Williams at pp. 1,028, 1,029, and Lord Justice Buckley at pp. 1,043, 1,044).

The claims alleged in the statement of claim in the present action were for damages for the torts of conspiracy, fraud and libel, and a claim depending on what was in the nature of quasi-contract.

Among the points raised by Sir Henry Slesser for the plaintiffs was the contention that under section 4 (2) of the Trade Disputes Act, 1906, a union could be sued if its trustees could be joined. As to that, Mr. Giveen replied that there was no sufficient indication that the defendants were trustees within the

Trade Union Act, 1871, whereupon Sir Henry Slesser applied for leave to amend by alleging that the three named defendants were sued as trustees. He (his Lordship), however, said that he would only allow the amendment at that late stage if it were supported by affidavit, and Sir Henry Slesser withdrew his application.

Now that counsel for the plaintiffs had definitely abandoned his contention that the defendants were trustees the case from some points of view bore a close resemblance to *Walker v. Sur and others* (30 *The Times* L.R., 171 ; [1914] 2 K.B., 930), but in the present action there was no claim for any declaration for the ascertainment of rights. Moreover, the actual alleged wrongdoers were before the Court.

After citing other cases, including the *Taff Vale* case (17 *The Times* L.R., 698 ; [1901] A.C., 426), his Lordship said that he was quite satisfied that on the particular facts with which he had to deal this was not a case which came within the provisions of Order XVI., rule 9. He held that there was no common interest as required by that rule, and in those circumstances it was unnecessary for him to deal with the further points raised on behalf of the defendants. Both appeals would be dismissed and there would be the same order in each case, the defendants to have the costs in any event.

Leave to appeal was granted.

[Solicitors—Mr. C. S. Tomlinson ; Messrs. Kenneth Brown, Baker, Baker.]

K.B. Div. (Rowlatt, J.) 1927. May 16.

DALE v. MITCALFE.*

Revenue—Income-tax—Income accumulated for benefit of a person contingently—Beneficiary having only a life interest—Claim to relief—Meaning of "benefit"—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 25.

By s. 25 of the Income Tax Act, 1918 :—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him" [a sum calculated as therein mentioned].

Held, that the words "for the benefit of" include a case where the accumulations of income are added to the capital of a trust fund in which the beneficiary has only a life interest and where therefore the accumulations never pass to the beneficiary.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

This was a case stated by the Commissioners for the General Purposes of the Income Tax Acts.

At a meeting of the Commissioners on October 29, 1925, Mary Catherine Louise Mitcalfe (formerly Burn), the wife of William Stanley Mitcalfe, of Oak House, 17, Aigburth Hall-road, Liverpool (hereinafter called the respondent), appealed against an objection made by the Inspector of Taxes for Hexham (hereinafter called the appellant) to a claim made by the respondent for relief under section 25 of the Income Tax Act, 1918, in respect of income accumulated under the trusts of the settlement hereinafter referred to.

By a settlement dated October 18, 1910, made between (1) John Henry Burn and (2) the trustees therein named, John Henry Burn (hereinafter called the settlor), settled certain stocks, securities, and moneys (hereinafter called the trust funds) upon certain trusts in favour of his children, of whom he then had five—namely, two sons and three daughters, all of whom were minors. Such trusts (so far as they were material to the questions raised in this case) were as follow :—

"5. Upon trust for all or any the children or child of the settlor now living or hereafter to be born who being male shall attain the age of 21 years or being female shall attain that age or previously marry if more than one in equal shares except that each son shall take double the share of each daughter.

"7. Provided further that the said trustees or trustee shall retain the share of each daughter of the settlor now living of and in the trust funds upon the trusts following (that is to say) the said trustees or trustee shall pay the income thereof to such daughter during her life and so that during coverture the same shall be for her separate use without power of anticipation but which restraint shall not preclude the payment of such income to a bank or banker for the credit of such daughter and after the death of such daughter shall stand possessed of her said share upon the like trusts and subject to the like powers and provisions in favour of the issue of such daughter as are hereinbefore declared and contained concerning the share of each of the sons of the settlor now living in the trust funds to take effect after the death of each of such sons in the same manner in all respects as if such trust powers and provisions were herein repeated with the substitution of the name of the said daughter for such son.

"10. Provided always that the said trustees or trustee shall apply the whole or such part as they or he in their or his discretion shall think fit of the income of the expectant or presumptive share (whether settled or unsettled) of any child or grandchild of the settlor in the trust funds under the trusts hereinbefore contained for or towards his or her maintenance education or benefit (whether there is any other fund applicable or any person bound by law to provide for such maintenance or education or not) and may either themselves so apply the same or may pay the same to the parents or guardians or guardian of such child or grandchild for the purpose aforesaid without seeing to the application thereof and shall during the minority of any such child or grandchild and in the case of a female spinsterhood accumulate the surplus (if any) of the same income by investing the same and the resulting income thereof in any of the investments hereby authorized in augmentation and so as to follow the destination of the share from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the child or grandchild for the time being

presumptively entitled as aforesaid in the manner in which such accumulations might have been applied had they been income arising in the then current year."

The following facts were proved or admitted :—

The respondent, then Mary Catherine Louise Burn, was a daughter of the settlor and attained the age of 21 years on May 26, 1921, and was married to her present husband, William Stanley Mitcalfe on August 31, 1922. Income-tax, at the rates appropriate to each tax year, had been duly paid by deduction or otherwise by the trustees for the time being of the settlement, in respect of the whole income of the trust funds up to May 26, 1921. As from that date the income of her share of the trust funds (including the income of her share of the invested accumulations) had been paid to the respondent, and she had been fully repaid all the tax recoverable by her in respect of such income up to the date of her marriage. The respondent claimed on September 12, 1922, under section 25 of the Income Tax Act, 1918, repayment of £380 3s. 11d., for or on account of tax paid or deducted in respect of income from the income accumulated during her minority under the settlement. The appellant refused the claim. The accumulations of income from the trust funds were, during the minority of the respondent, set aside to the credit of a separate accumulations fund in the names of the trustees of the settlement.

The claim was refused by the appellant on the ground that "as the accumulations of the income are added to the capital of the trust fund which never passes to the beneficiary the claim under section 25 of the Income Tax Act, 1918, cannot be admitted."

No question arose as to figures in the case.

It was contended on behalf of the respondent :—That the surplus income of the trust fund had been accumulated during her "minority for her benefit," to the extent of the share thereof to the income of which she became entitled on May 26, 1921, inasmuch as, on attaining the age of 21 years, she became entitled to receive the income from those accumulations in addition to her other income ; that the words "for the benefit of" in section 25 must be given their ordinary meaning, there being nothing in the Act to restrict that meaning in the way suggested by the Crown ; that the surplus income had been accumulating for the benefit of the respondent within the meaning of section 25 none the less because she was not under the trusts of the settlement entitled absolutely to those accumulations ; and that clause 10 of the settlement empowered the trustees of the settlement to apply accumulations in any subsequent year for the benefit of the child or grandchild presumptively entitled to a share in the trust funds in the manner in which such accumulations might have been applied had they been income arising in the then current year.

The appellant contended, *inter alia*, that the respondent was not entitled to the repayment of tax claimed under the provisions of section 25 of the Income Tax Act, 1918, and that the claim had, therefore, been rightly refused.

The General Commissioners held that the respondent was entitled to repayment of the tax the subject of the claim.

By section 25 of the Income Tax Act, 1918 :—

"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him [a sum calculated as therein mentioned]."

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown ; Mr. Latter, K.C., and Mr. Cyril King for the respondent.

MR. JUSTICE ROWLATT said that, in his judgment, the General Commissioners were right. The words that he had to construe were, "accumulated for the benefit of any person contingently on his attaining some specified age or marrying." Here the money was accumulated contingently on the beneficiary's attaining 21 or marrying, and the accumulations were to be capitalized. She was to receive interest on the accumulations, and so she would be provided for in a way in which it was customary for people of means to provide for their daughters.

It was said that "accumulation for the benefit" of a person meant that the accumulations were to be paid to the beneficiary on attaining the specified age. He agreed with Mr. Hills to this extent that, if a will were so carelessly drawn that money was left "for the benefit" of someone, that person could require the money to be paid to him. But he did not think that the converse was true. Parliament had used very wide words, "for the benefit of any person," and, if one applied ordinary language to a well-known social phenomenon, then when a man made provision of this sort he was providing "for the benefit" of his daughter.

He did not see his way to cut down those words in the manner suggested by the Crown. The only difficulty was one which affected the matter obliquely. If the tax had been less, or had not been deducted, the beneficiary would not have got the money, because it would have been accumulated and invested. That was a difficulty, but he did not think that he could cut down the words. The whole thing was very artificial, and this might be a *casus omissus*, or it might be that the trustees could make the respondent account for the money ; but he must dismiss the appeal.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Gregory, Rowcliffe and Co., for Messrs. Cooper and Jackson, Newcastle-on-Tyne.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927.
April 29.

REX v. MINISTER OF HEALTH—EX PARTE WORTLEY RURAL DISTRICT COUNCIL.*

Rating—Assessment area—Scheme—Proportion of different classes of members—Scheme providing actual number of representatives of each authority—Rating and Valuation Act, 1925 (15 and 16 Geo. V., c. 90), ss. 16 (2), 17 (4), 67 (1).

A scheme for the constitution of an assessment area under the Rating and Valuation Act, 1925, may specify the total number of members and

* Reported by J. W. HALL, Esq., Barrister-at-Law.

the number to be allotted to each rating authority, board of guardians, and county council, and is not confined to specifying the total number and the proportion between the different classes of authorities, so as to leave the authorities themselves to agree upon the number of members to be allotted to each authority of each class.

Observations on the powers given to the Minister of Health by s. 67 (1) of the Act.

This was a rule *nisi* for a *certiorari* to quash an order dated November 12, 1926, whereby the Minister of Transport purported to approve with modification a scheme made by the County Council for the West Riding of Yorkshire, and dated July 21, 1926, under the Rating and Valuation Act, 1925, upon the grounds that the constituent authorities were entitled to decide among themselves : (1) On the size or number of the Assessment Committee ; (2) on the mode of representation of their own group.

By section 16 (2) of the Rating and Valuation Act, 1925, county councils were required to make and submit to the Minister of Health a scheme for the constitution of assessment areas consisting of one or more rating areas.

Section 17 (3) provides for the constitution of the Assessment Committee in assessment areas which were county boroughs. Section 17 (4) provides : " In the case of any other assessment area the Assessment Committee shall consist of persons to be appointed by the following authorities, being authorities whose area or any part of whose area is comprised in the assessment area, that is to say, rating authorities, boards of guardians, and the councils of counties, and the proportion in which the said authorities shall be represented shall be determined by the scheme constituting the area."

The scheme in question in the present case constituted a number of assessment areas in the West Riding of Yorkshire, one of which was the Staincross area, consisting of the Wortley Rural District and 16 other smaller areas, making a total estimated population for the new area of 143,478 persons, with an assessable value of £707,494. The Wortley Rural District had a population estimated at 28,950 persons, with an assessable value of £182,758. An Assessment Committee was created for the area consisting of 28 members, of whom three were to be appointed by the county council, two by each of the three boards of guardians, two by the Wortley Rural District Council, and two by one urban district, while 13 urban districts and one rural district were to appoint one each. Save as aforesaid the scheme did not purport to determine the proportion in which rating authorities, boards of guardians and the county council should be represented.

The Wortley Rural District Council submitted that within the limits of the proportions to be fixed by a scheme the constituent authorities were entitled to decide among themselves (1) the size of the Assessment Committee, and (2) the mode of representation of their own group.

The Attorney-General (Sir Douglas Hogg, K.C.), and Mr. W. Bowstead showed cause for the Minister of Health ; Mr. Scholefield, K.C., and Mr. M. FitzGerald appeared for the County Council ; Mr. Montgomery, K.C., and Mr. St. John Micklethwait, K.C., supported the rule.

The Lord Chief Justice.—This is an order *nisi* for a writ of *certiorari* to be directed to the Minister of Health to remove into this Court an order dated November 12 last, whereby the Minister purported to approve with modification a scheme made by the County Council for the West Riding of Yorkshire under date July 21, 1926, that scheme having been made under the Rating and Valuation Act, 1925.

The grounds upon which the rule was granted on January 21, 1927, were two-fold : firstly, that under the Rating and Valuation Act, 1925, the constituent authorities are entitled to decide among themselves on the size and number of the Assessment Committee ; and, secondly, that they are entitled to decide among themselves on the mode of representation of their own group.

This recent statute is entitled : " An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates. . . . " The first part of the statute deals with rating. When we come to the second part, at section 16, the topic is valuation, and that part begins with provisions as to areas and authorities. By section 16, subsection 2, there is imposed upon the council of every county a certain duty : " As soon as may be after the passing of this Act the council of every county shall, after consultation with the authorities of the rating areas in the county and with the boards of guardians of the poor law unions situate wholly or partly in the county, make and submit to the Minister a scheme for the constitution of assessment areas consisting of one or more rating areas." Various detailed provisions are added with reference to the making of the scheme, and it is provided, for example, by subsection 10 : " In making schemes under this section regard shall be had to the population and rateable value of the rating areas which will be affected by the scheme and to the desirability that each assessment area shall have an administrative centre which is appropriate for the carrying out of the work of assessment in the area and convenient for the attendance of the persons interested therein, and that suitable premises for the transaction of the business of the Assessment Committee for the assessment area shall be available without unnecessary expenditure." Then it is provided by section 17 : " (1) There shall be an Assessment Committee for every assessment area. (2) The Assessment Committee for an assessment area shall, in the case of an assessment area being a county borough, be appointed as soon as may be after the passing of this Act, and in the case of any other assessment area shall be appointed as soon as may be after the assessment area has been constituted, and as from the appointed day Assessment Committees shall exercise such powers and perform such duties as are conferred on them by this Act, and all Assessment Committees constituted under the Union Assessment Acts, 1862 to 1880, shall cease to exist." Next, in subsection 3 there comes a specific provision as to an assessment area which is a county borough. In that case the committee is to consist " of such number of persons to be appointed by the council of the borough as may be determined by the council," and also it is provided that of the persons to be so appointed not less than a quarter are to be persons appointed to represent boards of guardians and not less than one-fifth persons who are neither members of the council nor members of the boards of guardians. Finally comes the subsection upon which the controversy in this case has chiefly turned (4) : " In the case of any other assessment area the Assessment

Committee shall consist of persons to be appointed by the following authorities, being authorities whose area or any part of whose area is comprised in the assessment area, that is to say, rating authorities, boards of guardians and the councils of counties, and the proportion in which the said authorities shall be represented shall be determined by the scheme constituting the area." Now this task, whatever may be the true dimensions and meaning of the task, comes to be a part of that which has to be done by the county council in discharging the imperative duty that is laid upon it by this Act.

The argument that was made by those who support the rule may, I think, be stated in this way. They say that the statute does indeed require the scheme to determine the proportion of representation as between three different kinds or types or groups of authorities, that is to say, rating authorities, boards of guardians and county councils, but the statute neither requires nor permits the scheme to determine the number of representatives whom a particular rating authority or a particular board of guardians or a particular county council is to appoint. The question turns, therefore, largely upon the true construction of this subsection (4). It is conceded by Mr. Montgomery in argument that it may well be that under this section, read together with other sections, the county council is empowered to determine the total number of representatives, but he denies that the county council can do more, having appointed the total number, than decide the proportion of representation as between the three various groups. In my opinion, that construction must do some violence to the words of this subsection. It involves, I think, two things : (1) That the phrase "the proportion in which the said authorities shall be represented shall be determined by the scheme" means the mere proportion and nothing more ; (2) that the words "the said authorities" are to be read as if they were "the said kinds or types or groups of authorities." Now it is not denied that in the course which has in fact been taken by the county council in making the scheme and by the Minister of Health in approving it the total number has been fixed and the proportion has been fixed, but the proportion is not stated superficially as a proportion between groups of authorities ; the proportion is collected from an examination of the number of representatives accorded to each particular example of the various kinds of authorities. I am not suggesting that these words are not open to some criticism on the ground of ambiguity ; but, looking at the purpose of the Act and at the scheme as a whole, I think that, even if the words be open to two constructions, we ought to adopt that construction which makes for good sense and the working of the Act. The other construction seems to me to lead to chaos and uncertainty in a remarkable degree. I think, therefore, that the contention that there has been here a usurpation or excess of jurisdiction fails.

I should like to add that there is a very remarkable provision in this statute, which may interest those persons, if there are any, who observe the progress of departmental authority. Section 67 (1) provides : "If any difficulty arises in connexion with the application of this Act to any exceptional area, or the preparation of the first valuation list for any area"—these are words of remarkable comprehensiveness—"or otherwise in bringing into operation any of the provisions of this Act," the Minister of Health may do a series of remarkable things. He may "by order remove the difficulty." The imagination fails to contemplate at one view the extent and variety of the power which is given to the Minister under this section. He may by order remove the difficulty. He may cut the Gordian knot in any way that seems best to him. He may declare any Assessment Committee to be duly constituted ; he may make any appointment or "do any other thing which appears to him necessary or expedient for securing the due preparation of the list or for bringing the said provisions into operation," and the Legislature, not content with arming the Minister with those remarkable and varied and far-reaching powers, goes on to provide that "any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient"—for what purpose? For carrying the Act into effect ? Not at all—"for carrying the order into effect." This, I think, though I say it with some hesitation, may be regarded as indicating the high water mark of legislative provisions of that character. It is obvious apparently that, if this Court had taken another view of the case presented to us and had decided to quash this order as having indeed been made *ultra vires*, the Minister to-morrow might, under the provisions of section 67, have arrived at the same end by making an order and removing the difficulty.

In my opinion, the argument on behalf of those who support this rule has failed and I think that this order *nisi* ought to be discharged.

MR. JUSTICE AVORY.—I am of the same opinion, and have nothing to add.

MR. JUSTICE SHEARMAN.—I agree.

[Solicitors—The Solicitor to the Ministry of Health ; Messrs. Warwick Williams and Marchant, for Mr. J. C. McGrath, Wakefield ; Messrs. Torr and Co., for Mr. James Morton, Sheffield.]

K.B. Div.
(Lord Hewart, C.J., (Avory and Shearman, JJ.)
1927.
Apr. 29.

SKINNER v. JACK BREACH, LIMITED.*

Master and Servant—Wages—Trade—Minimum wage—Mending of nets for use in employer's own business — Trade Boards Act, 1909 (9 Ed. VII., c. 22), ss. 1, 6, 9.

The word "trade" in the Trade Boards Acts, 1909 and 1918, is not confined to operations of buying and selling, but denotes any branch of work in which persons are employed commercially, provided that the employment is not casual or by a private person.

Held, therefore, that the minimum wage fixed for workers in the drift net mending industry applied to workers employed solely in mending nets, the property of, and used in the business of, their employers, who were fishermen and fishing boat owners.

This was a case stated by justices for the borough of Lowestoft.

An information was preferred by the appellant, Agnes Lawson Skinner, an officer appointed under the provisions of the Trade Boards Act, 1909, against the respondents, Jack Breach, Limited (whose

* Reported by J. W. HALL, Esq., Barrister-at-Law.

registered office was situated at Waveney Chambers, Lowestoft), under the Trade Boards Act, 1909, and the Trade Boards Act, 1918, and the order of the Ministry of Labour made thereunder dated June 24, 1926, for that they, as employers of workers in those branches of the rope, twine, and net trade in Great Britain for which a minimum rate of wages had been fixed by the Drift Nets Mending Trade Board (Great Britain), in pursuance of the Trade Boards Acts, 1909 and 1918, did on July 10, 1926, at The Shoals, Whapload-road, Lowestoft, unlawfully fail to pay wages at not less than the minimum rate to Edith Alice Finch, of 1, Cumberland-place, Whapload-road, Lowestoft, being one of the said workers. The information was heard on December 2, 1926, and the justices dismissed it.

Upon the hearing of the said information the following facts were proved or admitted :—

(*a*) That upon July 11, 1919, the Minister of Labour by virtue of the powers conferred upon him by the Trade Boards Acts, 1909 and 1918, made a Special Order of the above date (Statutory Rules and Orders, 1919, No. 930) to the effect that from and after July 18, 1919, the Trade Boards Acts, 1909 and 1918, should apply to the trade specified in the schedule of the said order as follows :—

"The Rope, Twine, and Net Trade, that is to say :— . . .

"(4) The braiding or splicing of articles made from rope, cord, twine, or net.

"(5) The mending of nets, . . ."

(*b*) That upon July 27, 1925, the Minister of Labour by virtue of the said powers made a Special Order varying the above-named Special Order as follows :—

"The following new paragraph shall be inserted in the Appendix to the Trade Boards (Rope, Twine, and Net) Order, 1919, after paragraph 4 and immediately preceding paragraph 5, that is to say :

"4 (*a*) The mending, refitting, and reconditioning of drift nets including all processes (whether similar to the foregoing or not) incidental thereto."

(*c*) That on July 28, 1925, the Minister of Labour by virtue of the said powers and in consequence of the said amending order set out in the immediately preceding paragraph made regulations amending the principal regulations and on the same date made regulations entitled the Trade Boards Drift Net Mending Trade, Great Britain (Constitution and Proceedings) Regulations, 1925, whereby (*inter alia*) it was provided as follows :—

"A Trade Board shall be established in Great Britain for the following branch of work in the rope, twine, and net trade as specified in the Trade Boards (Rope, Twine and Net) Order, 1919, as amended by the Trade Boards (Rope, Twine and Net and Drift Nets) Order, 1925, that is to say :—

"The mending of the net mesh of drift seine or similar nets except when done in a factory or workshop in which any of the following articles are made or re-made : (*a*) rope (including driving rope and banding), (*b*) cord, (*c*) core for wire ropes, (*d*) lines, (*e*) twine (including binder and trawl twine), (*f*) lanyards, (*g*) net and similar articles."

(*d*) That the general minimum times, rates, and overtime rates were fixed for certain classes of female workers by the aforesaid Trade Board for the drift nets mending trade in Great Britain, which rates were duly confirmed by the order of the Minister of Labour dated June 24, 1926, wherein it was ordered that such rates for such class of workers as were set out in the schedule thereto should become effective from June 28, 1926.

(*e*) That the respondents were a company carrying on the business of fishing and owning and employing their own boats for the purpose. The vessels brought their catch into the harbour of Lowestoft, where the same was sold.

(*f*) That the aforesaid Edith Alice Finch had been employed from March, 1923, and was still employed, as an adult female worker, by the respondents at The Shoals, Whapload-road, Lowestoft, the premises of the respondents, known as beating chambers, in the mending of drift nets, the property of the respondents. The said drift nets were used by the respondents in their said business as drift fishermen and fishing boat owners. The respondents' said business did not include the manufacture of nets or the repair of nets other than nets owned by and used in the business of the respondents.

(*g*) That there were employed on July 9, 1926, by the respondents at their said premises about 30 other women besides the said Edith Alice Finch upon the work of mending the respondents' nets.

(*h*) That on or about July 10, 1926, the aforesaid worker, Edith Alice Finch, was paid as wages for the week ending July 9, 1926, the sum of 17 shillings, being 15 shillings for a week of 43½ hours work, and in addition thereto a sum of two shillings for repairs to two nets completed, by way of bonus of 1s. each net.

(*i*) That the respondents had not paid and were not at the date of the hearing paying the minimum time rates and overtime rates as fixed by the aforesaid Trade Board for the drift nets mending trade, which rates were, for those workers who had completed two years of employment in the drift nets mending trade, 22s. per week of 44 hours or 21s. 10d. per week of 43½ hours.

On the part of the appellant it was contended that the respondents carried on the trade of mending drift nets, in which trade the aforesaid Edith Alice Finch was employed, and that such employment was subject to the provisions of the Trade Boards Acts, 1909 and 1918, by the operation of the orders above referred to.

On the part of the respondents it was contended that the respondents carried on no trade, and that before the Minister of Labour could make any order there must be a trade to which he could apply such an order ; that, if the business of drift fishermen and fishing boat owners constituted a trade, then the incidental mending of drift nets of the respondents was no part of that trade or of any trade ; that the said premises were not a factory or workshop, and in any case that the Trade Boards Acts, 1909 and 1918, and the orders and regulations made thereunder, did not apply to the mending of drift nets by workers employed by the respondents in the circumstances set out above.

The attention of the justices was directed to the following decisions :—

Palmer v. Snow (16 *The Times* L.R., 168 ; [1900] 1 Q.B., 725) ; *Nash v. Hollinshead* (17 *The Times* L.R., 352 ; [1901] 1 K.B., 700) ; *Curtis v. Shinner* (22 *The Times* L.R., 448) ; *Attorney-General v. Plymouth Corporation* (25 *The Times* L.R., 418).

The majority of the justices were of opinion that since the respondents only repaired their own gear or nets and used the same for their own purposes they were not carrying on a trade as provided for by the Trade Boards Acts, and that such Acts only applied to operations which were carried on as a trade. The justices accordingly dismissed the said information.

The question upon which the opinion of the Court was desired was whether, upon the above statement

of facts, the justices came to a correct determination and decision in point of law.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. C. W. Lilley appeared for the appellant; Mr. Neilson, K.C., and Mr. Dodson for the respondents.

The Lord Chief Justice.—This is a case stated by justices for the borough of Lowestoft. The question arises in the following way. An information was preferred by the present appellant, an officer appointed under the provisions of the Trade Boards Act, 1909, against the present respondents for that they, as employers of workers in those branches of the rope, twine and net trade in Great Britain for which a minimum rate of wages had been fixed by the Drift Nets Mending Trade Board, in pursuance of the Trade Boards Acts, 1909 and 1918, did on July 10, 1926, in Lowestoft, unlawfully fail to pay wages at not less than the minimum rate to one Edith Alice Finch, being one of the said workers. The justices, having heard the information, decided by a majority that the summons ought to be dismissed. The question for this Court is whether, in so deciding, they came to a correct determination in point of law.

So far as the facts are concerned, they may be briefly stated. The respondents, as the case shows, are a company carrying on the business of fishing, and owning and employing their own boats for that purpose. Their vessels bring the catch into the harbour of Lowestoft, and there the fish are sold. Edith Alice Finch, whose wages were said to be deficient, had been employed by the respondents for a considerable time. She had been employed by them ever since March, 1923, and she was still employed by them as an adult female worker at their premises in Lowestoft in the mending of drift nets, the property of the respondents. These drift nets were used by the respondents in their business as drift fishermen and fishing boat owners. On the material date, July 9, 1926, there were employed by the respondents at those premises some 30 other women in addition to Edith Alice Finch upon the work of mending the respondents' nets, and on or about July 10, 1926, Edith Alice Finch was paid as wages for the week ending July 9, 1926, the sum of 17s., being 15s. for a week of 43½ hours, and, in addition to that sum, a sum of 2s. for repairs to two nets completed, by way of bonus of 1s. each. The case further finds as a fact that the respondents had not paid, and were not paying, the minimum time rates and overtime rates as fixed by the Trade Board for the drift nets mending trade. These rates were, for workers who had completed two years of employment in the drift nets mending trade, 22s. for a week of 44 hours, or 21s. 10d. for a week of 43½ hours.

The respondents on their part contended that they carried on no trade, and that before the Minister of Labour could make any Order there must be a trade to which he could apply the Order; that if the business of drift fishermen and fishing boat owners constituted a trade, then the incidental mending of drift nets, the property of the respondents, was no part of that trade or of any trade; and further that the premises of the respondents were not a factory or workshop; and in any case that these statutes, and the orders and regulations made under them, did not apply to the mending of drift nets by workers employed by the respondents in the circumstances of this case. In the result a majority of the justices formed the opinion that, as the respondents repaired only their own gear or nets and used them for their own purposes, they were not carrying on a trade, and therefore that these statutes did not apply.

So far as the law is concerned, it is common ground that on July 11, 1919, the Minister of Labour, by virtue of the powers conferred upon him by the Trade Boards Acts, 1909 and 1918, made a Special Order, which is No. 930 of the Statutory Rules and Orders, 1919, to the effect that from and after July 18, 1919, the Trade Boards Acts should apply to the trade specified in the schedule to the Order, and that trade was the rope, twine and net trade, and it included amongst other things No. 5, the mending of nets "where these operations or any of them are carried on in a factory or workshop" in which any of certain specified articles were made or re-made. Then came a Supplemental Order on July 27, 1925. The Minister of Labour, by virtue of the powers already referred to, varied that Special Order by inserting a new paragraph in the appendix to it. That new paragraph was paragraph 4 (*a*), and it is in the following terms: "The mending, refitting and reconditioning of drift, seine or similar nets, including all processes (whether similar to the foregoing or not) incidental thereto." Regulations followed, and a Trade Board was established in Great Britain for what was described as "The following branch of work in the rope, twine and net trade, as specified in the Trade Boards (Rope, Twine and Net) Order, 1919, as amended by the Order of 1925, that is to say, the mending of the net mesh of drift seine or similar nets except when done in a factory or workshop in which any of" certain named articles were made or re-made.

To complete the matter so far as the law is concerned, under that Order and Regulation there followed the fixing of general minimum time rates and overtime rates for certain classes of female workers by the Trade Board for the drift nets mending trade, and these rates were duly confirmed by Order of the Minister dated June 24, 1926, so that they became effective from June 28, 1926. It was not disputed that if these rates were applicable to the case of Edith Alice Finch she was underpaid.

The real question, which emerged in the argument before the justices and has been elaborated before us, may be stated in the following way: Does the Act apply only to persons of one of the specified trades employed by an employer whose trade is that trade, or does it apply also to persons of one of the specified trades by whomsoever he is commercially employed?

Our attention has been directed to a series of cases of which perhaps the chief is *Nash v. Hollinshead* (17 *The Times* L.R., 352; [1901] 1 K.B., 700), for the purpose of arguing that here there was no trade of drift net mending carried on by these respondents. But it is a little important to remember that that case, and all the other cases of the same class that were cited to us, turned upon the meaning of words in a different Act of Parliament which had a different purpose. We have to look at the true meaning of the Trade Boards Acts and the Orders and Regulations made under them. No doubt in a great many contexts the word "trade" indicates the process of buying and selling, but that is by no means an exhaustive account of its meaning. It may also mean a calling or a class of work or a branch or class of skilled labour, and when one looks at Acts like the Trade Disputes Act, 1906, it is apparent that the word "trade" is commonly used to indicate the position created by the relation of employer and employed in certain industries or classes of labour. So, for example, the compositor says that his trade is the

trade of a compositor, the engineer, that his trade is the trade of an engineer, and a trade union is spoken of under a name which indicates the trade, calling or avocation or occupation of the persons, the skilled handicraftsmen, who are included within it. Now in this Act, the Trade Boards Act of 1909, the first provision is that the Act is to apply to the trades specified in the schedule to the Act and to any other trades to which it has been applied by Provisional Order of the Board of Trade made under this section, and when one looks at the trades which are specified in the schedule one finds there participles of verbs, "ready-made" and "wholesale bespoke tailoring," the making of boxes, operations of lace curtain finishing. These things, "making" and "operations," are spoken of as "trades." Subsection 2 goes on to provide that the Board of Trade may make a Provisional Order applying this Act to any specified trade to which it does not at the time apply, if they are satisfied that the rate of wages prevailing in any branch of the trade is exceptionally low as compared with that in other employments and that the other circumstances of the trade are such as to render the application of this Act to the trade expedient, and it was in pursuance of these powers that in due course another participle, or substantive based upon a participle, was added to denominate a new trade which was brought within the ambit of the Order, "The mending of the net mesh of drift, seine or similar nets." When one looks further, by section 2 (1) it is provided that "the Board of Trade shall, if practicable, establish one or more Trade Boards constituted in accordance with Regulations made under this Act for any trade to which this Act applies or for any branch of work in the trade," and by section 6, where the minimum rate of wages has become effective, it is provided that an employer shall, in cases to which the minimum rate is applicable, pay wages to the person employed at not less than the minimum rate clear of all deductions, and if he fails to do so he becomes liable to a penalty. The meaning which, as it seems to me, is to be collected from phrases like that (and they by no means stand alone), and indeed from the whole scheme and purpose of the Act, is reinforced by the particular language of section 9. Section 9 no doubt is dealing with an individual matter, but it uses words which seem to me to illuminate the purpose of the statute as a whole. Section 9 provides: "Any shopkeeper, dealer or trader"—that is to say, any shopkeeper, dealer or trader whatsoever—"who by way of trade"—that is, who by way of any trade—"makes any arrangement express or implied with any worker in pursuance of which the worker performs any work for which a minimum rate of wages has been fixed under this Act, shall be deemed for the purposes of this Act to be the employer of the worker, and the net remuneration obtainable by the worker in respect of the work after allowing for his necessary expenditure in connexion with the work shall be deemed to be wages." That section shows that, even where the out-worker or the worker who provides some of the requisite materials or tools is concerned, the Act is looking to the nature of the work performed, and if he is doing the kind of work to which the minimum rate of wages has been applied, it matters not that the shopkeeper, dealer or trader would not describe his business, or, at any rate, would not describe the whole of his business, by words applicable to that particular branch of industry. No doubt questions may arise upon the topic, Where is the line to be drawn? Illustrations were put in argument of the nature of a *reductio ad absurdum*. It is enough to say, I think, that casual work is not here dealt with, nor work given by a private person; there must be a commercial employment, and, if there is commercial employment, then it does not matter that the particular work which is done by the worker is not exhaustive of the whole business or industry of the employer.

Applying that interpretation to the facts of this case, I think that, although the business of these respondents was truly to be described as the business of fishing and owning fishing boats, nevertheless they were employing not casually but regularly, not privately but for commercial purposes, a considerable number of women engaged in the work or industry of mending nets. That being so, it seems to me to be immaterial that mending nets was not the whole of the business of the respondents.

In these circumstances I think that the justices came to a wrong conclusion, and that the minimum rate applies.

Mr. Justice Avory.—I have arrived at the same conclusion with some hesitation. At first I was disposed to think that this statute and the Orders made under it applied only in the case where the employer and employed were engaged in the same trade, and the contention of the appellant before the justices rather gave colour to that view, because it is stated in the case that on behalf of the appellant it was contended that the respondents carried on the trade of mending drift nets. Now, in my opinion, the respondents did not carry on the trade of mending drift nets, and if it had been necessary for a decision of this case to establish that they did, I should think the justices' decision would have been correct. But looking at the provisions of section 9 of the Act, and particularly at the provisions of section 6, which is the penal section, I have come to the conclusion that the statute and the Orders under it cannot be limited in that way. Section 9, as my Lord has pointed out, applies to any shopkeeper who employs a worker to perform some work for which a minimum rate of wages has been fixed. That, I think, clearly contemplates a shopkeeper who carries on a particular trade and who, for his own convenience, employs some worker to do some work which may possibly be the work of another trade, a trade other than that which the shopkeeper ostensibly carries on; and section 6 is quite general in its terms when it says that "where any minimum rate of wages . . . has been made obligatory by order of the Board of Trade under this Act, an employer"—that is, any employer—"shall, in cases to which the minimum rate is applicable, pay wages to the person employed at not less than the minimum rate." That leads me to the conclusion that it is sufficient to satisfy the terms of this Act if the employer carrying on one kind of trade employs a worker to do some work which is incidental to the trade or business which the employer is carrying on, subject to the qualification which my Lord has mentioned, that the statute is not intended to apply to a private individual who gives a casual job to some person engaged in a particular trade to do work for him.

I have only one other word to add with regard to the cases which have been cited. The one that was nearest to this case was the case of *Curtis v. Shinner* (22 *The Times* L.R., 448). That was a case of mending fishing nets, but, as has been pointed out, it turned upon the Factory and Workshop Act, 1901, and the Court there had to decide whether the place where the nets were mended was a workshop within the meaning of that Act. It does not appear to me that that decision under the Factory and Workshop

Act, 1901, governs this case. For the reasons I have given this Act appears to me to apply to a case where fishermen, such as these, who were undoubtedly carrying on a trade, employ persons who are engaged in a different trade—namely, that of mending nets.

In these circumstances, I agree that the justices came to a wrong conclusion and that the case should be remitted to them. The question what penalty should be imposed in the circumstances of this particular case is a matter entirely within their discretion.

MR. JUSTICE SHEARMAN.—I am of the same opinion, and I have only a few words to add. I think the magistrates were misled by cases which were decided under another and different statute. Under some other statutes the word "trade" may have a different meaning from that which it has in this statute. In my judgment, when you look at section 1 of this Act—and I need not read it—and the reasons given as to why it was necessary and the rules as to when a Trade Board could fix a rate of wages, I think the dominant meaning of the word "trade" in this statute is "industry." The nearest synonym is "industry." It was intended, wherever it was discovered that there was a recognized form of industrial employment which was underpaid, that by the machinery of this Act, and also the subsequent amending statutes, provision should be made that the industrial workers in that kind of industry should be properly paid. When one looks at it, even without reference to section 9, I think it is clear that sections 1 and 6 enable the Board to fix a rate of wages in any specified industry between employers and employed. "Specified" does not necessarily mean anything which the Board chooses to call a trade, but some recognized species of industrial work. I have no doubt that in these circumstances if there is a species of industrial work (and that is not disputed here) known as net mending, if it is carried on by way of a trade, then the Board, as to those workers who carry it on by way of a trade, can fix a rate of wages between those workers and their employers, whatever other business the employers may carry on.

In my view, therefore, the justices were wrong, and the case must go back.

[Solicitors—The Solicitor to the Ministry of Labour; Messrs. Botterell and Roche, for Messrs Chamberlin, Talbot, and Bracey, Great Yarmouth.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. May 3.

WOODWARD v. OLDFIELD.*

Education—Defective child—Parent—Father a convict—Child residing with mother—Consent to child being sent to special school—Education Act, 1921 (11 and 12 Geo. V., c. 51), ss. 42, 53, 54 (1), 170 (12).

The parent whose consent is required to be given or unreasonably withheld before a defective child can be ordered, under s. 54 (1) of the Education Act, 1921, to be sent to a special school which is not within reach of the child's residence or to a boarding school, is the parent who has *de facto* custody of the child.

Hence in a case where the father of a defective child was a convict serving a term of penal servitude and the child resided with its mother,

Held, that the mother was the parent for the purposes of the section.

This was a case stated by Somerset justices.

A complaint was preferred on October 11, 1926, by Norman Oldfield, of Weston-super-Mare, solicitor, deputy clerk of the County Council of Somerset, on behalf of the local education authority for the county of Somerset (hereinafter called the respondent) under the Education Act, 1921, section 54, against Marion Ann Woodward (hereinafter called the appellant), for that she on October 4, 1926, at the parish of Burnham-on-Sea in the said county, being the parent of a certain defective child named Marion Lilian Woodward, over seven years of age, was on September 18, 1926, required by the said local education authority to send the said child to the special school provided by them at Sandhill Park, Bishops Lydeard, in the said county, being a school certified by the Board of Education as suitable for mentally defective girls, and that she had failed without reasonable excuse to do so, and the said local education authority applied for an order requiring the said child to be sent to a certified class or school suitable for the child and willing to receive her, pursuant to the statute aforesaid.

The complaint was heard and determined at Petty Sessions on October 18 and November 1, 1926, the said parties respectively being then present, and upon such hearing, there appearing to the justices to be no reasonable excuse why the said child should not be sent to a special school, they ordered that the said child should within 14 days from the said November 1, 1926, be sent to the special residential school for mentally defective girls at Sandhill Park, Bishops Lydeard, in the county of Somerset.

Upon the hearing of the said complaint the following facts were admitted or proved in evidence:—

(1) The appellant was the mother of the said child, Marion Lilian Woodward, and the said child then was over the age of seven years, to wit, of the age of 12 years, and was residing and at all material times resided with, and was in the actual custody of, her said mother. The said mother was stone deaf.

(2) The father of the said child was Harry Edward Woodward, who at all material times was serving a sentence of penal servitude and was imprisoned at his Majesty's Prison at Maidstone until the last week of April, 1927. The consent in writing of the child's said father or of the appellant to the said child's being sent to the special school hereinafter mentioned had not been obtained.

(3) The said child was, in fact, a defective child within the meaning of that word as used in Part V. of the Education Act, 1921, and the Somerset County Education Committee, acting as the local education authority for elementary education under powers delegated to them by the County Council of Somerset pursuant to the said Act, were satisfied, after consultation with the appellant, that she was not making suitable provision for the said child's education, whereupon they required the appellant to send the said child to a certified class or school suitable for such child, to wit, the said special school at Bishops Lydeard. The appellant failed without reasonable excuse to send the said child to such school.

(4) On June 14, 1926, one Alfred Ernest Remmett Weaver, M.D., B.Ch., D.P.H., senior assistant school medical officer under the said local education

* Reported by J. W. HALL, Esq., Barrister-at Law.

authority, being a duly qualified medical practitioner approved by the Board of Education, gave a certificate in writing which the justices found was to the effect that the said child was defective within the meaning of section 55 of the Education Act, 1921, and the justices were not satisfied that the said certificate was incorrect, but were satisfied that the same was correct.

There was no doubt expressed by the medical witnesses on either side, nor had the justices any doubt, that the said child was defective. The said Alfred Ernest Remmett Weaver gave evidence before the justices.

(5) The special school at Sandhill Park, Bishops Lydeard, was one provided by the local education authority and was duly certified as such by the Board of Education within the meaning of section 54 of the Education Act, 1921. The said school was one suitable for the said child, and the authorities at the said school were willing to receive her, and the justices considered it expedient that the said child should be sent to the said school. The said school was not within reach of the child's residence and was a boarding school. The appellant had not selected, and did not before the justices select, a suitable class or school.

(6) By letter dated September 21, 1926, the appellant, in reply to a letter to her from the local education authority, dated September 18, 1926, refused to consent, and before the justices refused to consent, to the said child's being sent to the said school.

(7) It was proved to the justices' satisfaction that the appellant unreasonably withheld her consent to the said child's being sent to the said certified school, and they were not satisfied that such consent was withheld with the *bona fide* intention of benefiting the said child.

At the hearing the appellant stated on oath that she refused her consent to the said child's being sent to the said school on the ground that she believed that the child would do better at home in charge of herself as her mother than at school, where she would be liable to be punished ; and that the child was quite capable of doing housework ; and that she believed the child to be, by reason of defective intelligence, incapable of benefiting from instruction in a special school for defective girls and that she was so advised by her medical adviser, Arthur Hugh Lowther.

The said Arthur Hugh Lowther, M.B., a registered medical practitioner practising at Burnham-on-Sea, was also called as a witness on behalf of the appellant, and he testified that he had examined the said child on one occasion, namely, on Thursday, October 28, 1926, and he gave it as his opinion that the child was feeble-minded within the definition in the Mental Deficiency Act, 1913, but that in his opinion she was incapable of benefiting by instruction at the special school for defective children under the Education Act, 1921, and that, as the child was of an emotional temperament, her interests would best be served if she remained at home in her mother's care, as it would be more beneficial for her to associate with normal persons than with other defective children, and that he had so advised the appellant.

The appellant contended that, pursuant to the terms of the said statute, the justices had no power in law to make an order that the said child should be sent to the said school on the grounds following :—

(1) That the parent of the said child within the meaning of section 54 of the Education Act, 1921, was the father and not the mother of the child, if the father was alive and could be found, and no consultation had ever taken place between the local education authority and the father of the said child.

(2) That no request had ever been addressed by the local education authority to the father of the said child that he should send the said child to the said school.

(3) That there was no evidence before the justices that the father had failed without reasonable excuse to send the child to the said school.

(4) That there was no evidence that the consent in writing of the father of the said child had ever been requested, or obtained or unreasonably withheld.

(5) That there was no evidence that the mother of the said child, in refusing her consent to the said child's being sent to the said special school, was not acting with the *bona fide* intention of benefiting the said child.

(6) That there was no evidence that the mother of the said child was acting unreasonably in withholding her consent.

(7) That the certificate aforesaid given by Dr. Weaver and put in evidence before the justices was incorrect.

The respondent contended :—

(1) That the said child was in the actual custody of the appellant and that the appellant was the parent of the said child.

(2) That on the facts admitted and proved the complaint of the respondent was made out and that the whole of the provisions of section 54 (including the proviso thereto) and of section 55 of the Education Act, 1921, were satisfied.

(3) That the justices had power in law to make the said order.

The justices were of opinion that the contentions of the respondent were correct and that those of the appellant were incorrect, and accordingly they made the order hereinbefore mentioned.

The question for the opinion of the Court was whether, upon the above statement of facts, the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

By section 42 of the Education Act, 1921 :—

"It shall be the duty of the parent of every child between the ages of five and fourteen, or, if a byelaw under this Act so provides, between the ages of six and fourteen, to cause that child to receive efficient elementary instruction in reading, writing, and arithmetic."

By section 53 :—

"The duty of a parent under Part IV. of this Act to cause his child to receive efficient elementary instruction shall, in the case of a defective or epileptic child over seven years of age in any place where a special class or school certified by the Board of Education for defective or epileptic children, as the case requires, is within reach of the child's residence, include the duty to cause the child to attend such a class or school, and a parent shall not be excused from this duty by reason only that a guide or conveyance for the child is necessary."

By section 54 (1) :—

"If a local education authority for elementary education are satisfied, after consultation with the parent of a defective or epileptic child over seven years of age, that the parent is not making suitable provision for the child's education, they may require the parent of the child to send the child to a certified class or school suitable for the child, and, if he fails without reasonable excuse to do so, may by complaint apply to a court of summary jurisdiction for an order requiring the child to be sent to a certified class or school suitable for the child and willing to receive

him, being either such as the parent may select, or, if he does not select a suitable class or school, then such class or school as the Court think expedient. . . .

"Provided that (i.) no order shall be made requiring the child to be sent to a certified class or school which is not within reach of the child's residence or to a boarding school without the consent in writing of the parent, unless it is proved to the satisfaction of the Court that such consent is unreasonably withheld, or that the parent cannot be found, but consent shall not be deemed to be unreasonably withheld if withheld with the *bona fide* intention of benefiting the child. . . ."

By section 170 (12) :—

"The expression 'parent' in relation to a child or young person includes guardian and every person who is liable to maintain or has the actual custody of the child or young person."

Mr. E. H. C. Wethered appeared for the appellant ; Mr. Croom-Johnson, K.C., for the respondent.

The Lord Chief Justice.—This is a case stated by justices for the County of Somerset. The case arises upon a complaint preferred on October 11, 1926, by the present respondent, who is deputy clerk of the County Council of Somerset, on behalf of the local education authority under section 54 of the Education Act, 1921, against the present appellant. The complaint was that on October 4, 1926, being the parent of a certain defective child named Marion Lilian Woodward, over 7 years of age, she was on a day in September last required by the local education authority to send the child to a special school provided by the authority at Sandhill Park, being a school certified as suitable for mentally defective girls, and that the appellant had without reasonable education authority under section 54 of the Education authority applied for an order requiring the child to be sent to a certified class or school suitable for the child and willing to receive her. That complaint being heard by the justices at the Petty Sessions, there appeared, the justices say, to them to be no reasonable excuse why the child should not be sent to a special school, and accordingly the justices ordered that the child should be sent to a named school within a named period. The appellant appeals from that order, and the question is whether in arriving at the conclusion set out in the case the justices came to a correct determination in point of law.

The facts of the case may be summarized quite shortly. The appellant is the mother of Marion Lilian Woodward, and that child being 12 years old at all material times resided with and was in the actual custody of her mother, who is stone deaf. The father of the child at all material times was serving a sentence of penal servitude, his release being expected to take place in the month of April, 1927. [He was in fact released a few days before the hearing in the Divisional Court.] The case finds as a fact that the consent in writing of the child's father or of the appellant, the child's mother, to the sending of the child to the special school had not been obtained ; more than that, the child was in fact a defective child within the meaning of that word as used in Part V. of the Act of 1921, and the County Education Committee, acting as the local education authority, were satisfied, after consultation with the mother, that she was not making suitable provision for the child's education. Accordingly, in pursuance of the provisions of the Act, the education authority required the mother to send the child to a certified class or school, and the case finds as a fact that the appellant failed without reasonable excuse to send the child to that school. Meantime, on June 14, 1926, the medical officer under the education authority gave a certificate in writing to the effect that the child was defective within the meaning of section 55 of the statute, and the case adds that there was no doubt expressed by the medical witnesses on either side, nor had the justices themselves any doubt, that the said child was defective. Correspondence had passed between the education authority and the appellant, and on September 21, 1926, the appellant in writing refused to give her consent to the sending of the child to the school, and in an important finding of fact the justices say : "It was proved to our satisfaction that the appellant unreasonably witheld her consent to the said child's being sent to the said certified school, and we were not satisfied that such consent was withheld with the *bona fide* intention of benefiting the said child." The mother, the appellant, gave evidence on oath. She stated her reasons ; she said that she believed the child would do better at home in her charge as her mother than at school, where she would be liable to be punished, and that the child was quite capable of doing house work. The mother's evidence was to some extent corroborated by a registered medical practitioner, but having weighed the evidence the justices came to the conclusion which has been already stated.

Upon those materials two points have been urged on behalf of the appellant. The first point is that there was no evidence upon which the justices could reasonably find that the appellant withheld her consent unreasonably and not with the *bona fide* intention of benefiting the child. With regard to that submission it appears to me that the evidence upon the one side and upon the other was before the justices ; it is fairly and clearly summarized in the case, and I think it is clear that the justices upon conflicting evidence came to a conclusion as to which it is only necessary to say that it was a conclusion to which they were entitled to come. Then it is said that there was no evidence upon which they could reasonably come to this conclusion. What appears really to be meant upon analysis is that they did not accept the evidence given by and on behalf of the appellant, but preferred the evidence which was given on behalf of the education authority.

The second contention is the real point of substance in this case, and it is this, that notwithstanding that the father was at all material times serving a sentence of penal servitude in Maidstone, still he was within the meaning of the statute the parent referred to ; that nothing had happened to impose upon him any disability in relation at any rate to this matter ; and that as his consent had neither been asked nor received, the condition precedent had not been fulfilled which required that before the education authority took the step referred to here the consent of the parent must first be obtained, or in the alternative unreasonably withheld. Is it true to say that within the meaning of the term in this part of the statute the father in such circumstances continues to be the parent whose consent, whether given or withheld, is the material consent ? That question depends upon this statute, and not upon the use of like terms in some other statutes, and under this statute it is provided by section 42 at the beginning of Part IV. of the Act as follows : "It shall be the duty of the parent of every child between the ages of 5 and 14, or, if a byelaw under this Act so provides, between the ages of 6 and 14, to cause that child to receive efficient elementary instruction in reading, writing and arithmetic." When one turns to the definition

section in this Act, which is section 170, one finds that the expression "parent" in relation to a child or young person includes guardian and every person who is liable to maintain or has the actual custody of the child or young person. It is not denied in the argument made before us on behalf of the appellant that at the time when the father was detained in prison and the child was in the actual custody of the mother it was the mother who would have been liable if she had neglected the duty imposed on the parent by section 42. Reference may usefully be made upon that point to the case of *Hance v. Burnett* (45 J.P., 54). It was held there that the mother of a child having the actual custody and control of the child was liable for neglecting to cause the child to attend school while her husband was at sea, whether or not he was the father of the child. In giving judgment Lord Coleridge, C.J., said at page 55 : "I observe that it is not found in the case that this was the child of the husband. If it had been his child, I think nevertheless that owing to the father's absence, as the child was in the actual custody of the respondent she was liable to see to the child being sent to school, otherwise the children of the seafaring population might be wholly neglected. The words of the statute sufficiently comprehend the present case and the justices ought to have convicted." Those observations, as it seems to me, are apposite to the present matter, and indeed when one turns to section 54 of this statute under which the proceedings now under examination were launched, the matter is, I think, still more plain. By section 53 of the Act it is provided that : "The duty of a parent under Part IV. of this Act to cause his child to receive efficient elementary instruction shall, in the case of a defective or epileptic child over seven years of age in any place where a special class or school certified by the Board of Education for defective or epileptic children, as the case requires, is within reach of the child's residence, include the duty to cause the child to attend such a class or school, and a parent shall not be excused from this duty by reason only that a guide or conveyance for the child is necessary." It might indeed be said that the admission that under section 42 in the circumstances of this case the mother would have been liable in the case of a normal child for omitting to perform the duty laid down in section 42 carries with it the proposition that she has the duty as the parent in the circumstances of the case under Part IV. Section 54 provides as follows : "If a local education authority for elementary education are satisfied, after consultation with the parent of a defective or epileptic child over seven years of age, that the parent is not making suitable provision for the child's education, they may require the parent of the child to send the child to a certified class or school suitable for the child, and, if he fails without reasonable excuse to do so, may by complaint apply to a court of summary jurisdiction for an order requiring the child to be sent to a certified class or school." To apply that section to the circumstances of this case, if by reason of the fact that the father remains the father notwithstanding that he is in prison he is the parent referred to, the consequences become a little grotesque. The education authority must then satisfy themselves after consultation with the person undergoing penal servitude that he, being in that place and in those circumstances, is not making suitable provision for the child's education. The education authority must then require the convict undergoing penal servitude to send the child to a certified class or school suitable for the child, and it is only if the convict fails without reasonable excuse so to do that they may by complaint apply to a Court of Summary Jurisdiction. What could be a more reasonable excuse, if indeed the father was the parent referred to, than to express his regret that he was not in a place where it was possible for him to comply with the suggestion ? And the result would be that as he had a reasonable excuse the defective child would have to be neglected until the period of penal servitude, whatever it might happen to be, came to an end, because only on its expiration would he be deprived of the reasonable excuse.

There are other sections of the Act which seem to me to enforce the same conclusion, and I think here upon the meaning of the word "parent" the test is whether there is a person otherwise satisfying the definition in section 170 who is liable to maintain or has the actual custody of the child or young person ? That is not to say for a moment that in other circumstances and under the provisions of other statutes the father in such circumstances may not retain the rights of a paternal parent. Reference has been made to the case of *Rex v. Judge Radcliffe* (31 *The Times* L.R., 610 ; [1915] 3 K.B., 418), and in particular to the passage in the judgment of the Court at page 423, but it is to be observed among other things with reference to that case that the matter there in question was the presentation of a petition, an affirmative act by the parent or guardian, and the statute had provided for the protection of the parent or guardian ; where the petition was not presented by the parent or guardian the order was not to be made without the consent in writing of the parent or guardian unless it was proved to the satisfaction of the judicial authority that such consent was unreasonably withheld or that the parent or guardian could not be found. It seems to me that the reasonings in that case under the terms of that statute are not applicable to the special provisions of this Act with reference to the education of a defective child.

In these circumstances, it appears to me that the justices were entitled to come to the conclusion of fact to which they came, and that in the interpretation which they put upon the law they were right. I think, therefore, that this appeal ought to be dismissed.

Mr. Justice Avory.—I am of the same opinion. I think that in order to give practical effect to this statute it is necessary that we should hold that the expression "the parent" in section 54 of the Education Act, 1921, means the parent who *de facto* has the custody or control of the child, and not the parent who *de jure* has the custody or control of the child. It would be impossible, as my Lord has pointed out, otherwise to give any effect to section 54, because where the father is in penal servitude it would always be said by him that he had a reasonable excuse for not complying with the requirement that was made upon him ; and looking particularly at subsection 3 of that section it is obvious that the section contemplates a parent who in fact has the custody or control, and not one who in law merely has it, because that subsection provides : "Nothing in this section shall be construed as affecting the power of a parent to withdraw a child from school on proof to the satisfaction of the local education authority that he will make suitable provision for the child's education in some other way." Under those circumstances it appears to me that we ought to follow the decision of the Court in the case of *Hance v. Burnett* (45 J.P., 54), where the father was at sea, and not the decision in the case of *Rex v. Judge Radcliffe* (31 *The Times* L.R., 610 ; [1915] 3 K.B., 418), where the father in fact was at home

and *de facto* had the custody and control of the child. In this case, upon the question of fact no doubt it would have been open to the justices to come to a contrary conclusion as to the mother's reasons for not consenting to the child being sent to a school, but, when they have found as a fact as they did, it is impossible for this Court to interfere with their finding of fact, and I therefore agree that the appeal should be dismissed.

MR. JUSTICE SHEARMAN.—I am of the same opinion. We are asked in this case to construe section 54 of the Education Act, 1921, with regard to an alleged defective. In my judgment the words "the parent" in this section mean the parent who has the actual custody of the child. Those are the words in the definition section, "the actual custody of the child" at the time of the cause of the offence arising. The difficulty I felt during the argument of the case was the considered decision in the case of *Rex v. Judge Radcliffe* (31 *The Times* L.R., 610; [1915] 3 K.B., 418), which was no doubt a case arising out of section 6 of the Mental Deficiency Act, 1913, because one is most desirous, if it can be avoided, of not having different meanings given to the same words in cognate sections. On consideration I have come to the conclusion that that case does not in the least conflict with the decision which we are giving. No doubt where both husband and wife are living together the person having the actual custody would be the husband, and when one looks at the *Judge Radcliffe* case (*supra*) the wife and husband were living together, and the Court quite properly said that the husband was the person having the actual custody; and therefore the authorities are not in line. I think this appeal should be dismissed.

[Solicitors—Messrs. Calder Woods and Sandiford, for Mr. A. Chambers Harris, Burnham-on-Sea; Messrs. Maude and Tunnicliffe, for Mr. G. I. Simey, Weston-super-Mare.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. May 2.

REX v. SOUTHWARK VACCINATION OFFICER—EX PARTE GOVERNORS OF PEABODY DONATION FUND.*

Vaccination — Register — Search — Additional information required by subsequent Act — Whether right of search impliedly abolished —Vaccination Act, 1867 (30 and 31 Vict., c. 84), s. 24—Vaccination Act, 1871 (34 and 35 Vict., c. 98), s. 6—Vaccination Act, 1898 (61 and 62 Vict., c. 49), s. 2—Vaccination Act, 1907 (7 Edw. VII., c. 31), s. 1.

The provision of s. 24 of the Vaccination Act, 1867, which gives a right to search the vaccination register has not been impliedly repealed by the subsequent Vaccination Acts requiring information to be inserted in the register beyond the information required by the Act of 1867.

This was a rule *nisi* for a *mandamus* directed to the Vaccination Officer or Officers of the Guardians of the Poor of the Borough of Southwark to show cause why they should not allow search to be made of the vaccination register kept by their clerk or registrar under the provisions of section 24 of the Vaccination Act, 1867 (30 and 31 Vict., c. 84). The rule was obtained on the ground that by that section and section 6 of the Vaccination Act, 1871, the Governors of the Peabody Donation Fund were entitled to search the vaccination register.

The Peabody Donation Fund, a body incorporated by Royal Charter dated December 14, 1900, owned a large number of working-class dwellings in various districts of London, including the Metropolitan Borough of Southwark. The charter empowered them to build dwellings to be let to the labouring poor of London who were of moral character and good conduct and to impose regulations, terms, and conditions in respect of the occupation thereof.

In accordance with their powers the Governors made it one of the terms of each tenancy granted by them that every member of the tenant's family should be vaccinated. To ascertain whether that term was being complied with the superintendent of the Peabody Estate at Southwark asked to be allowed to search the vaccination register, but permission was refused. The Governors submitted that the right of search was given by section 24 of the Act of 1867.

The Guardians admitted the refusal, but contended that the vaccination register as now kept under the various Vaccination Acts and the Vaccination Order of 1898 was not the register of vaccinations contemplated by or referred to in section 24 of the Act of 1867, inasmuch as it contained information entirely beyond the information required to be registered under that section.

The right of the Peabody Governors to inspect the register arose in 1913, when one of their tenants made a statutory declaration of conscientious objection. The then vaccination officer gave information to the applicants, and the tenant, a Mr. Redford, was given notice to quit. Mr. Redford complained to the President of the Local Government Board, who took the view that the vaccination officer had exceeded his duties in giving the information referred to.

The question had not been raised again until the Guardians refused the applicants' request on the view taken by the Local Government Board, and on their own view that it was not right to allow the register to be searched for the purpose of enabling the Peabody Governors to bring pressure on their tenants. The Guardians were desirous that the law should be properly carried out and agreed to act in any way the Court might direct.

Mr. Wingate-Saul, K.C., and Mr. Morle showed cause.

Mr. Macmorran, K.C., and Mr. Wynn Werninck, who supported the rule, were not called upon to argue.

THE LORD CHIEF JUSTICE, in giving judgment, said that the case seemed to him to be perfectly clear. There was an effort made to search the register; that effort was resisted on the ground that search was no longer permitted. The argument was that section 24 of the Vaccination Act, 1867, was impliedly repealed because information which was not and could not be contemplated by that Act must now appear in the register. The argument was quite unsustainable.

By section 24 of the Act of 1867 the registrar was to keep a register of certificates of successful vaccination. There were under that statute two other kinds of certificate—certificates of unfitness for vaccination and certificates of insusceptibility to vaccination or of previous smallpox.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

Those certificates at that time were not matter of transmission and registration, but by the Vaccination Act of 1871 they required registration. Then came the Act of 1898, which provided for certificates of exemption, and there was then a fourth part of the register for certificates under section 2 of the Act of 1898. Afterwards the Act of 1907 substituted statutory declarations for certificates of exemption, and by paragraph 2 of the fourth Schedule to the Vaccination Order, 1898, as amended by the third Schedule to the Vaccination (No. II.) Order, 1907, these declarations had to be entered on the register. The certificate of successful vaccination remained—that was the foundation; the other certificates of unfitness and of insusceptibility remained and the name of the medical man remained, as always. It was desperate to argue that the register had been so altered as impliedly to repeal section 24 of the Act of 1867. The rule must be made absolute.

Mr. Justice Avory agreed. He said that he was quite unable to appreciate the respondents' reason for refusal.

Mr. Justice Shearman concurred.

[Solicitors—Messrs. Percy Robinson and Co.: Mr. G. A. Martin.]

Prob., Divorce, and Adm. Div. (Hill, J.) 1927. May 16.

BACH (OTHERWISE KOHN) v. BACH.*

Divorce — Nullity — Gretna marriage — Informality — Non-residence in Scotland for requisite period — Decree *nisi* of nullity.

This was an undefended petition for nullity of marriage by reason of informality. Mary Celine Bach, otherwise Kohn, of Belle Vue Hotel, Cheltenham, who in April, 1924, went through a form of marriage with William Ernest Bach, a commercial traveller, at the Old Blacksmith's Shop at Gretna Green, Dumfriesshire, Scotland, prayed for a decree of nullity.

Mr. T. F. Davis, for the petitioner, submitted that the condition of 21 days' residence by one of the parties required under the Marriage (Scotland) Act, 1856, had not been complied with, the couple, both of whom lived at Birmingham, having travelled up to Scotland together the day before the ceremony. Section 1 of that Act provided:—

"After the 31st day of December, 1856, no irregular marriage contracted in Scotland, by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage; any law, custom or usage to the contrary notwithstanding."

On the authority of *Lawford v. Davies* (4 P.D., 61) Counsel asked for a decree of nullity.

Mr. A. Dewar Gibb, a member of the English Bar and advocate of the Scottish Bar, gave expert evidence.

Other evidence having been given, his Lordship said that it was quite clear that there had been no marriage, the ceremony being carried out directly in the teeth of the Act. He granted a decree *nisi* of nullity, with costs.

[Solicitors—Messrs. Bulcraig and Davis.]

* Reported by William Latey, Esq., Barrister-at-Law.

Chan. Div. (Tomlin, J.) 1927. May 11.

COULSON v. AUSTIN MOTOR COMPANY, LIMITED.*

Companies—General meeting—Right to attend and vote—Non-cumulative preferred ordinary shares—No right of holders to attend unless dividend in arrear—Meaning of "in arrear" in the articles.

A company's articles of association provided that the original preference shares, carrying a cumulative preferential dividend of 7 per cent., should not confer upon the holders the right to attend and vote at any general meeting or to have notice thereof unless (*inter alia*) the dividend thereon was "in arrear" for more than three months. Subsequently the capital of the company was increased by the issue of preferred ordinary shares with the right to a non-cumulative preferential dividend of 10 per cent. payable in respect of each year exclusively out of the profits earned in each year and to rank after the preference shares. It was further provided that the holders of these preferred ordinary shares should, *mutatis mutandis*, be subject to the same restrictions as to receiving notices of and attending and voting at general meetings as the holders of original preference shares. Since 1920 no profits had been available to pay dividends, and for the general meeting of 1926 the holders of preferred ordinary shares received no summonses. In an action by holders of such shares against the company for a declaration that they were entitled to have notice of and to attend and vote at the general meetings,

Held, that the words "in arrear," in the context in which they appeared in the articles, could not be construed to cover the non-payment of a non-cumulative preference dividend payable out of the profits of each year and not paid because there were no profits available for the dividend, and the action failed.

This was an action brought by the plaintiffs, Samuel Twentyman Coulson and William Robinson Harrison, on behalf of themselves and all other holders of the Ten per Cent. Preferred Ordinary shares of the defendant company claiming a declaration that the holders of Preferred Ordinary shares were entitled to have notice of, and to attend and vote at, general meetings of the company; a declaration that the proceedings at an ordinary meeting held on August 31, 1926, were invalid by reason of the exclusion of the holders of Preferred Ordinary shares; and an injunction to restrain the company from acting otherwise than in accordance with the above declarations.

The company was incorporated on February 4, 1914, with a capital of £650,000 divided into £1 shares. The company's articles of association provided (article 6) that 250,000 shares of the original capital should be Preference shares and should be

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

called original Preference shares; (article 7) that those shares should carry a Cumulative Preferential dividend of 7 per cent. per annum; and (article 8) that in a winding up the surplus assets of the company should be applied first in payment to the holders of the original Preference shares of the paid up capital, secondly in payment to the holders of the original Preference shares of an amount equal to the difference (if any) between the total amount of dividends paid and 7 per cent. per annum on the capital paid up, and thirdly in payment to the holders of Ordinary shares as there mentioned.

Article 65 provided as follows:—

"Subject to any special terms as to voting upon which any shares may be issued or may for the time being be held, every member personally present at a meeting shall have one vote on a show of hands and every member shall upon a poll have one vote for every share held by him but the original Preference shares shall not confer upon the holders the right to attend or vote, either in person or by proxy, at any general meeting or to have notice of such meeting unless the meeting is convened for reducing the capital otherwise than by merely cancelling capital paid up or credited as paid up on Ordinary shares or for winding up or sanctioning a sale of the company's undertaking or for altering the regulations of the company or where the proposition submitted to the meeting directly affects the rights and privileges of the holders of the original Preference shares or the dividend thereon is in arrear for more than three months after any half yearly day fixed by these articles or by the terms of issue for the payment thereof."

The 250,000 Seven per Cent. Cumulative Preference shares were issued and fully paid and by the terms of issue dates were fixed for the payment of dividends.

At an extraordinary general meeting of the company held on January 20, 1919, a resolution was passed increasing the capital of the company to £1,650,000 by the creation and issue of 1,000,000 new shares called "B" Preference shares. By that resolution the "B" Preference shares were given a right to a Cumulative Preference dividend of 6 per cent., ranking after the original Preference shares. The resolution also provided (*inter alia*) that the new shares should have—

"the same voting rights (subject to the same restrictions and qualifications *mutatis mutandis* in all respects as regards receiving notice of and attending and voting at general meetings) as the original Preference shares, but no further voting rights."

The "B" Preference shares were duly issued and fully paid.

At an extraordinary general meeting of the company held on January 21, 1920, it was resolved that the capital of the company should be increased to £5,000,000 by the creation of 3,350,000 new shares of £1 each. The directors were thereby authorized to issue any of the new shares with such rights in regard to dividend and return of capital and with such voting rights as they should determine, but with the reservation of a right to issue further "B" Preference shares as therein mentioned.

On January 26, 1920, the directors passed a resolution for the issue of 1,500,000 10 per cent. Preferred Ordinary shares, with the right to a non-cumulative Preferential dividend on the paid-up capital payable in respect of each year exclusively out of the profits earned by the company during each year and to rank after the original Preference and "B" Preference shares. The resolution also provided *inter alia* that those shares should have

"the same voting rights (subject to the same restrictions and qualifications *mutatis mutandis* in all respects as regards receiving notices of and attending and voting at general meetings) as the said original Preference shares and 'B' Preference shares, but no further voting rights."

It was on behalf of the holders of those shares that the plaintiffs were suing.

In 1920 the company experienced difficulties and a receiver was appointed in a Debenture holders' action, but ultimately a scheme of arrangement was carried through, the receiver being discharged. Since then the company had prospered and earned substantial profits, but by reason of the lee-way which had to be made up no profits had been available since June 30, 1920, to pay dividends.

Until the 11th general meeting, held on August 31, 1926, the Preferred Ordinary shareholders had always been summoned to general meetings of the company. It was the failure to do so for the meeting of August 31, 1926, that caused these proceedings.

Mr. Jenkins, K.C., and Mr. Roxburgh appeared for the plaintiffs; and Mr. Maugham, K.C., and Mr. Cecil Turner for the defendant company.

Mr. Justice Tomlin, in giving judgment, said that it was to be observed that the holders of Preferred Ordinary shares were given (putting it shortly) the same voting rights *mutatis mutandis* as the original Preference shareholders and the "B" Preference shareholders, but no further voting rights.

The voting rights of the original Preference shareholders were set out in article 65 and the effect of the referential clause in the directors' resolution must be that, for the purpose of ascertaining the rights of the shareholders, it was necessary to read article 65 as though whenever there was a reference to the original Preference shares there was substituted a reference to the Ten per Cent. Preferred Ordinary shares, and as though the appropriate alteration in dates were made.

It was not suggested that, on its construction, the referential clause could be read as giving the Ten per Cent. Preferred Ordinary shareholders a right to vote whenever the "B" Preference shareholders voted. The question was as to the true construction of article 65 read as indicated. The answer must depend on the true meaning of the phrase "or the dividend thereon is in arrear for more than three months" after the appropriate date for payment.

The plaintiffs said that "in arrear" meant if no dividend was paid, and that as they had had no dividend they were entitled to be summoned to meetings. On the other hand, the defendants said that where, as here, the Preferred shares were non-cumulative, there could be no arrears in respect of any year in which there were no profits earned available for dividends. It was further said that, if it were otherwise, the curious result would follow that, if once the dividend was passed, the non-cumulative Preferred shareholders would have a right in perpetuity to attend meetings, even though they thereafter received in every year the dividend in full.

He (his Lordship) thought that the word "arrears" or the words "in arrear" connoted in the strict sense a reference to a sum which had become due and payable and had not been paid. They might, however, be used in a secondary sense to indicate some deficiency which was capable, either certainly or contingently, of being made good. It was that secondary meaning which was attributed to the word "arrears" in *In re Springbok Agricultural Estates, Limited*

([1920] 1 Ch., 563), and that meaning might be applicable to the words "in arrear" used in article 65.

The secondary sense did not, however, assist the plaintiffs. Was there, then, a third sense wide enough to cover the non-payment of something—a non-cumulative Preference dividend payable out of the profits of each year and not paid because no profits were available for the dividend—which never in fact became payable, and never could in the future in any contingency become payable or be made good? It was impossible to say that there might not be a context which would necessarily require some such sense, but in his (his Lordship's) judgment the words "in arrear" in article 65 could not, in the context in which they occurred, be so construed.

The plaintiffs had suggested that the words *mutatis mutandis* enabled the Court to mould article 65 by giving to the Ten per Cent. Preferred Ordinary shareholders, when no dividend had been earned, the right, three months after the date fixed for the payment of dividend, to attend meetings until the next dividend date. He (his Lordship) could find no justification for that, which would amount to settling new terms of application for the Preferred Ordinary shares.

The action must be dismissed, with costs.

[Solicitors—Messrs. Bell, Brodrick, and Gray; Messrs. Simmons and Simmons, for Messrs. Ryland, Martineau and Co., Birmingham.]

House of Lords.
(Viscount Cave, L.C., Viscount Haldane, Viscount Dunedin, Viscount Sumner, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Blanesburgh.)

1927. May 5.

DONALD CAMPBELL AND COMPANY, LIMITED v. POLLAK.*

Practice — Costs — Appeal — House of Lords—Appeal for costs—Competency—Order as to costs founded on error of law.

The rule of the House of Lords as to appeals for costs, while it prevents the House from entertaining an appeal for costs on the mere ground that the discretion of the Court has been wrongly exercised, does not prevent it from entertaining such appeal on the ground that the order is founded on an error of law.

So *held* by the majority of their Lordships, Viscount Sumner and Lord Shaw of Dunfermline dissenting.

On an appeal against an order of the Court of Appeal reversing an order of Mr. Justice Branson as to costs, the respondent objected to the competency of the appeal on the ground that it was an appeal for costs.

The respondent was formerly in the employ of a firm of Donald Campbell and Co., and, on the firm being converted into the appellant company, became a director of the company. The company had since gone into liquidation. Actions were brought against the respondent by the firm and the company, and the actions were consolidated. These actions were tried before a Judge and jury and in each case the plaintiffs obtained a verdict and judgment in their favour. The Court of Appeal ordered a new trial of both actions. The House of Lords allowed the judgment in the action by the firm to stand, but affirmed the order of the Court of Appeal for a new trial of the action by the company.

At the re-trial of the second action, without a jury, Mr. Justice Branson gave judgment in favour of the respondent, but without costs, having regard to the fact that the respondent had been guilty of improper conduct, which necessitated the second action.

The respondent appealed, without leave, to the Court of Appeal against so much of the judgment as related to costs.

The Court of Appeal (Lord Justice Bankes, Lord Justice Scrutton, and Lord Justice Atkin) allowed the appeal on the ground that the trial Judge in dealing with the costs was not entitled to take into account the proceedings in the other action, and had therefore no materials upon which to exercise his discretion.

The total costs of the litigation amounted to many thousands of pounds.

Mr. Jowitt, K.C., and Mr. H. J. Astell Burt appeared for the respondent in support of the preliminary objection; and Mr. Stuart Bevan, K.C., Mr. Barrington-Ward, K.C., and Mr. E. F. Spence, K.C., for the appellants.

The Lord Chancellor.—My Lords: Mr. Justice Branson, who re-tried this action (under an order for a new trial) without a jury, decided the issues of fact in favour of the defendant (the respondent in this appeal), but gave judgment for him without costs. In arriving at his decision not to give the defendant his costs, the learned Judge relied mainly upon the fact—established by the verdict and judgment in another action which had been consolidated with the present action—that the defendant had been guilty of improper conduct which (as he held) had induced the liquidator of the appellant company, and, indeed, had forced him in the execution of his duty, to bring the present action. On an appeal by the defendant to the Court of Appeal against so much of the judgment of Mr. Justice Branson as had ordered that no order should be made as to costs, that Court held that the trial Judge was not entitled to take into account the proceedings in the other action—which (as they held) had been "de-consolidated" and wholly separated from the present action by the order for a new trial of this action—and accordingly that the Judge had no materials before him upon which it was right for him to exercise his discretion as to costs; and they allowed the appeal and declared the defendant entitled to his costs of action. The plaintiffs have now appealed to this House against the order of the Court of Appeal. The costs in question amount to a very large sum, as they include the costs of two long trials and several appeals. The respondent raises the preliminary objection that the appeal is incompetent as being an appeal as to costs only, and your Lordships have now to deal with this preliminary objection.

The objection appears, at first sight, to be somewhat surprising. Under section 5 of the Supreme Court of Judicature Act, 1890, and Order LXV., Rule 1, of the Rules of the Supreme Court, the costs of a trial without a jury are in the absolute discretion of the trial Judge; and under section 49 of the Supreme Court of Judicature Act, 1873 (which was in force when the appeal to the Court of Appeal was heard), no order made by the High Court of Justice or any Judge thereof as to costs only which by law were left to the discretion of the Court was subject to any appeal except by leave of the Court

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

or Judge making such order. Notwithstanding these enactments, the respondent appealed (without leave of the Court or Judge) to the Court of Appeal against the order of the trial Judge as to costs, and he succeeded in that appeal on the ground that the Judge had no right in law to make that order; and, now that the appellants ask your Lordships to review that decision and to hold that the trial Judge had such a right, the respondent objects that the appeal to this House is as to costs only and cannot be entertained. It would seem that, if the appeal to the Court of Appeal, which was an appeal as to costs only, was competent notwithstanding the statutory prohibition of such appeals, the appeal to this House must be equally competent notwithstanding the rule of the House which prohibits such appeals. But the respondent contends that the rule adopted by this House goes beyond the terms of the statute which binds the Court of Appeal, and that under that rule this appeal cannot be heard.

My Lords, there are passages to be found, both in speeches made in this House and in text-books of authority, which lay it down in broad terms that an appeal as to costs only will not be entertained here; but it is plain that the rule, so stated, needs some qualification. For instance, an order made contrary to a statute which gives a party a right to his costs is clearly appealable (see *Tod v. Tod*, 2 Wilson and Shaw, 542). So, an order as to costs made by the Court of Appeal without jurisdiction must needs be subject to an appeal to this House, for otherwise the law might be broken without redress; and *Garnett v. Bradley* (3 App. Cas., 944) and *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355; 14 App. Cas., 26) are instances of such appeals. Why, then, should a decision of the Court of Appeal as to costs which is founded on a wrong view of the law—and in dealing with the preliminary objection this must be assumed to be the case—be exempt from review? If, on argument, it should appear that the Court of Appeal was wrong in holding that the trial Judge had no right to refer to the proceedings in the consolidated action, then there was no ground on which the Court of Appeal could discharge his decision as to costs, and the order setting that decision aside was made contrary to the statute and was without jurisdiction. Why should the appellants be prohibited from putting forward this contention? The suggestion that, if the appeal were allowed on that ground, the House would be reviewing a discretion exercised by the Court of Appeal is obviously untenable; for if that Court was wrong in setting aside the discretionary order of the trial Judge, then there was no field for the exercise of any discretion by the Court of Appeal itself. On principle, therefore, unless there is some settled rule of the House which prevents your Lordships from hearing the appeal, I am of opinion that it should be heard.

My Lords, if the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party from asking to have a decision reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of costs. In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law.

As the contention of the respondent is wholly based on the citation of cases, I feel compelled to trouble your Lordships with a review of the decisions of this House bearing upon the point; and I have thought it well to include in order of date the relevant decisions of the Judicial Committee of the Privy Council and some statements made by Lord Chancellors when sitting on appeal from Judges in Chancery. The earliest case with which I am acquainted is *Duvall v. Terrey* (Shower, P.C., 15), where the appeal failed on merits and the report concludes:—"And as to costs, held no cause for an appeal in this case, nor in truth was it ever known to be a cause if the merits were against the party appellant. And so the decree was affirmed in the whole." In *Huband v. Huband* (7 Brown, P.C., 433) a decree of Lord Keeper Harcourt was affirmed except as to costs. In *Gould v. Granger* (Mosely, 395) "the Lord Chancellor (Lord King) allowed an appeal from the Master of the Rolls for costs only, and his Lordship said he had known the House of Lords allow an appeal for costs only, tho' the old practice was otherwise." In *Owen v. Griffith* (1 Ves. sen., 250), on an appeal from a decree made by Mr. Justice Abney upon a bill against an execution creditor for an account on the ground that the Judge had not given the defendant her costs, counsel for the respondent insisted on "the general rule that there could not be an appeal for costs only"; but Lord Chancellor Hardwicke allowed the appeal, saying that the creditor was clearly entitled to his costs on the merits "if not precluded by that rule; which I have often heard so delivered by the Court. The foundation of it," he added, "was to prevent vexation and trouble; for, as cases in equity often depend on abundance of circumstances about which as the reason of mankind might differ, it would create perpetual appeals; but this is no printed rule; and it seems somewhat strict and hard to adhere to it; for since the stamp duties, costs come to be very material. Yet, if it was to be laid open generally, that an appeal might be for costs, it would cause that general inconvenience, to which a particular inconvenience ought to give way. But if a sound distinction from the rule can be made, it ought to be allowed; and it will be very unfortunate if in this case the defendant should be precluded thereby; for being an incumbrancer for a just debt, and having a lien on the estate for her costs as well as her demand, it seems to be an exception, and different from the Court's not suffering matters to be overruled merely for costs." In *Cowper v. Scott* (1 Eden, 17) the Lord Keeper (Lord Northington) said that an appeal or re-hearing for costs only was not to be encouraged, "because costs are merely discretionary, and depending upon particular circumstances; and when a Judge has once determined the matter a re-hearing for costs should be admitted with great caution"; but upon the authority of *Owen v. Griffith* (*supra*) he allowed the appeal. In *Wirdman v. Kent* (1 Brown, C.C., 140) Lord Chancellor Thurlow is reported to have said that the appeal in *Owen v. Griffith* (*supra*) was admitted upon such an apparent mistake that upon motion for enrolment the minutes of the decree would have been altered; but (as the editor of Brown's Reports points out) Lord Thurlow can hardly have said this, as Lord Hardwicke clearly treated the case of an execution creditor as a sound exception to the rule.

I turn now to the cases which were cited in the argument on this appeal. In *Fitzgibbon v. Scanlan* (1 Dow, 261, at p. 270) the appellant, although unsuccessful on the merits, was relieved of some of the costs thrown upon him by the order below; and Lord Eldon said that, "although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respect-

ing other matters." In *Tod v. Tod* (*supra*), where there was a cross-appeal as to costs only, Lord Eldon said that this House never entertained an appeal for costs "where costs were in the discretion of the Court below"; but the appellant in the cross-appeal, who was entitled by statute to his costs, succeeded in his appeal. In *Burkett v. Spray* (1 Russell and Mylne, 113) a decree was varied on appeal as to costs only, Lord Lyndhurst saying that an appeal would lie in respect of costs if any principle were involved and they were not merely given as consequential on the decree. In *Brodie v. Sinclair* (5 Wilson and Shaw, 567), where a pursuer who had succeeded as to a part of his claim had been ordered to pay the defender's costs of suit on the ground "that the expense of litigation in this case had been mainly, if not altogether, occasioned by the pursuer insisting for the other items in the account which have not been sustained," this House set aside that part of the decree, Lord Chancellor Brougham saying, "It is quite true that the costs are in the discretion of the Court in all cases, but I find there is no such rule as that assumed for the interlocutor." In *Inglis v. Mansfield* (3 Cl. and Fin., 362) the appeal failed on merits, but the appellant was relieved of the costs thrown upon him by the judgment, and Lord Brougham said (p. 371):—

"The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of Review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised."

In *Clyne's Trustees v. Dunnet* (Maclean and Robinson, 28) Lord Cottenham used similar expressions, but said that the order of the Court below as to costs was right. In *Angell v. Davis* (4 Mylne and Craig, 360), where a decree had been made giving a trustee his costs of the cause out of the estate, Lord Cottenham, relying on *Owen v. Griffith* (*supra*), *Cowper v. Scott* (*supra*), and *Burkett v. Spray* (*supra*), allowed an appeal by the beneficiaries against that part of the decree and ordered the trustee to pay the costs of the cause so far as they had been occasioned by his own misconduct. In *Home v. Pringle* (8 Cl. and Fin., 264) the House dismissed an appeal by trustees claiming to be entitled to their costs, Lord Cottenham saying, at p. 293:—

"A Court of Appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone."

I pass to the more recent cases, and first to *Wilson v. The Queen* (L.R. 1 P.C., 405). In that case one of the appellants (Cole) appealed to the Queen in Council against a decree of the Admiralty Judge at Sierra Leone on the ground that, although he had succeeded in the Court below, he had not been awarded the costs of the proceedings; and Lord Cairns said, at p. 408:—

"Their Lordships are of opinion that, with regard to the appellant, Cole, the appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule that an appeal for costs could not be entertained."

The order for costs which was the subject of appeal was clearly discretionary. In *Yeo v. Tatem* (L.R. 3 P.C., 696), an action in the Admiralty Court for damages caused by collision, the defendants pleaded a general denial and also a special defence founded on the doctrine of *res judicata*. On evidence that the damage had been caused by a third party the Court gave judgment for the defendants without costs, and declined to go into the special defence. On an appeal by the defendants to the Judicial Committee, it was held that, although the issue on the special defence had become material only as regards costs, the appellants were entitled to have judgment upon it and to have the general costs of the action. The appeal was accordingly allowed; and Sir Joseph Napier, who delivered the judgment of the Board, said, at p. 702:—

"Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal."

This was a plain case of an appeal on a point affecting costs only, and the appeal was allowed. The same may be said of *Garnett v. Bradley* (*supra*), where, the plaintiff in an action for slander tried with a jury having recovered only one farthing damages, the Court of Appeal had held that under the statute 21 Jac. I., c. 16, he was not entitled to the costs of the action; but the House of Lords, holding that the statute of James I. had in effect been repealed by Order LV., gave him his costs. In that case the issue upon merits had been finally determined by the verdict of the jury and the judgment in the action, and the appeal to this House was plainly as to costs only; but it was not suggested that it was incompetent. In *Metropolitan Asylum District Managers v. Hill* (5 App. Cas., 582) it was held that an order of the Court of Appeal which imposed, as a condition for a new trial, the payment of the costs of the first trial was not an appeal in respect of costs only and ought, therefore, to be entertained; and Lord Selborne, at p. 584, stated the rule as follows:—

"The rule, subject to certain exceptions, is established that an appeal is not to be allowed in respect of costs only; which means that, when the merits of a question have been determined, and when a Court has thought fit to give or refuse costs in the exercise of its discretion, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money but also of judicial time, for the mere purpose of reviewing that discretion."

No doubt the appeal in that case was not in respect of costs only, but was an appeal against a refusal to make an unconditional order for a new trial; but the language of Lord Selborne is interesting as showing the origin and meaning of the rule under discussion. In *Huxley v. West London Extension Railway Company* (*supra*) an appeal as to costs only was entertained, the question argued being whether there was "good cause" for depriving a litigant of costs under Order LXV., Rule 1, but the decision of the Court of Appeal on this point was affirmed. Lastly, in *Rieken v. Yorke Peninsula District Justices* (24 *The Times* L.R., 821; [1908] A.C., 454) the Judicial Committee disallowed an appeal against an order as to costs on the ground that the Court in Australia had exercised a judicial discretion and that there had been no mistake of law.

As reliance has been placed upon a decision of the Appeal Committee established by Lord Eldon in the year 1812, it may be convenient to refer to a few decisions of that Committee to which my attention has been called by the Judicial Department of the House. In *Robertson v. Tait* (1852) an appeal as to costs only was dismissed as incompetent, and Lord Chancellor St. Leonards said :—

"The rule, I apprehend, both here and in the Courts below, is that you cannot appeal for costs generally. If the question of costs involves a serious question of law, then, although you only go for costs, the appeal may be sustained, because in that appeal it may be necessary to decide a question of law. Now here what has been stated shows . . . what the general rule is ; but it is equally clear that it is not a binding or positive rule."

In *Marquess of Ailsa v. Kerr* (1853) an appeal as to costs only was dismissed, the Lord Chancellor (Lord Cranworth) saying :—

"You cannot have an appeal on the subject of costs where, the decree being otherwise right, the discretion of the Court is exercised wrongly upon the subject of costs. . . ."

In *Sawers v. Monteith* (1869), on an appeal against a discretionary order as to costs, Lord Hatherley said : "The appeal upon costs only we do not proceed with." Again, in *Thallon v. Kinnear Moode and Co.* (1884) an appeal against a discretionary order as to costs was dismissed as incompetent. Lastly, in *Caledonian Railway Company v. Barrie* (briefly reported in [1903] A.C., 126) the respondent petitioned against the competency of an appeal on two grounds : first, that it was an appeal on costs only ; and, secondly, that under the statute which was there in question an appeal would only lie on a question of law. The Appeal Committee dismissed the appeal, Lord Macnaghten saying (as appears from the shorthand note) :—

"Their Lordships are of opinion that the objection is a good one and must prevail."

It does not clearly appear on which of the two grounds the appeal was dismissed ; and, in any event, the order as to costs made by the Court below was a discretionary order, the Court of Session having a very wide discretion as to costs. There is, therefore, not much to be learned from this decision.

My Lords, I have gone through this long succession of cases only for the purpose of ascertaining what is the precise rule which has been laid down by this House ; for I agree that, if a rule of practice exists, it ought not now to be disturbed, and that the rule (whatever it may be) was not abrogated by section 3 of the Appellate Jurisdiction Act, 1876. The result of my examination appears to me to be (1) that there is no universal rule that an appeal as to costs only will not be entertained by this House, but the true rule is as stated by Lord Northington in *Cooper v. Scott* (*supra*), by Lord Eldon in *Tod v. Tod* (*supra*), and by Lord Selborne in *Metropolitan Asylum District Managers v. Hill* (*supra*), as well as by Sir Joseph Napier in the Judicial Committee and by Lord St. Leonards and Lord Cranworth in the Appeal Committees ; and accordingly (2) that in this House, as in the Court of Appeal, an appeal from a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a *bona fide* appeal on merits ; but (3) that when it is alleged that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard. There are (as will have been seen) many cases in which an appeal under those conditions has been entertained, and there is no case in which such an appeal has been held to be incompetent.

If this be the true view, then it is plain that the appeal in the present case, in which the exercise by the trial Judge of his statutory discretion as to costs has been set aside by the Court of Appeal on legal grounds, ought to be allowed to proceed. I therefore move your Lordships that the preliminary objection to this appeal be disallowed and that the costs of and consequent upon that objection be paid by the respondent in any event.

Viscount Haldane (read by Lord Carson).—My Lords : The point with which we are at present concerned in this case is whether an appeal lies to this House from a judgment of the Court of Appeal. That Court had varied a judgment of Mr. Justice Branson in favour of the respondent, the defendant in an action, tried by the learned Judge without a jury, for damages in respect of alleged breach of contract and fraud. Mr. Justice Branson had deprived the respondent of costs, amounting to a large sum, in the exercise of what he considered to be the discretion which he could exercise. The Court of Appeal altered this, directing that the judgment in favour of the respondent should carry costs. Assuming for the purposes of the present question that the appellants may develop a substantial case against the decision of the trial Judge depriving the successful defendant of his *prima facie* title to his costs, there remains a preliminary question which has to be decided at this stage of the appeal to your Lordships' House. It is whether the appeal, which is limited exclusively to the question of these costs, is one which, according to the principle that regulates our practice, can be entertained at all. When a trial takes place without a jury the costs, under section 5 of the Supreme Court of Judicature Act, 1890, and Order LXV., rule 1, are in the discretion of the trial Judge, and under section 49 of the Supreme Court of Judicature Act, 1873, there is to be no appeal from the exercise of his discretion except by leave of the Judge who made the order. Nevertheless the respondent appealed against the order without leave, and succeeded in the Court of Appeal, upon the ground that the Judge had no right in law to make it for the reason for which he did make it. Mr. Justice Branson, in deciding not to allow costs to the defendant, relied on the circumstance that the verdict and judgment in another action against the defendant, in which the plaintiffs were different persons from the appellants, the plaintiffs in the present case, established facts which justified the liquidator of the appellant company in the execution of his duty in bringing the present action. But the Court of Appeal, holding that Mr. Justice Branson was not entitled to take into account the proceedings in a different case with different parties, considered that the learned Judge had not proper materials before him on which he was at liberty to exercise his discretion under the rule as to costs.

The question with which we have to deal presents this peculiarity. The appeal to the Court of Appeal was brought without leave. This may have been legitimate on the ground that the Judge was said to have been without a reason on which to proceed legitimately in the way he did. But it seems curious that if that were so an appeal to this House raising what seems to be a precisely analogous question should be incompetent. If it is so, this must be for some special reason which has been definitely established by this House in relation to its own proceedings, and which goes beyond the principle applied in the Court of Appeal. It seems as though it must be

shown that this House is precluded by its established decisions from entertaining an appeal which relates exclusively to costs given by the Court below in the exercise of its discretion, even when the exercise of that discretion has arisen out of error about matter of law.

This question is one the answer to which must be collected from a study of the authorities. It is not enough that section 3 of the Appellate Jurisdiction Act of 1876 gives in general terms a right of appeal from the Court of Appeal to this House. The general words employed in this section may not be sufficient to interfere with the special practice of this House if such a practice is established. What the section was directed to was to get rid of the repeal of appellate jurisdiction effected by a statute of 1873, and not to the alteration of the settled practice where jurisdiction existed.

When the authorities are examined they disclose, what is apt to happen unless a very definite principle is being enunciated, a certain vagueness in judicial statement. Where a rule is laid down it is sometimes qualified by exceptions which are vaguely expressed. If, however, the cases are read as a connected series of utterances the result seems to me to admit of two different contentions. One is that it is established that when an appeal to the House of Lords resolves itself into a question only of costs the House will refuse to entertain it. It is added that this refusal is not confined to cases where discretionary costs have been dealt with below in accordance with an exercise of a discretion conferred and not infringing any principle of law. It is said that costs can be dealt with where they are ancillary to a variation of the substance of a judgment, but that otherwise there is no power to deal with them unless the case comes within certain nominate exceptions referred to in the course of the discussion. In effect these are said to be :—(1) instances in which the order as to costs has been made personally against parties who have as matter of law a right to be exempted from them, such as trustees and mortgagees ; (2) instances in which costs have been ordered to be paid out of a particular property to the prejudice of persons interested in it and not before the Court ; (3) instances in which a statutory or analogous legal title has been disregarded. All of these are exceptions in which a substantive right is said to have been violated, as distinguished from cases in which it is claimed that there has been what is merely a non-judicial and in that restricted sense improper exercise of the function of the Judge to the appellant's disadvantage. Mere error in law not of a special character is accordingly in this view not enough to give ground for an appeal.

The observation at once occurs that the exceptions which the authorities relied on for this conclusion illustrate are upon this interpretation of the restriction curiously limited in nature and unconnected in character. So far as they go, they certainly do not give ground for the assertion of a more general principle, such as that this House will make an exception to the rule against hearing an appeal against a mere award of costs where any general principle of law has been disregarded.

Speaking for myself, after examination of the authorities, I do not think that they establish the list of exceptions collected above as an exhaustive list. If an order as to costs were, for example, made without jurisdiction, I do not think that they show that there could be no appeal to get rid of the illegality committed. Surely the burden lies heavily on those who assert that this House has precluded itself by decisions from entertaining such an appeal, and from dealing in this case with such a decision of the Court of Appeal based on want of jurisdiction, as freely as that Court dealt with the decision of Mr. Justice Branson.

The second and alternative interpretation of the scope of the authorities admits of this. It concedes that the settled practice of this House, and indeed of the higher Courts of Appeal in England generally, is to refuse to admit appeals as to costs alone where these have been disposed of by the Court below as matter of discretion. But what is an exercise of mere discretion, and what is in reality a declaration based on imagined legal principle, are matters not so clear. In 1749, when Lord Hardwicke was laying the foundations of the modern system of equity procedure, he laid down a principle which admits of costs under certain conditions being made the subject of appeal. He said of the rule that there cannot be an appeal for costs only, that it was "no printed rule," and that while it was for the general convenience that the rule should be maintained, a sound distinction where it could be made ought to be allowed. That was in *Owen v. Griffith* (1 Ves. sen., 250). I cite the case, not as fully defining the principle as it exists to-day, but as showing that in the days when it was being developed its now rigid character was emphasized. In inquiries into the origin and scope of rules of practice of this kind a genetic method seems essential.

Pursuing this method, the conclusion to which the language of the leading authorities seems to point is that where a discretion as to costs has been exercised on material that is illegitimate or is non-existent, or in violation of some principle of substantive right, an appeal will be entertained. Turning first to the question as it stands to-day in the Court of Appeal, I think that this is established there. That it should be so is important, for the restriction on appeals for costs as stated in the decisions of this House is not stated as though it were the outcome of a principle which is peculiar to the House. In *Civil Service Co-operative Society, Limited v. General Steam Navigation Company* (20 *The Times* L.R., 10 ; [1903] 2 K.B., 756) the plaintiffs sued to recover money paid on a consideration that had failed. The learned Judge who heard the case gave judgment for the defendants, but as they would not accept suggestions made by him for a settlement he deprived them of their costs. They appealed, and the Court of Appeal said that there were no materials before the Judge upon which he could legitimately exercise a discretion to this effect, and that accordingly he had no power to make the order. "No doubt," said Lord Halsbury, who presided at the hearing, "where a Judge has exercised his discretion upon certain materials which are before him, it may not be, and I think it is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied." Why is this principle not applicable to appeals to this House ? No doubt your Lordships have power to define the conditions on which such appeals are to be allowed. But have you done so in such a fashion as to exclude appeals as to costs when the discretion has been exercised in a way which is alleged to be contrary to the law ? Certainly Lord Hardwicke did not say so. In *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355 ; 14 App. Cas., 26) the question which arose related to another part of the Order which enabled the trial Judge to direct that where he found "good cause" the costs were not to follow the event, as was to be the normal

course where the trial was with a jury. It was said here, that where the discretionary power to deprive of costs for good cause had been duly exercised, that exercise was not to be subject to any review. And it was also said by the House that not any reason which may have been assigned for disallowing the costs of a party who had been successful in getting a verdict must necessarily be accepted as good cause. If the trial Judge gives effect to considerations which do not constitute "good cause" his decision is not protected from review. The House therefore listened to an appeal which was only concerned with costs.

My Lords, there are observations in *Metropolitan Asylum District Managers v. Hill* (5 App. Cas., 582) which appear to me to be only consistent with the view I have preferred, and in *Yeo v. Tatem* (L.R., 3 P.C., 696) that view was distinctly enunciated in the judgment delivered for the Judicial Committee of the Privy Council by Sir Joseph Napier at page 702. In the hearing of that case Lord Justice James and Lord Justice Mellish, both great authorities on the old general practice, took part.

The decision of the Appeal Committee in *Caledonian Railway Company v. Barrie* ([1903] A.C., 126) was cited in support of the contrary general proposition that the House will not entertain an appeal against costs only. That case was not a decision of the House and no reasons are given, and it is not clear that the preliminary question may not, in reality, have turned equally on the provision of the Judicature Act of Scotland which confines appeals to this House in cases commenced in the Sheriff's Court to matters of law alone. I find myself unable to treat this imperfectly reported case before the Appeal Committee as having been intended to overrule, or as having been capable of overruling deliberately, the principle underlying the other decisions to which I have referred. There are further decisions which support the view which I have expressed, but on these I do not think it necessary to enter because they have been referred to by the Lord Chancellor, in whose analysis of them I concur. I think, with him, that when the right to costs, or the existence of a discretion as to costs, depends on the decision of a question of law or procedure, an appeal on that question will be heard. The general rule against appeals as to costs is, as Lord Hardwicke said as long ago as 1749, a "paper rule," in the sense that it is a *prima facie* statement capable of being displaced in this way.

I therefore think that the respondent is not entitled to succeed upon his present contention.

Viscount Dunedin.—My Lords: Before forming my opinion in this case I had the great advantage of perusing the opinions of the noble Lords who had heard the case on the former occasion. These opinions being equally divided were a sure proof that the case was not easy of determination, and I therefore think that no apology is needed for saying that my opinion has not been arrived at without much thought and hesitation. The opinions to which I have referred have so thoroughly analysed the numerous decided cases that it would be quite useless to do so again. I shall therefore, in the remarks which I venture to address to your Lordships, assume complete familiarity with the facts of the case and with the many decisions. I have myself come to the conclusion that it is not possible to say that this House has in terms laid down a rule which will settle this case. I do not think that that is a matter of great surprise because I think it is plain that the precise question could not have arisen before the Judicature Act, and since then no case which raises the point has reached your Lordships' House. It follows that our duty now is to lay down the rule which is to guide future practice.

It was natural that one should search with avidity for a precise decision which settled the matter. At one time during the discussion I thought I had found such a case in *Caledonian Railway Company v. Barrie* ([1903] A.C., 126, and reported in the Court below 5 F., 30), but on further reflection I felt that this was not so. In the present case the Court of Appeal has altered the judgment of the trial Judge as to costs because it considered that the trial Judge had been influenced by evidence which was not legally before him. They could not, no leave to appeal as to costs having been either asked for or given by the trial Judge, under the terms of section 49 of the Supreme Court of Judicature Act, 1873, simply apply their own discretion to the point as to whether the costs should be allowed or not. In *Barrie's* case (*supra*) the Inner House of the Court of Session, who have by Scottish law and practice just as full discretion as the Judge or Judges whose judgments they are reviewing, did look, as they were entitled to look, to certain evidence, and on their view of it came to the conclusion that the Judge from whom the appeal came had been right. The result, so far as appeal to this House is concerned, would have been the same if they had held that he was wrong.

The nearest approach to a general rule, indeed so far as expression is concerned it might be taken as a general rule, is, in my opinion, what Lord Watson said in the case of *Metropolitan Asylum District Managers v. Hill* (5 App. Cas., 582, at p. 586):—

"I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the Judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case; because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties."

It would, however, have been, I think, impossible in view of the numerous judgments and the varying forms of expression contained therein to pick out the dictum of one Judge and say that it settled the rule as laid down by this House. It follows, in my view, that your Lordships have now for the first time to lay down the rule by an authoritative judgment.

Now before stating what I think the rule should be I wish to state a preliminary proposition. It has not strictly to do with the rule, but I think it is necessary before going to the rule. That proposition is that if in any case the merits are raised by a competent appeal before this House, raised *bona fide* and not merely colourably with a further intent, then, however infinitesimal the pecuniary value of the merits may be in comparison with the pecuniary value of the costs, yet appeal will lie and the costs may be dealt with with a free hand.

I come now to the rule when the appeal is for costs alone. It is to be remembered that the appeal is always from a Court of Appeal, and it is that judgment which is to be held appealable or not. What has happened in the former stages is, for the moment, immaterial. Further, I am using the words "costs alone" as meaning when the costs are the only stake. I am not for a moment saying that these

words have always been so used by others, but I am using them in that sense, and in so doing I am, I think, doing the same as Lord Watson when he spoke of nothing but the payment of costs being involved.

The rules that I would wish to lay down are these. Appeal will lie :—

1. If an express statutory provision applies and it can be shown that the Court of Appeal has disregarded it. An illustration may be found in the case of *Tod v. Tod* (2 Wilson and Shaw, 542).

2. If a rule of law and not mere discretion could decide the question. Illustration : *Lord Advocate v. Dunglas* (9 Cl. and F., 173) and *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355 ; 14 App. Cas., 26).

3. If the Court of Appeal have based their judgment on a point of law which may or may not be erroneous. Illustration : the present case.

In all other cases no appeal will lie.

I do not fancy that there is any controversy as to the soundness of my first two rules. It is the third that is controverted. My Lords, I confess I think the justification of the third is that without it there would be grave injustice done. The position under the Judicature Act of the Court of Appeal is very peculiar. When an appeal comes to them as to costs awarded by the discretion of a Judge, they cannot exercise their discretion instead of his unless leave to appeal from his order as to costs has been given by him. By a long series of decisions the Court of Appeal has held that that does not prevent them from upsetting what the Judge has done if they can find that he had no proper materials on which his discretion was exercised. This having been found, it strictly becomes the duty of the Court of Appeal to refer the matter back to the Judge for a proper exercise by him of his discretion as to costs. It may be doubtful whether this view is sound, but it has been acted on so consistently and so long that as it is, after all, a question of procedure your Lordships would not now wish to interfere with it. Nothing would suit the appellants better than if you could, for the judgment of the Court of Appeal would simply disappear and Mr. Justice Branson's judgment would stand. But, as it is, it would surely be very unjust that the respondent here could get rid of the trial Judge's judgment upon the point of law that he had considered matter which it was illegitimate for him to consider, and that then that view could not be overruled, if erroneous, by this House. This House is then revising not a discretion but a legal opinion that no discretion had been exercised. I am, therefore, of opinion that the appeal in this case is competent.

Viscount Sumner (read by Viscount Dunedin).—My Lords : On both the occasions when this preliminary objection has been argued at the Bar, the question has been, as I understood, whether any rule of this House existed which limited the competence of appeals for costs and, if so, how that rule had been defined by your Lordships' predecessors. On neither was there question of laying down a new rule, except in so far as the application of an old rule to new circumstances may itself be said to renew it. I think it is necessary to note this, because there is a singular lack of decided cases on the point in this century, and the precise issue raised in this appeal could not have arisen before the orders and rules of 1875, and could not previously have been contemplated even constructively. This appeal really rests upon authorities decided in the Court of Appeal upon the meaning and effect of the Judicature Act and the orders and rules made under it on the subject of costs, where there has not been a trial by jury. There has been no case in this House upon that effect of the rules, for I am convinced that *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355 ; 14 App. Cas., 26), whatever bearing it may have, is not now decisive. If it were, why have the older authorities been reviewed at all ? To this case I must return later.

My Lords, after the first argument I examined as exhaustively as I could the cases before this House and the Appeal Committee, both reported and unreported, which seemed to touch the point, and also the cases on costs in the Privy Council, and I submitted to your Lordships a detailed statement of them, on whichever side they appeared to be, with the conclusions that I drew. These have not found any favour with your Lordships and it would only be tiresome to examine all the cases again. As, however, the second argument has only confirmed my former view, and as it would be discourteous to dissent from your Lordships' better judgment without assigning reasons, I ask leave to trespass on your Lordships' time with a statement of the results of my examination of the cases and some observations on the present position of this appeal.

A hundred years ago the practice of the House as to appeals for costs only was not new, but it had not been formulated in published reports and decisions, still less in any regulation of the House itself. The general subject, especially as it was dealt with in Chancery, was familiar, and the distinction between costs as to which certain persons had vested rights, and costs which were entirely in the discretion of the Court, was well known. Still the question whether and, if so, under what circumstances costs which were in the discretion of the Court constituted appealable subject-matter was not and could not be a matter of general principle. In the absence of statutory regulation it was a matter of practice to be settled by the tribunal of the proposed appeal alone. In the case of an appeal to the House of Lords this practice derived its authority from the House. The rules adopted by the Privy Council or on a rehearing in Chancery might be known to be like those adopted by the House, and to the extent of that similarity might be contemporary evidence to show what the rule of the House was, but they could not even indirectly govern or prescribe it. It is not as though a uniform and consolidated body of rules had been laid down for the three tribunals, so that a case in the one would be any authority as to the practice of another. If this is right, the crucial examination of the decided cases is considerably limited in its scope.

Looking then at the opinions expressed by noble and learned Lords and the decisions of the House thereafter arrived at, there is abundant evidence that the formula " no appeal as to costs only " was regarded as a sufficient, if loose, description of the rule, and that, understanding the costs in question to have been costs in the discretion of the Court below, there is no adequate authority for treating that rule as doubtful or as admitting of fresh exceptions. The reported cases show, very early, that " costs " in this formula did not mean all or any costs, but only costs that had been in the discretion of the Court below. Step by step costs given by statute, costs of trustees, and costs of incumbrancers by way of mortgage or otherwise, were decided to be outside the rule. They were the subjects, respectively, of rights by law vested in certain parties antecedently to and independently of any Court's exercise of its discretion in their favour. On similar grounds the immunity of

the Crown from having to pay costs constituted another vested exception, but these cases lend no aid to the contention that costs become an exception to this rule of incompetence, whenever the discussion of the order below involves what is called a "question of law." I think this has never been decided, and the dicta most favourable to the appellant fall far short of it. Lord St. Leonards leaves it in doubt whether it is upon the emergence of any question of law or only of a serious one that the competence of an appeal as to costs depends (*Robertson v. Tait* (unreported) (*supra*). Lord Cranworth's language would seem to show that, for a wrong exercise of discretion as to costs, there can in no case be an appeal (*Marquess of Ailsa v. Kerr* (unreported) (*supra*), and Lord Selborne, on the other hand (*Metropolitan Asylum District Managers v. Hill,* 5 App. Cas., 582), appears to be content with the vague statement that discretion is not interfered with "in the absence of any settled principles upon the subject," whatever that may mean. His words should be read in connexion with those of Lord Blackburn and Lord Watson in the same case, by which I think they are considerably limited. On the facts of that case, however, the question was not one of disregard of a settled principle as to the grant or refusal of costs, but of an order regarding the allowance of an appeal on the merits, which the Court of Appeal had clearly no jurisdiction to make. The House has so often declared in terms that an appeal as to discretionary costs is incompetent and will not be proceeded with, and has so often dismissed appeals accordingly, that the appellants' argument ought not to be that *Huxley's* case (*supra*) was a case as to discretionary costs and is therefore in point, but that their own appeal is one as to jurisdiction, like *Huxley's* case (*supra*), and is governed by it for that reason, which I have not understood them to allege. With the very doubtful exception of *Brodie v. Sinclair* (5 Wilson and Shaw, 567) I have not found any case in which your Lordships' House has entertained or allowed an appeal as to discretionary costs only, without some addition of the merits of the cause or of a question of jurisdiction or vested legal right. In *Brodie's* case (*supra*) the appellant had succeeded at the trial, though not as to all the items, and had been ordered, nevertheless, to pay all the unsuccessful defender's costs. Some rule of Scottish law was apparently vouched in justification of this singular order. Lord Brougham, L.C., after inquiry, satisfied himself that there was no such rule, and accordingly the appeal succeeded. Here again the Court below had disregarded the pursuer's legal right, which was not to be compelled to indemnify another for outlay neither incurred at his request nor necessitated by his breach of the law. The rule has been repeatedly stated (*e.g., Fitzgibbon v. Scanlan,* Dow, 261, at p. 270), that, if a question on the merits be appealed, provided that it be raised genuinely and not merely colourably, the House will hold itself free to modify the order made as to costs below, even if it dismisses the appeal on the merits. I cannot think that such a rule was needed, or would have been laid down, if the real mind of the House was that even discretionary costs could be made the subject of an appeal by themselves, if any question of law was added or involved. If this was the latent rule of the House, it already included their patent but narrower rule, and this express statement of it was merely otiose and confusing.

My Lords, in 1835 (*Inglis v. Mansfield,* 3 Cl. and F., 362), Lord Brougham is reported as having said that the Privy Council rule and the rule in Chancery too were then the same as that in the House of Lords. How this may have been it is hard to tell, for, scanty as are the reported decisions on the subject in the House of Lords before that date, in the Privy Council I think there is hardly one. The later decisions we must read for ourselves. I wish to make one general remark as to the Privy Council cases, which is equally applicable to the review of causes in Chancery. In the latter Court always, and in the Privy Council often, the appeal is a first and only appeal. In the case of the Privy Council the appeal is not infrequently from Vice-Admiralty Courts abroad or from Courts of Ecclesiastical Jurisdiction in England. It may well be that, for that reason, the Judicial Committee's general rule against appeals for costs only should be less strict than in the case of your Lordships' House, which is always a tribunal at least of second appeal. I cannot help thinking that this is a material consideration. Test it thus. If Mr. Pollak's appeal had failed in the Court of Appeal, how would a second appeal to this House have been regarded then ?

The case of *Yeo v. Tatem* (L.R., 3 P.C., 696) has been much relied on by the appellants. It is true that it is a case in which the immediate benefit to be derived from the appeal was to get an order for payment of costs, but I do not think that no other matter than a right to costs was involved in it. Sir Joseph Napier's words show that the appeal was taken out of the general rule against allowing appeals for costs only, because there had been a mistake upon some matter of law, which governed or affected costs or involved the application of principles of law. The matter of law there in question was not simply failure to give costs. It was a substantive error in declining to exercise jurisdiction to decide the issue as to recovery of full satisfaction for the matter of the plaintiff's claim in a previous personal action at law. This could only have been decided in favour of the appellant, and he would have thereby gained the advantage of being able to plead *res judicata,* if the matter were ever raised again. As the law then stood it was his vested legal right to have all the pleaded issues decided one way or the other (*Rex v. Johnson,* 6 Cl. and Fin., 41). As the report of *Yeo v. Tatem,* in 40 L.J., Adm. 29, shows, the respondent's main argument was that, as the alleged satisfaction was made in an action *in personam* and the Admiralty proceeding was *in rem,* neither the special plea nor the general issue sufficed to bring the common law proceedings before the Admiralty Judge as a matter requiring adjudication. The dispute was therefore as to the Judge's jurisdiction, the existence of which the respondent denied, and not as to his right to exercise it. Legal rights at that time constantly found expression in terms of pleading, and I think this discussion, technical as it looks, was really the natural way in which to raise the complaint that the appellant had not enjoyed the right secured to him by law and was not merely appealing about a failure to give him rather more costs than he actually got. It is thus as an appeal against the act of the Admiralty Judge in declining jurisdiction to the appellant's prejudice that *Yeo v. Tatem* (*supra*) was subsequently understood in *Rieken v. Yorke Peninsula District Justices* (24 *The Times* L.R., 821 ; [1908] A.C., 454, though it is true that Lord Collins, in stating the grounds on which the appeal was dismissed, says both that the Court below had exercised discretion and that there had been no mistake in law. This is equivalent to saying that the justices had not declined jurisdiction and that there was nothing appealable about their decision. He goes on to say that the

Privy Council rule was the same as your Lordships', and so it was, if this is the right construction of the decision.

So much as to the current of authorities, which fix the substance of the rule. Assuming that the form in which it should be stated is that there is no appeal as to costs only, I see no escape from the present objection merely by saying that this appeal, though an appeal as to costs, is not an appeal as to costs only. Nothing is gained by saying it is an appeal as to a question of law as well. I think this expression only leads to confusion. You do not add a question of law to a question of costs; the two things are not *in pari materia*. You raise a question of law, which is a question of the law of costs. A question of law must be a question as to the law affecting some subject-matter, and so with a question of fact. The only subject-matter here is costs, and the only question of law is whether, in this case, the Judge's discretion as to costs was exercisable in either of two directions or in one only. Justiciable questions are not divisible into three kinds, questions of law, questions of fact, and questions of discretion. Judicial discretion as to costs goes to the Judge's powers over questions of law and questions of fact, but the powers themselves alike are powers over costs and costs only. The question suggested here is, whether the respondent's conduct in the first (the firm's) action was in any sufficient way made evidence before Mr. Justice Branson on the trial of the second (the company's) action, which appears to be a question of fact, and to be decisive of the matter one way or the other, but in any case I do not know what arguable question about costs there could be, other than mere questions of fact, that would not be some sort of question of law on the legal subject of costs. In the Court of Appeal, however, the decisions have so copiously laid down limitations and directions for the exercise of a Judge's discretion as to constitute a body of jurisprudence, which tends to destroy that free exercise of his statutory powers, which the Legislature conferred.

The relevancy of the inquiry into the effect of the reported cases on the present occasion is twofold. First, if it is laid down that the rule of the House always was such as to extend to appeals, which nowadays arise under Order LXV., rule 1, where a Judge sitting alone has deprived a successful party of costs and has not given leave to appeal, then in future discussions of other cases, coming under the same class but differing in their features from the present appeal, it will be open and may be necessary to go back to the old authorities in detail and to seek in them, and probably with success, reasons for distinguishing such other cases and excluding them from any appeal. Secondly, in the minds of some at any rate, the Appellate Jurisdiction Act, 1876, section 3, presents a difficulty in the way of any rule limiting appeals at all, unless it can be affirmed that it is one which existed before that Act was passed and can therefore be deemed not to have been affected by it. I do not understand your Lordships to decide that all matters as to costs are appealable. Some remain incompetent still, section 3 notwithstanding. I take it, for example, that *Caledonian Railway Company v. Barrie* ([1903] A.C., 126) must still render incompetent any order of the Court of Appeal as to costs which are in its own discretion, for it related to costs, which were in the discretion of the Court of Session. Hence the importance of discovering whether it really can be said that the rule existing before 1876 extended to the present case, or whether it is not really a question of making a new rule now.

My Lords, my own view would be that in a matter of practice your Lordships are and always were masters, and that no general statute as to jurisdiction could be read as limiting the right to mould the *cursus curiae*. This seems to have been the view which underlies section 11 of the Appellate Jurisdiction Act of 1876. I think that the rule, both originally and all along, was a practice rather than a principle, a matter of self-defensive policy, like the maxim *de minimis non curat lex* or the Privy Council rule as to concurrent findings of fact, and these are clearly questions of the way in which the House exercises its jurisdiction. Such matters must be capable of modification, whenever your Lordships think it expedient from time to time. Particularly must this be so, where a new regulation of practice opens your Lordships' doors to new subjects of appeal not hitherto entertained. The only question in this view would have been one as to the expediency of the change, but this has not been the matter in debate, and I will only say that I am not at present persuaded on this head.

I should also like to point out, what I think may be very important in any further proceedings, that I do not understand your Lordships to pronounce any conclusion as to the validity of the practice, long as it has prevailed in the Court of Appeal, of entertaining appeals from a Judge below, brought without his leave, against the exercise of his discretion as to costs when sitting without a jury. The principles on which this is done and the grounds on which it is supported are very conveniently stated by referring to what was said by Lord Halsbury in the *Civil Service Cooperative Society, Limited v. General Steam Navigation Company* (20 *The Times* L.R., 10; [1903] 2 K.B., 756). This may stand for a numerous body of decisions. These decisions have not been put in the arguments on the present objection. Not unnaturally, Mr. Jowitt, whose client had appealed to the Court of Appeal successfully, did not argue that the decisions, under which this had been done, were wrong, but this does not alter the fact that they are not binding on this House, have never come before it for approval or the reverse, and will be open to review on future occasions. The fact that counsel did not dispute them in this case cannot, of course, make your Lordships' present decision equivalent to an affirmation of them.

Huxley v. West London Extension Railway Company (*supra*) is, no doubt, a case of importance in this connexion, but I think it must be clear that its value lies in analogy only. It is not a decision on the rule in the *Civil Service Cooperative Society's* case (*supra*). I see no difficulty in reconciling the fact that the House entertained the appeal in *Huxley's* case (*supra*) with the existence of a rule, good or bad, that it will not entertain appeals as to costs only. The question being "was there good cause?" the decision did not touch the question "was there good enough cause?" The ground of the appeal was that the Lord Chief Justice had acted without jurisdiction, surely an appealable matter apart from the mode in which he dealt with the costs. If he acted without jurisdiction the litigants' legal rights were invaded, just as in *Yeo v. Tatem* (*supra*) they were disregarded. Order LXV., rule 1, has the force of law and *Huxley's* case (*supra*) arises under the second proviso which it contains. The structure of the proviso is that, where the matter has been tried by a jury, the costs shall follow the event and be independent of the Judge's order, unless the occasion arises, which alone gives him jurisdiction to intervene, that is, the existence of "good cause." The

question of its existence, since his jurisdiction depends on it, must be appealable; a Judge cannot give himself jurisdiction by finding that he has it when, in fact, he has not. The rule, where the trial is without a jury, is laid down on totally different lines. The costs are then in the discretion of the Court and there is no express statement of anything which limits it or is the foundation on which jurisdiction depends. Costs, which are in the discretion of the Court, are *primâ facie* costs which are got from the Judge according to his view of the case before him, and they are not the subject of standing legal prescriptions, vesting in a litigant a prior legal right to certain costs at all. If you come to think of it, costs, which are in the discretion of the Judge, must also be in his indiscretion, and so the only question that remains outstanding is the question of jurisdiction. In saying this, I am painfully aware that I am departing from the line which has long been followed in the Court of Appeal. There the cases have been steadily assimilated, whether the trial was by Judge and jury or not, and the extent to which under this process the exercise of the Judge's discretion has now been prescribed to him by decisions of the Court of Appeal, as matters of law, may well be collected from the judgment of Lord Justice Atkin in *Ritter v. Godfrey* (36 *The Times* L.R., 144, at p. 145; [1920] 2 K.B., 47, at p. 54). Further, by the words of the principal Act itself, the Judge's order as to such costs is made expressly, and *primâ facie* absolutely, unappealable without his leave. There is no doubt here about jurisdiction, for the subject-matter is simply costs, whether an order for costs is made or is refused, and those costs are entirely within the Judge's discretion since he tried the cause. His jurisdiction is complete, if the cause has proceeded before him. "The necessary hypothesis of the existence of materials, upon which the discretion can be exercised," is merely a condition precedent to the exercise of a discretion which the Judge possesses, if he proposes to exercise it otherwise than in one way. In the face of a rule which places costs in the Judge's discretion, it is impossible to argue that the successful litigant has by law a right to costs, in the sense in which that is said of trustees' costs or costs given by statute. Now this condition is only implied, if it exists at all, but the implication, according to Lord Halsbury, is not only that the right to exercise the discretion, otherwise than in one way, is conditional, but also that the question of the existence of that condition is itself appealable, notwithstanding the statutory words. These questions are quite different from those which arose in *Huxley's* case (*supra*). How they should be answered is not a question which now arises for decision, but for the purpose of emphasizing what I have ventured to say about the complete distinction between *Huxley's* case (*supra*) and the issue in this appeal, I would point out two things. First, an implied condition, unlike an expressly limited jurisdiction, even if it can be implied at all, may nevertheless not be appealable matter, for the Act may mean the Judge himself to be the sole judge of the existence of the condition, as he is of the other matters that guide him in the exercise of his sole discretion. The second is that to imply such a condition as an appealable question, if it is merely rested on the proposition that the Judge must act judicially, is a construction deserving of close scrutiny. A Judge, sitting in the seat of justice and acting as a Judge, may sometimes deal with costs as with other things, injudiciously, but in the matter of costs, which are in his discretion, an injudicious order is not open to review. If, then, the statement that he must act judicially really means more than this, it is no doubt true, but in common experience it is an injunction never disregarded. Certainly during the argument we were presented only with somewhat fantastic suggestions of non-judicial conduct, under the express language of Order LXV., and such cases, if they occur, are but a dubious ground for implying rules about self-misdirection and the existence of evidence fit to be considered by a reasonable man, which really belong to trials by jury.

My Lords, I should desire to add two observations on another aspect of the case. Mr. Pollak appealed to the Court of Appeal claiming that Mr. Justice Branson had gone outside his discretionary power and had fallen into an error of law in so doing, which was appealable. He won. He now says that by the rules of your Lordships' House the matter is no further appealable. It is now contended that grave injustice would be done, if we refused to entertain the appeal on the appellants' allegation, for this purpose deemed to be capable of being established, that the Court of Appeal in its turn was guilty of error of law and that the trial Judge was not. As this involves hearing all the facts of the appeal, it makes any rule which has to be enforced by an objection *in limine*, quite useless, for the merits will always have to be fully heard on the appellants' allegation that, when they are heard, the error in law will appear. Further, though it may be surprising for this House to have a rule differing from that adopted by the Court of Appeal, or to refuse to review that Court's decision on the same ground as that, on which it undertook the task of review, the question is not whether our rule is surprising, but whether it exists. For the rest, I am frankly unable to understand how the fact that Mr. Pollak sought the Court of Appeal and won there can assist the appellants in showing that they, in their turn, must have a corresponding right of appeal to your Lordships. With great respect, I think that the objection should have been allowed, and that in any case the decision should be no more than this, that your Lordships, in the exercise of your power over the practice of this House, think fit to proceed with the appeal.

Lord Atkinson.—My Lords: I think the respondent's objection to the hearing of the appeal fails. I concur with the judgment of the Lord Chancellor on this point. He has dealt with the authorities touching it so exhaustively that it is quite unnecessary for me, agreeing as I do with the conclusion at which he has arrived, to deal with them afresh at any length. I base my opinion mainly upon the principle upon which the two following cases have been decided—namely, *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355; 14 App. Cas., 26) and *Civil Service Cooperative Society, Limited v. General Steam Navigation Company* (20 *The Times* L.R., 10; [1903] 2 K.B., 756). The first of these two was an action brought by the appellant Huxley against the railway company for damages alleged to have been sustained by him through the negligence of the latter while carrying him as a passenger on their line. He claimed to receive £3,000. The defendants pleaded that there was no negligence on their part, that there was contributory negligence on the plaintiff's part, and that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendants, if any, and lastly that the plaintiff was not injured as alleged. At the trial before Lord Coleridge, C.J., and a special jury, a verdict was returned for the plaintiff for £50. The Chief Justice, though applied to by the company's counsel to exercise the power conferred upon him by Order

LXV., rule 1, and to deprive the plaintiff of his costs, declined to exercise any jurisdiction in the matter, upon the ground that the later decisions of the Court of Appeal (especially that in the case of *Jones v. Curling*, 13 Q.B.D., 262) had made the principles upon which this jurisdiction was to be exercised unintelligible to him. The plaintiff accordingly entered up for judgment for himself for £50 and costs. My Lords, I think it would be illuminating to consider at this stage what was the nature and scope of the judgment of the Court of Appeal in the case of *Jones v. Curling* (*supra*) which the Chief Justice found so unintelligible. The action in that case was brought to recover possession of six parcels of land. The defendants, availing themselves of the provisions of Order XIX., rule 15, which corresponds with Order XXI., rule 21, of the Rules of 1883, pleaded as a defence that they were in possession of all the closes claimed. The jury found for the plaintiffs as to four of these closes, numbered respectively 1, 2, 3, and 5 and for the defendants as to closes 4 and 6. The respective portions recovered by the plaintiffs and defendants were about equal in area, the plaintiffs' portion being valued at £4,950. Lord Coleridge, C.J., before whom the case was tried, made an order that the costs of both parties should be added together, and divided, apparently equally, between the plaintiffs and the defendants. This order was obviously not an order that the costs should follow the events ; but rather an order that on the ordinary system of taxation they should not follow the event. The appellants appealed to the Court of Appeal. At page 267 of the report, the Master of the Rolls (Sir Balliol Brett) is reported to have expressed himself thus. He said : "Now from this order" (the order as to costs) "an appeal has been brought to this Court, and the first question for us to decide is whether we can entertain any appeal, and if so to what extent. I am of opinion that this Court has a right, and is bound, to inquire whether the condition exists which gives a Judge jurisdiction to make an order as to costs." At the bottom of the same page the Master of the Rolls says : "The condition which gives the Judge upon a trial before himself and a jury jurisdiction to make an order as to costs is, whether there was a good cause or not existing, and I am of opinion that that is a subject-matter of appeal. Whether there was a good cause or not is a question of fact, and the Court of Appeal must consider whether in their judgment that fact did exist, and if they disagree as to this with the Judge who tried the action they must allow the appeal." Lord Bowen expresses his opinion on the matter with his well-known felicity of language at page 271 of the report. Referring to Order LXV., rule 1, he said : "The question of costs is dealt with by Order XLV., rule 1. That rule begins with placing in the discretion of the Court the costs of all proceedings in the Court, but then follows a provision by which, in the event of a jury trial, the costs are removed from the discretion of the Judge and are to follow the event except in one case, which is, if the Judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the Judge, provided a condition precedent is fulfilled ; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause then the Judge had no jurisdiction. It seems to me that on the true construction of this rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the Judge depends. When, however, this jurisdiction is established, then I think there is no appeal unless the Judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all. . . . It being open for us to decide whether there was good cause here for making the exceptional order by which the costs do not follow the event, we are driven to consider what is good cause within the meaning of this rule. . . . Good cause really seems to me to mean that there must exist facts which might reasonably lead the Judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make." Lord Justice Fry, at page 274, said : "It appears to me that the question whether the facts exist which give the Judge the discretion must be the subject of appeal. . . . I will not attempt to give any definition of what 'good cause' is, but it plainly must be something which renders it reasonable that the Judge should interfere with the rule that costs should follow the event." He then points out that the judgment or verdict in the case was distributive, the event with which it dealt not being single, and that upon taxation the costs would therefore follow the distinct issues, and he concludes as follows :—

"Is then the fact of the success of the plaintiff on some issues, and of his failure on other issues, by itself good cause for interfering with the rule that costs follow the event ? I am bound to say that it appears to me not to be so. I am of opinion therefore that there was no good cause shown, and consequently that the Lord Chief Justice had no jurisdiction to make the order, and that the order must be set aside."

In *Huxley's* case (*supra*) the Court of Appeal made an order that the defendants should have liberty to renew their application to Lord Coleridge and that if he declined to exercise his jurisdiction under Order LXV., rule 1, they should apply to the Divisional Court. A stay of execution was given in the meantime. On December 18, 1885, the defendants accordingly renewed their application for an order depriving the plaintiff of his costs. On January 3, 1886, the Lord Chief Justice heard the arguments, and on April 5 following made an order that the plaintiff be deprived of his costs for the reasons given in the report of the case in 17 Q.B.D., 373. The Lord Chief Justice delivered a judgment which covered nine and a half printed pages of the report. On the first of these pages he states, as I understand it, what are the facts which he considered amounted to "good cause" for depriving the plaintiff Huxley of his costs. The statement runs thus. "In the case of *Huxley v. West London Extension Railway Company* (*supra*), the plaintiff had preferred an extravagant and extortionate claim for compensation—£3,000—not merely in the formal statement of claim but in the particulars delivered in the action ; he had supported it by fraudulent statements and dishonest acts ; and endeavoured to substantiate it before the jury by evidence which they very properly disbelieved." The plaintiff Huxley appealed to the House of Lords against this Order of the Court of Appeal. The appeal was heard by the following six members of this House—namely, Lord Chancellor Halsbury, Lord Watson, Lord Bramwell, Lord Fitzgerald, Lord Macnaghten, and Lord Herschell. Four of these noble Lords gave long judgments. Lord Macnaghten stated that he agreed with the conclusions at which his learned friends had arrived,

and Lord Herschell expressed his concurrence with the opinion Lord Watson had delivered. The House entertained the appeal and decided it on the ground that the statement as to Huxley's conduct in instituting and supporting his action, as stated by Lord Coleridge, constituted "good cause" for his depriving Huxley of his costs. The judgments delivered in the case are very valuable, inasmuch as they deal with the proper construction of Order LXV., rule 1, and indicate what was the true meaning and reach of the words "good cause" used in the Order, and next the important question whether Huxley's appeal was to be dealt with and regarded as an appeal on "costs alone" or the same thing "costs only." Lord Watson, while stating that he would not attempt to give a general definition of "good cause," said that he might give an incomplete definition of it, and indicated what the words, in his view, meant in the Order and what they embraced. In his view, he said, they embraced everything for which the party was responsible, connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense. And he lays it down that as long as the Judge or Court deals with considerations of this kind, the sufficiency or insufficiency of those considerations as affording a reason for disallowing costs is a matter of which they are the constituted arbiters. They are acting within their jurisdiction and their decisions are final and conclusive. On the other hand, he said, if they give effect to considerations which do not constitute "good cause" within the meaning of the rule they exceed the limits of their jurisdiction, and on that ground their decisions are not protected from revision. Lord Halsbury's judgment is practically to the same effect. The judgment of the Court of Appeal dealt solely with the question whether Huxley's conduct and action, as described by Lord Coleridge amounted to proof of "good cause" for depriving him of costs within the provisions of Order LXV., rule 1. There was not, in the Court of Appeal, any suggestion that the verdict found for Huxley should on any ground be set aside or modified or that the damages awarded to him should on any ground be diminished. The appeal dealt solely with the question of the existence of "good cause" under Order LXV., rule 1, for depriving a successful litigant of his costs. The only relief asked for from the Court of Appeal or this House was that he might be declared entitled to these costs. The appeal to the House of Lords was likewise an appeal dealing solely with costs, *i.e.*, an appeal to get rid of the order of the Court of Appeal which deprived Huxley of costs. It is difficult to see how an appeal that only aims at annulling an order which deprives a litigant of his costs, because of his own conduct and not because of the merits of his action, is not an appeal dealing solely with costs. As an example of the practical application of those principles I refer to the second of the above-mentioned cases—namely, the case of *Civil Service Cooperative Society, Limited v. General Steam Navigation Company* (*supra*). There the defendants chartered to the plaintiffs a steamer to bring a party of sightseers to Spithead and other places to see the review of the fleet to be held on the occasion of King Edward VII.'s Coronation. The review was first postponed to the 25th June. The amount to be paid to the defendants was the lump sum of £1,500. The plaintiffs paid him £250 on the signing of the charter, and the balance £1,250 on the 18th June. On the 25th of June, when the review was postponed, notice was given by the plaintiffs to the defendants that they would not require the use of the ship. Before the postponement the defendants had expended £500 in fitting out the steamer. The review did not, in fact, take place till the month of August. The plaintiffs sued the defendants to recover the sum of £1,500 as money paid on a consideration which failed. At the trial before a Judge alone, Mr. Justice Bigham, as he was then, it appeared that there had been some negotiations between the parties for a settlement of the dispute, and the learned Judge expressed a desire that the matter should be left to him to say what, under the circumstances and apart from the strict legal rights of the parties, should be done. The defendants declined to take this course, and refused to accept another suggestion of the learned Judge—namely, that they should be content to retain the amount of the expenses they had received and their costs. In the result the learned Judge gave judgment for the defendants but ordered that each of the parties should bear their own costs. The plaintiffs appealed against the judgment in favour of the defendants, contending they were entitled to recover the sum they had paid. And the defendants appealed from the order of the learned Judge that each of the parties should bear their own costs. The appeal was heard before Earl Halsbury (Lord Chancellor), sitting in the Court of Appeal, Lord Alverstone (Lord Chief Justice), and Lord Justice Cozens-Hardy. The plaintiffs' appeal against the order of the learned Judge was dismissed, and on reference to the defendants' cross-appeal against the award of costs, the Lord Chancellor, at page 765, is reported to have said: "No doubt, where a Judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to override that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned Judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Mr. Justice Bigham, and in the judgment of this Court, they are right; and it practically comes to this—that the learned Judge has deprived the persons sued of what, *prima facie*, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned Judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the Judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the Judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs."

It is, I think, perfectly clear from these authorities that if a Judge in a case tried before him and a jury should, by the exercise of the discretion given to him by Order LXV., rule 1, deprive a successful litigant of his costs, the materials upon which he exercises that discretion, if it is to be properly exercised, must be materials proved in that case to exist. It is not enough that they should be imagined, or suspected, or without proof believed by the learned Judge, to exist, nor is it enough if they should exist in a suit different from the suit tried, and the Judge should mistakenly suppose that they had been established in this latter suit and act upon that false assumption. That it appears to me is what has occurred in this case. Besides, it should always be

remembered that the discretion which is to be exercised under this Order and rule is a judicial discretion. It is not a judicial exercise of this discretion to order a litigant who has been completely successful in a suit and against whom no misconduct is alleged to pay the costs of the proceeding : *Kierson v. Thompson* (29 *The Times* L.R., 205 ; [1913] 1 K.B., 587, at p. 589). Irrelevant matters cannot be relied upon by a Judge as constituting "good cause" for depriving a successful litigant of his costs, such as his putting forward, in his defence to a money demand, the Gaming Act, *Granville v. Firth* (19 *The Times* L.R., 213), or the Statute of Limitations, *Elms v. Hedges* (22 *The Times* L.R., 574), or the expression by the jury of their opinion as to how the costs should be borne. The rule that no appeal shall lie to the House of Lords on a question of costs alone is not a statutory rule. It is merely a rule of practice. It was shaped, adopted, and applied long before our expeditious and effective Court of Appeal was created. Upon what rational principle this rule, if it be a desirable one, is to be applied to appeals to the House of Lords and not to appeals to the Court of Appeal, it is difficult to see. The judgments of this House delivered in the *Huxley* case (*supra*), if they do not disregard it altogether, would appear to me to deprive it of all coercive authority. For these reasons I am of opinion that the preliminary point fails and that the objection raised should be disallowed.

Lord Shaw of Dunfermline (read by Lord Carson).—My Lords : There is no question before your Lordships' House as to the merits of the action between these parties. It is admitted by both of them that these merits are finally disposed of and that the sole difference between them is as to costs.

I wish to make this general statement in the most absolute terms. A consideration of the decisions founded upon by learned counsel shows, first, that a question of costs which is incidental to a consideration of a judgment upon the merits may be entertained when but not unless the merits are brought before this House and made the subject of consideration.

In the second place, there may be cases figurably and indeed definitely alluded to in the judgment of this House to which reference will presently be made in which, even although the merits be brought formally upon appeal, yet the House may discern that that is but a colourable attempt to introduce costs and nothing but costs to their Lordships' consideration. Such an attempt being colourable stamps the case as one in which no merits are before this House ; the remainder of the case being costs alone, the appeal is thrown out on the simple ground that in substance costs, and nothing but costs, were brought before your Lordships. Such an appeal will not be entertained.

In these circumstances the respondent in this case makes an objection founded upon the practice. The first reason stated in his case is that the appeal ought to be dismissed "because the present appeal is one brought as to costs only, and is therefore one which in accordance with the established principles of your Lordships' House cannot be sustained." The meaning of that I take to be that the appeal is excluded from consideration by the established practice. I think that reason to be sound, and I am of opinion that the appeal should accordingly be dismissed. The argument upon this subject contained a full reference to many authorities and was long and elaborate. It is clear to me that an attempt is now being made to subvert or invade in a most substantial sense our long-settled practice.

The respondent was in the employ of a firm Donald Campbell and Company, and was the manager of their Eastern department. Their business was formed into a limited concern, namely, Donald Campbell and Company, Limited ; the respondent became director of that company and he was a large shareholder in it. It did not prosper, and in a short time went into liquidation. Acute differences ensued on the subject of the respondent's dealings, and, in particular, as to his relations with one Boris Said. The firm sued the respondent by a writ issued on May 31, 1921 ; then, a few days afterwards, namely, on June 3, 1921, the company issued a writ against him. The two actions were consolidated and tried before Mr. Justice Darling and a jury, and resulted adversely to the respondent. The Court of Appeal ordered a new trial in both actions. On appeal to this House it was decided that there should be no new trial in the action by the firm and that a verdict in the firm's favour for £2,943 2s. 0d. should stand. With regard to the company's action, however, which was an action for an account, it was decided that it should be re-tried.

It was re-tried, and confessedly the trial was most satisfactorily conducted. To use the language of Lord Justice Atkin :—

"That second action was tried before Mr. Justice Branson. It was tried before him for eight or ten days, and he gave a judgment as to the issue of liability, and, if I may say so, a more satisfactory judgment I have never read in a complicated case. It seems to me that the learned Judge went very carefully into all the facts, considered very carefully the contentions of both parties, and, having very carefully considered and weighed them, eventually came to a decision in favour of Mr. Pollak. An action tried in that way should have the usual result that the parties are satisfied that justice has been done, although they do not go away satisfied with the result, because it is very seldom possible to convince an unsuccessful plaintiff or defendant against his will. Nevertheless, both parties are obviously satisfied with the way in which the case has been tried, and there is no further appeal from the findings of the learned Judge on the question of liability. The question that is before us now is the question as to costs. The learned Judge has deprived Mr. Pollak of his costs."

My Lords, I do not propose to discuss whether Mr. Justice Branson was right in so depriving Mr. Pollak of his costs, or whether the learned Judges of the Court of Appeal were right in reversing that judgment and finding Mr. Pollak entitled to costs. In substance the Court of Appeal held that in exercising his discretion as to costs the learned Judge had been moved towards that decision by facts established, or held to be established, when certain evidence was led in the previous consolidated action ; the Court of Appeal held that he should not have been so influenced. The material was no doubt before him, in this sense, that the consolidated action and its procedure were referred to, but the Court of Appeal considered that Mr. Justice Branson overstepped the legitimate limits by allowing the evidence to enter into or influence his mind and did not properly exercise his discretion. In these circumstances they confined within what they reckoned to be proper limits the true subject for consideration in the exercise of a discretion as to how costs should be awarded, and they did, in their turn, exercise a discretion as to costs, and made a pronouncement upon them in favour of Mr. Pollak. I shall, before I close, revert to this subject of discretion.

It would be improper to indicate which of these judgments was right, but the brief narrative has only been given in order to lead up to the fact now

definitely manifest, namely, that from the day when Mr. Justice Branson gave judgment in favour of the respondent the merits of this action were not only finally determined but completely passed from. The judgment stands without suggestion by either side that it can be gone back upon, and with a confession that the appeal to this House is on costs alone. Neither in substance nor in form or colour are the merits brought before this House, and it is to that clear and clean case that the authorities as to practice have to be applied.

In *Fitzgibbon v. Scanlan* (1 Dow, 261) Lord Chancellor Eldon said at p. 270 :—

"In regard to the matter of costs, although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters."

That is a clear distinction between costs alone and other matters, namely, the merits. As to costs alone "an appeal would not be received." It is reported that Lord Redesdale concurred with the Lord Chancellor "in every particular." The case was decided in 1813.

The case of *Tod v. Tod* (2 Wilson and Shaw, 542) completely confirms the same view as to practice, but it illustrates the matter from another aspect. A summons of reduction of a certain election of magistrates to a Royal Burgh in Scotland was raised in the Court of Session. The merits of the discussion need not be entered upon, but the Lord Chancellor said, upon the point of practice, as follows at p. 549 :—

"This House never does entertain an appeal for costs where costs are in the discretion of the Court below."

That is a statement of the general practice. He then, however, added :—

"But when the Legislature by a statute has expressly required that the Court of Session, in the case of an action that is brought under the authority of that statute, and in the case of a summary complaint which is brought under that statute, the Court shall make the party who fails pay the full costs of suit, it does appear to me that the party is in fact entitled to full costs of suit, and that, being so entitled to full costs of suit, the Court below ought, by their judgment, to have given full costs of suit, unless they were prepared to say that this was a case out of the statute."

And the Lord Chancellor concludes with this clear pronouncement :—

"If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie."

In 1835 occurred the case of *Inglis v. Mansfield* (3 Cl. and F., 362), a case on appeal to this House from the Court of Session. Lord Chancellor Brougham put the matter thus at p. 371 :—

"The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is that you cannot appeal for costs alone ; but you can bring an appeal on the merits ; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised."

It appears to me, confining the decision to the practice of this House, that that judgment makes clear the distinction in our practice that costs alone you cannot appeal for : they will only be considered by this House when merits are brought up for consideration, and they will not even then be so considered if the bringing up of the merits is a colourable device for getting costs considered. I am humbly of opinion that all this is still law.

Home v. Pringle (8 Cl. and Fin., 264) was decided in 1841. Lord Chancellor Cottenham dealt with the question of costs on the same lines. He said at p. 293 :—

"If I had been sitting in the Court below, considering the failure of the case made against the trustees and the unjustifiable charges brought against them, I should perhaps have thought it just that they should be indemnified in costs by directing the pursuer to pay them. But in this House the case is different. A Court of Appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone."

And the House decided accordingly.

Although I am citing the authorities presented to the House in their order, it seems clear to my mind that the general practice of the House was a practice not begun with those cases, but that the dicta of these three Lord Chancellors confirmed a rule of long and well-established standing. It is so treated in Mr. MacQueen's work on the Practice of the House of Lords and Privy Council. An appeal, says he, will not lie on costs alone, but it does not follow that the article of costs may not be taken into consideration when there is an appeal respecting other matters, and then he quotes Lord Brougham's judgment already cited.

In *Wilson v. The Queen* (L.R. 1 P.C., 405) an appeal had been presented to the Judicial Committee of the Privy Council from a decree of the Vice-Admiralty Court of Sierra Leone, restoring property seized for breach of the Customs laws. One of the appellants was proved not to be the owner of the goods, though so proceeded against. He, however, was cast in costs by the Court below. He made no appeal on the merits, the decision being in his favour. He, however, did appeal, and Lord Cairns, then Lord Justice Cairns, said at p. 408 :—

"With regard to one of the appellants, Cole, it was attempted to maintain his right to appeal, on the ground that, although he had been absolved from penalties in the Court below, he had not been awarded the costs of the proceeding against him. Their Lordships are of opinion that with regard to the appellant, Cole, the appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule that an appeal for costs could not be entertained."

The rule thus enunciated by Lord Chancellors of the greatest eminence and covering a period of practice of over half a century is, however, argued to have been either changed or evaded by *Yeo v. Tatem* (L.R., 3 P.C., 696), decided in 1871. It was a case of damage instituted on behalf of the owners of the brigantine Georgiana against the brig Orient and her owners, the appellant company being, as was assumed, their agents. A general denial was pleaded in answer, and a special defence was put in that the damage complained of had been already adjudicated upon in a court of law and judgment obtained and satisfied. At the hearing it was proved by a witness who was the principal defendant that the damage was occasioned by acts done by him on his own responsibility, but claiming certain rights as consignee. The Admiralty Judge held that the suit could not be maintained, but declined to give the defendants their costs or go into this special defence,

although his judgment was asked thereon by the defendants' counsel. It was held by the Judicial Committee that the defendants were entitled to have the judgment of the Court as asked on the special defence, that the general traverse and denial were sufficient to justify the evidence, and that the appeal was not for costs alone.

It is plain that the merits of the case, and not costs alone, were thus brought before the Privy Council, and it is also clear that the Council so thought. A perusal of the judgment of Sir Joseph Napier demonstrates this. In the course of his opinion, however, he said this at p. 702 :—

"Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal."

My Lords, I am clearly of opinion that the argument ably submitted in the present case to this House misconstrues these words here employed, namely, "mistake upon some matter of law that governs or affects costs." It seems plain to me that that refers to a matter of law on the merits of the case : it does not refer to a decision upon costs or a matter of law about costs, but it refers to a matter of law upon the merits of the case consequent upon which decision on merits the question of costs could hang. That there was such a decision on the merits given in *Yeo's* case (*supra*) is plain, and a most important decision as to practice it was, namely, as to whether the general traverse and denial were sufficient to justify certain evidence produced ; and, furthermore, it is plain that a substantial question on the merits equivalent to a plea of *res judicata* had to be decided. Merits accordingly being thus brought before the Judicial Committee, any question as to "costs alone" disappears. And it is to be noted that "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs."

It is argued that in the case of *Metropolitan Asylum District Managers v. Hill* (5 App. Cas., 582) observations fell from the Court which essentially weakened the long-established rule of practice so frequently affirmed. I am humbly of opinion that this is not so. Upon the contrary, the rule was reaffirmed that an appeal must not be brought for costs or in relation to costs, "but an appeal against an order which imposes, as a condition to having a new trial, the payment, within a certain time, of the costs of the first trial does not fall within that principle." As Lord Selborne, Lord Chancellor, put it, at p. 584 : "The Court of Appeal conditionally discharged the order for the new trial, and in the alternative conditionally dismissed the appeal." It seems clear, accordingly, that the point before the House was whether the appellants "were entitled to retain the order which they had obtained from the Court of first instance, unclogged and unfettered by conditions." Lord Blackburn makes the distinction very emphatically when he says at p. 586 : "Your Lordships may possibly come to the conclusion that there ought to be a new trial absolute and simple, without any condition at all, or it may be that you will think it right for there to be a new trial with the condition which the Queen's Bench Division imposed, or with the condition which the Court of Appeal imposed, or it may possibly be that you will be of opinion that there should be a new trial with some other condition different from either." Lord Watson expressly concedes "the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs. But," he adds, "it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined."

Instead, accordingly, of *Hill's* case (*supra*) casting doubt upon the rule, it follows it and confirms it, and, as appears from the language of Lord Watson just cited, applies it almost expressly to the present case now before the House, which is cited to be a case "where the whole merits of the action or cause have been determined."

In 1889 occurred the case of *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355 ; 14 App. Cas., 26). The case did not deal with the question now before your Lordships' House, but with the construction of a certain passage in Order LXV., rule 1, of the Rules of the Supreme Court, 1883, which applies to the discretion exercised by the Judge or Court in trials with a jury, the prescription of the rule being that in such cases "the costs shall follow the event unless the Judge . . . or the Court shall for good cause otherwise order."

The Judge trying the cause with a jury had refused to exercise his discretion or exercise any jurisdiction in the matter. The Court of Appeal sent it back to him, and he deprived the plaintiff of costs for the causes set out in his report. The questions before this House truly were whether the Lord Chief Justice by at first declining to determine costs had rendered himself *functus officio*, and what in practice and on merits was important, namely, what were the true procedure under, and the true construction of, the Statutory Order. The case does not appear to me to throw any light upon the point of practice before your Lordships.

It is different, however, with the case of *Caledonian Railway Company v. Barrie* ([1903] A.C., 126). The pure and broad question was there brought before a powerful Committee of this House, consisting of Lords Macnaghten, Shand, Davey, Robertson, and Lindley. It was an appeal against a judgment of the Court of Session in Scotland in an action directed against the railway company for injury to cattle being conveyed under a certain contract. The Sheriff-Substitute assoilzied the company, but gave them no costs. On an appeal to the Sheriff he cast the company in the costs of the case. It appeared that the company's behaviour was considered reprehensible ; it had denied to the cattle dealer any information as to the cause of the injury to the stock and had declined to allow any railway servant to be precognosced.

The First Division of the Court of Session by a majority affirmed the Sheriff. Lord Adam said that the case raised "a question of principle" depending on the construction and meaning of the correspondence between the parties and their actings. The Court accordingly applied their minds to the correspondence, &c., and held that the Sheriff was right. Lord McLaren dissented, holding that he was wrong. If there ever was a pure question of costs on which the House of Lords could have been induced to entertain the appeal, this was one. The successful party had been cast in the costs of the unsuccessful party. One Judge of Appeal had dissented and the other Judge had admitted that he decided the case upon principle. The Appeal Committee before whom the case was argued and decisions cited held as follows : "That the appeal being on the question of costs only was incompetent."

In *Rieken v. Yorke Peninsula District Justices* (24 *The Times* L.R., 821 ; [1908] A.C., 454) another attempt was made in the Privy Council to get the better of the rule. The judgment of their Lordships was delivered by Lord Collins, who cited *Wilson v. The Queen* (*supra*), *Inglis v. Mansfield* (*supra*), and *Yeo v. Tatem* (*supra*), and held that the rule was firmly established.

I have thus, my Lords, gone through all the relevant and important cases founded upon. They cover a period of over one hundred years. They appear to me to culminate in *Caledonian Railway Company v. Barrie* (*supra*). It appears to me to be settled by authority that this appeal, admittedly in no respect upon the merits of the cause but solely upon costs, must be rejected as incompetent. It falls within no exception to which a statute applies. When an Act of Parliament or a Statutory Order or a recognized rule of law has prescribed that in a certain event there must be a certain result as to costs, then the Courts must follow that prescription, but this becomes part of the merits of the case itself. There is no such case here.

The exercise of discretion is a wide term. Suppose a decision demonstrably and confessedly resting upon elements derived illegitimately and improperly from material only imported into the case on account of some invidia in the Judge's mind, and not resting upon material in the cause, it may be that in such a case this House might think fit to break down or make that an exception to the rule. I do not suggest that the House would be foreclosed from doing so, although it stands to reason that such an invasion of practice would require to be founded upon extraordinarily strong grounds.

But I see nothing in the present case to give a right to an appeal to this House on the challenge that it was a legal matter for the House to determine as to what were the materials on which the Judge who tried the case should have exercised his discretion. These materials were admittedly to be found within the four corners of the consolidated actions by the company and the firm. The case, in short, is the familiar one of a discretion being alleged to have been wrongly exercised by a Judge ; the phrase used is that he misdirected himself, the equivalent of which is simply that he went wrong. If he took something into account which had entered into the case actually or by inference, but which he should not have allowed to enter his mind, and should have been blind to, then his discretion might have been erroneously exercised, and the Court of Appeal according to its practice was of course within its rights in correcting this error and exercising its own discretion without allowing such an error to creep in.

But, my Lords, the practice of the House appears to me to be plain, that at that stage finality upon costs with all the points as to the elements of discretion applicable thereto is definitely reached. The Court of Appeal in England and either Division of Court of Session in Scotland are charged with that final responsibility. This House respects that finality as does the Judicial Committee of the Privy Council in regard to decrees upon costs alone pronounced by Indian and Colonial judicatories.

I desire to add this, my Lords : Of course I cannot testify specially upon the practice in England. But with regard to Scotland I can. I feel sure that legal practitioners and litigants in that country have looked upon the rule as so settled and have accepted that finality of their Supreme Court accordingly. I do not doubt that the same thing has happened in England. Your Lordships are thus confronted with an appeal made to upset not only a course of decision which has extended for over a century, but a uniform practice of the laws of the countries in conformity therewith. I think that practice was right and that this case falls within it.

My Lords, I will add but one word as to the argument submitted to this House in regard to the Appellate Jurisdiction Act, 1876. Section 3 of that statute is as follows : "Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following, *i.e.*, (1) of Her Majesty's Court of Appeal in England. . . ." It was argued in the present case, as it was in *Secretary of State for Home Affairs v. O'Brien* (39 *The Times* L.R., 638 ; [1923] A.C., 603), that this language is language of complete generality. It was held in the case cited that such language could not and was never meant to apply in the sense of extending the jurisdiction or practice of this House so as to make appealable an order of liberation pronounced upon a writ of *habeas corpus*, the practice of this House having been to respect the principle that when once liberation had been granted by any Court the cause is at an end.

I do not think that the enumeration in general terms as to all orders of the Court of Appeal was made to or does apply to a complete inversion of the practice of this House as to declining to entertain appeals solely upon costs. The long-settled practice to which I have referred could only have been inverted or invaded by language directly and distinctly aimed and settled for that purpose. The principles set forth in *O'Brien's* case (*supra*) and in *Cox v. Hakes* (6 *The Times* L.R., 465 ; 15 App. Cas., 506) appear to me to cover the present case.

I am humbly of opinion that the objection by the respondent to the competency of the present appeal is well founded, and that it should be sustained and the appeal dismissed with costs.

My Lords, the above was the opinion which I formed at the close of the first hearing. I have most carefully and respectfully considered the very able arguments of counsel at the second hearing and the views of your Lordships just delivered, and I adhere to my first opinion. In doing so the House will forgive me, I trust, while I merely note these supplementary points :—

1. This is a purely English appeal. Its decision turns out to be governed by the effect of Order LXV. of the Rules of the English Supreme Court and of the position and practice of the Court of Appeal under the English Judicature Act. It appears to be accepted that the Court of Appeal may rectify an error in law which it is satisfied the first Judge fell into, but that it itself exercises no discretion. In case of the present decision of this House ever being cited in any Scotch attempt at appeal from the Court of Session not on merits but upon costs alone, I think it right only to mention that in Scotland there is neither by enactment nor practice nor analogy any justification for holding that the long-standing practice with regard to Scotch appeals is now being invaded or altered. The Inner House of the Court of Session has itself a discretion as to the award, modification, or refusal of costs. *Quoad* an appeal to the House of Lords, if a decision upon costs has been reached by the Inner House that decision cannot, solely on costs, be challenged in this House, and must stand as final. The matter has been so treated by writers on practice, such as the learned Professor Æneas Mackay. And its clear and absolute character has, I can personally testify, been so treated during the more than half a century of my own professional life.

2. I venture to enter my special dissent from those

opinions which have expressed either doubt or question of the decision of the powerful Appeal Committee which sat in *Caledonian Railway Company v. Barrie* (*supra*). It is true that in the argument a reference was made to another question, namely, the effect of section 40 of the Judicature Act of Scotland, 1825 (which confines the range of facts to those found in the Court below). But that reference was an irrelevant and futile reference and had no bearing on the question of the competency of the appeal. The true question, namely, "whether there is an appeal to the House of Lords on a question of costs alone"—that question, as the private records of the case show, was thoroughly argued and the whole catalogue of leading cases already alluded to was cited; and when Lord Macnaghten in throwing out the appeal did so, he referred to the ground for doing so as one; and nobody can doubt that it was and was alone the one which is before your Lordships now.

3. I venture to call attention to what happened in the Court of Appeal on the form of that Court's judgment. It is as follows, namely, that such part of Mr. Justice Branson's judgment "as orders that no order be made as to costs be set aside and that *judgment be entered for the defendant Raymond Pollak with costs.*"

My Lords, there is no record, and it is, I understand, not the fact, that any objection whatsoever was made by either party to the Court of Appeal itself deciding the question of costs. If their judgment was taken as merely a correction of an error or self-misdirection, the legal course was to send the case back to Mr. Justice Branson to eliminate that error and apply his discretion correctly to the case and make such a judgment on the whole case—without that error—as should seem right.

Why was this not done? It appears to me to be fairly clear that the reason was that it was accepted by both parties that the Court of Appeal should be allowed to arrange costs according to its discretion, that is to say, its idea of what a discretion on a review of the whole case should have come to. The astonishing fact remains that neither party in the case—by the reason formulated in his appeal—has taken any point of objection to the decision of the Court of Appeal on costs standing *pro forma* as it does. The argument presented to your Lordships is rather of the nature of an astute afterthought unsupported by either reason or suggestion upon the papers. I do not enter further upon the topic lest I should trench upon the merits.

4. On the general rule which excludes from this House appeals on costs alone, the invasion of that rule has, in my opinion, in the past been only allowed by reason of something like a statutory or other prescription—as already referred to—which arises *ab extra* and so compels by force of law the exception. But the case of the present appeal does not arise from a prescription *ab extra*; it is founded on something psychological, discoverable by an analysis of what is alleged to have operated in the minds of the Judges who settled the costs. It is here that I part company with those who invoke the suggestion of a failure of substantial justice. The cases are legion in which, even while assenting to the merits of the judgment, one or other or both of the parties think that substantial justice has not been done upon costs. And if the rule against excluding such questions from that salutary finality which has for generations made them find an end in the lower Courts—if that rule be either invaded or abrogated, then the way may possibly have been opened to powerful litigants to the perpetration of much duress and injustice by, it may be, the ruinous protraction of litigation.

Lord Blanesburgh (read by Viscount Dunedin).—My Lords: Lord Justice Turner when delivering the judgment of the Judicial Committee in *Attenborough v. Kemp* (14 Moore, P.C., 351, at p. 353), deals with appeals upon costs alone in terms which may usefully be recalled. His observations are invariably referred to as the basis of the rule on this subject which, as elucidated in subsequent decisions, obtains with the Board.

Their Lordships, said the Lord Justice,

"do not wish to lay it down as a general rule, that in no case would there be an appeal in respect of costs, and of costs alone; because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the Court below has proceeded upon mistake or misapprehension. Their Lordships do not think that any general rule can be laid down which must apply to cases of this description. Such cases their Lordships desire to leave untouched; but where there has been *bona fide* care and discretion exercised on the part of the Judge who has decided the case, their Lordships have no hesitation in stating their opinion to be that in such a case no appeal will lie in respect of costs alone."

I may, at a later stage, have to refer to this passage in its entirety. At the moment I am concerned only with its last sentence. Upon that, I hazard the observation that in your Lordships' House also, the rule at least to the extent there stated is equally well established. And with a rule so limited, I know of no interference, legislative or other, which is or ever has been, threatened from any quarter.

How far further, if at all, the rule in this House extends or should be permitted to extend: at what point an appeal which may superficially retain the appearance of an appeal as to costs alone ceases under these words to be correctly so described in any sense relevant to its competence: at what point an appeal within the meaning of any rational rule on the subject ceases to be an appeal as to costs alone and becomes something quite different: at what stage it ceases in the same sense to be an appeal as to costs at all—these are the questions and the only questions upon which in a case like the present there is room for difference of opinion.

There emerges, however, on this appeal largely as the result of the conjoint effect of two decisions of this House, *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355; 14 App. Cas., 26), and *Secretary of State for Home Affairs v. O'Brien* (39 *The Times* L.R., 638; [1923] A.C., 603), a separate question of perhaps equal importance. We are here concerned with an appeal from an order of the Court of Appeal in England. It is presented to your Lordships' House under and by virtue of section 3 of the Appellate Jurisdiction Act, 1876. The appeal quite clearly comes within the words of that section, and the separate question here is whether the appellants are not under its unqualified provisions entitled at your Lordships' hand to a hearing of their appeal whatever may be the true limits of any rule of the House applicable to appeals, not within the section.

It will, my Lords, be a convenient introduction to the consideration of all these questions if an attempt be made in the first instance to determine with precision exactly what this appeal is and what it is not, and incidentally to ascertain what the jurisdiction was which the Court of Appeal exercised in making the order now appealed from and how it became

possessed of that jurisdiction. Whether there is or is not a duty laid upon your Lordships' House to entertain this appeal will, I believe, largely turn on the position as made apparent by that preliminary inquiry.

My Lords, after deciding the case in favour of the defendant, Mr. Justice Branson, who tried the action without a jury, gave judgment for him, but, as the formal order expresses it, he made no order as to costs. In the circumstances, these words were superfluous. The operation of the learned Judge's order would have been the same had it been silent as to costs. Its result intended and effective was that the costs did not follow the event for the reason that the learned Judge, purporting to exercise his judicial discretion in the matter, decided that they should not.

He explains his decision and the reasoning which led him to it in terms which do not admit of misunderstanding. But for one circumstance the defendant was, so the learned Judge intimated, entitled to his costs of action, as in ordinary course. But for that circumstance he would have exercised his discretion by ordering the plaintiffs to pay them. The plaintiffs, however, had called his attention to certain things touching the conduct of the defendant in an action which was at one time consolidated with this action but to which the plaintiffs were not parties: to these circumstances which he accepted as having been proved before him the learned Judge held that he was in law entitled to have regard in dealing with costs: and taking them into account, and them alone, he exercised his discretion by making no order as to costs at all, with the result that the defendant was thereby deprived of a very large sum to which it is quite clear that the learned Judge would otherwise have considered him entitled. It is true that that large sum was costs. But that, so far as the principle of the thing is concerned, is the merest accident. The legal question whether the learned Judge was justified in taking into account the circumstances which he did, might, in another case, just as easily arise with reference to a right to any kind of property made dependent upon the exercise of a judicial discretion.

In relation to costs the learned Judge's powers are derived from Order LXV., Rule 1. That order so far as material is in the terms following:

"Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

My Lords, the action, as I have said, was not tried with a jury, and your Lordships have present to your minds the difference which exists under that rule in the matter of costs between an action tried with a jury and one, like the present, tried by a Judge alone. In the first case, the costs follow the event unless "for good cause" it is otherwise ordered. In the second case, the costs all through are in the discretion of the Judge, and the successful party, whether plaintiff or defendant, gets no costs unless the Judge awards them. But while that is the distinction there is in a case like the present no practical difference between the two. Had this action been tried with a jury and had the jury's verdict been for the defendant, the learned Judge would have found in the circumstances to which I have already alluded, the presence of the "good cause," which would have enabled him in his discretion to "otherwise order." And his order, then discretionary, would as now, have said that there was to be no order as to costs. The result and the mental process by which it was judicially reached would have been the same in each case. I desire, my Lords, particularly to emphasize this statement, and for the reason that had the learned Judge's order as to costs here followed the verdict of a jury instead of, as it did, a judgment of his own, the question whether in law he was entitled to make the order would without doubt have been open to final review in this House. Such is the result of *Huxley v. West London Extension Railway Company* (*supra*). In my eyes, it is not the least of the respondent's difficulties in this preliminary discussion that he is confronted with the problem, which I have myself found insoluble, of stating, as he must, your Lordships' rule as to appeals for costs alone in a form under which the "good cause" cases will be taken and appeals like the present will be left.

From the learned Judge's order, so far as it deprived him of costs, the defendant appealed to the Court of Appeal, and it is now essential to see exactly what the objection was which he there took to the order made. On its nature the competence of the Court to entertain the appeal turned. And, first of all, the objection had nothing to do with the manner in which the learned Judge had exercised his discretion. It has never been denied in these proceedings that the actual exercise of a proper discretion in relation to costs remained in this case a matter for the learned Judge and for no one else. Section 49 of the Supreme Court of Judicature Act, 1873, which is the governing section, provided that "no order made by the High Court or any Judge thereof . . . as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order." Such leave in the present case was never either asked for or given. And, the object of the section being that except with such consent the Court of Appeal shall not review a Judge's discretion with reference to costs—*Bew v. Bew* ([1899] 2 Ch., 467, at p. 471)—it follows that in the present case any such review was entirely beyond the competence of the Court of Appeal. Nor did that Court undertake any task of the kind. How, indeed, could it have, when the merits or demerits of the respondent's conduct in relation to the litigation were never before it. The order of the Court of Appeal took the form it does, only, I feel sure, because the learned Judge had in effect intimated how he himself would have dealt with the costs if the circumstances to which he had had regard were not open to his consideration. But for that intimation the Court of Appeal would have been bound to refer the case back to the learned Judge for him to exercise his discretion afresh on a consideration of the materials to which in the view of that Court he was confined. In the circumstances that would have been a needless formality. The order accordingly gave to the defendant his costs at once. But in so giving them there was no exercise by the Court of Appeal of a discretion of its own. Sure it is that this appeal, whatever else may be said of it, is not, in any sense, an appeal from the exercise by the Court of Appeal of any discretion at all. It is not, I submit, open to

your Lordships to refuse to entertain it for any such non-existent reason.

The point is of first importance. On that very ground the present case is at once distinguished in principle from many which have been referred to, and notably from one on which great reliance was placed by Mr. Jowitt—I mean *Caledonian Railway Company v. Barrie* ([1903] A.C., 126). There the learned Sheriff-Substitute had exercised his discretion as to costs on the facts which were all before him. On appeal, the Sheriff-Principal first, and the Inner House in turn, exercised on their view of the same facts, but in another way, what they treated as being and what was apparently on all hands accepted as being their own discretion. There was then an appeal to this House, and if its rejection by the Appeal Committee was in fact based on the ground that it was an appeal from the exercise of that last discretion one can feel no surprise at the result. For *Barrie's* case (*supra*) is only another illustration of the Privy Council rule as above expounded by Lord Justice Turner : an illustration of a rule of this House as accepted on all hands.

Very different was the case raised here in the Court of Appeal and decided by that Court. It was that the learned Judge, bound by law to deal with the costs of the action in the exercise of a judicial discretion, had, so far from doing so, avowedly based his order upon circumstances which in the submission of the defendant were not before him and to which in law he was not entitled to have any regard at all ; that, in other words, on the learned Judge's own avowal, the only discretion he had exercised was no discretion whatever.

And that contention of the defendant he was entitled to raise by appeal. "No doubt," says Lord Halsbury in *Civil Service Cooperative Society, Limited v. General Steam Navigation Company* (20 *The Times* L.R., 10; [1903] 2 K.B., 756, at p. 765), "where a Judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned Judge could exercise a discretion at all. . . . That is not exercising a discretion upon materials properly before the Judge ; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the Judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs."

The deprivation of a party of his costs, if upon a ground not warranted in law is a determination of the Judge in point of law, see *per* Mr. Justice Phillimore in *Westgate v. Crowe* (24 *The Times* L.R., 14 ; [1908] 1 K.B., 24, at p. 27). Accordingly, the order of Mr. Justice Branson, as to costs, objected to, as it was, on the ground stated by Lord Halsbury in the judgment just cited, was an appealable order under section 19 of the Supreme Court of Judicature Act, 1873, just as for a reason completely analogous is appealable the question, whether there exists in law "good cause" enabling a Judge after verdict of a jury and in the exercise of his discretion to order that the costs shall not follow the event but shall be dealt with in some other way.

Thus is brought to view the exact question which your Lordships on this preliminary point have first to decide. Is there any existent rule of this House as to appeals for costs alone, be its terms what you will, which is effective to stop *in limine* this particular appeal of the appellants from this order of the Court of Appeal made in the circumstances and on the grounds stated ?

Now excluding as I do from consideration any possible suggestion that the appeal is an abuse of your Lordships' procedure—no one in the circumstances of this case has made or could have made such a suggestion—I venture to assert in answer that for two reasons quite independent of each other, there can be no such rule.

First, this appeal is in this matter of costs indistinguishable in principle from the appeal as to the presence of "good cause" which was entertained and decided by the House in *Huxley v. West London Extension Railway Company* (*supra*). In such cases, as had been observed by Lord Esher, Master of the Rolls, in *Jones v. Curling* (13 Q.B.D., 262, at p. 267), the Court [of Appeal] is bound to inquire whether the condition exists which gives a judge jurisdiction to make an order as to costs. In *Huxley's* case (*supra*), this House entered upon the same inquiry—its reason for doing so being, I think, correctly expressed in the head note in the words, "that if [the Court or Judge] give effect to considerations which do not constitute 'good cause' within the meaning of the rule they exceed the limits of their jurisdiction ; and on that ground their decisions are not protected from review." Equally so, here, my Lords. The question is, and is only, whether or not the learned Judge did not for an analogous reason exceed his jurisdiction. As Lord Blackburn observed in *Metropolitan Asylum District Managers v. Hill* (5 App. Cas., 582, at p. 586). "it is not because the condition involves the payment of costs, that, therefore, the question whether there is to be a condition or not is to be considered a mere dispute about costs." The real question here raised is only accidentally concerned with costs.

But, my Lords, there is another reason which leads to the same result. It is that under section 3 of the Appellate Jurisdiction Act, 1876, the House has the duty imposed upon it of hearing this appeal. In my judgment that conclusion results from the decision in *Secretary of State for Home Affairs v. O'Brien* (39 *The Times* L.R., 638 ; [1923] A.C., 603), as embodied for this purpose in the following passage from Lord Dunedin's judgment at p. 620 :—

"The generality of expression of a clause which gives an appeal . . . to the Court of Appeal is indistinguishable from the generality of the clause which gives an appeal from the Court of Appeal to this House. It follows that the considerations urged in the case of *Cox v. Hakes* (6 *The Times* L.R., 465 ; 15 App. Cas., 506), which case decided that appeal was not competent, are equally applicable when the question is whether appeal in such a case as the present lies from the Court of Appeal to this House."

My Lords, the converse here is the case. By common consent, for Mr. Jowitt in terms adhered to that position in his reply, an appeal in this case lay to the Court of Appeal under section 19 of the Supreme Court of Judicature Act, 1873 : by section 3 of the Appellate Jurisdiction Act, 1876—a clause of equal generality—an appeal is given to this House. Why then does no appeal lie in this case ? The only answer I have heard made is that just as in *O'Brien's* case (*supra*), the words, although wide enough to cover an appeal from an order for the issue of a writ of *habeas corpus*, could not have been intended to include such an appeal, so here the words of section 3 must be read so as to exclude the competence of an

appeal which impinges upon your Lordships' rule against hearing an appeal for costs alone.

My Lords, I cannot think that *O'Brien's* case (*supra*) can be invoked to support that answer. I cannot think that the exception there introduced—on the high ground that if it were not, the sections would have retraced what had been "the evolutionary development of the constitutional liberty of the subject"—a backward step which a majority of your Lordships were satisfied Parliament had no intention of taking, can justify a similar exception in favour of a mere rule of procedure so undefined in its scope that it offered no hindrance to the free discussion in this House of *Huxley v. West London Extension Railway Company* (*supra*), an appeal indistinguishable from the present, as I hope I have shown.

On this ground, also, my Lords, I am of opinion that this preliminary point should be determined in the appellants' favour.

I come now to the question of the actual ambit of the rule. On that I have little to say. I have had the advantage of reading in print the judgment of the Lord Chancellor, and with that judgment upon this matter I am in entire agreement. I would venture, upon it, to add only these observations of my own.

First. The rule has never been described as one peculiar to your Lordships' House. Lord Brougham in his statement of it in *Inglis v. Mansfield* (3 Cl. and Fin., 362, at p. 371), says it is common to this House, the Privy Council and the Court of Chancery. The Lord Chancellor has, I think, clearly shown that to extend it beyond the limit which he sets for it would carry the rule in this House beyond that of the Privy Council, the Court of Appeal in Chancery or the Court of Appeal as now constituted. His review of the authorities, I think, also establishes that this appeal would to-day be cognizable in the Privy Council, and it was, of course, entertained from the respondent's point of view by the Court of Appeal. No case since the passing of the Judicature Act has disclosed the existence in this House of any rule which would make it incompetent here. *Huxley v. West London Extension Railway Company* (*supra*) and less pointedly *Metropolitan Asylum District Managers v. Hill* (*supra*) show that no such rule was then operative. These cases on the one hand, with *Caledonian Railway Company v. Barrie* (*supra*), as reported, on the other, prove to my mind that the existing rule in this House is really in accord with the statement of the Privy Council rule as contained or implied in the words of Lord Justice Turner, with which I commenced this judgment. Since *Barrie's* case (*supra*) the question has apparently not been raised in this House, and from that fact and from the further fact that no attempt was made in such cases as *Jones v. Curling* (*supra*), and *Civil Service Co-operative Society, Limited v. General Steam Navigation Company* (*supra*), to test in this House the decision of the Court of Appeal, it has been suggested that since *Barrie's* case (*supra*) the sense of the profession has been that the avenue to this House has been closed. But, if so, the profession misunderstood *Barrie's* case (*supra*), and, next, *Jones v. Curling* (*supra*) was a "good cause" case. The *Civil Service Society's* case (*supra*), as the extract from Lord Halsbury's judgment in it above cited shows, was identical with the present. And truly there was no further appeal in either. But whatever may have been the reason for that omission in the *Civil Service Society's* case (*supra*)—poor prospects seem a sufficient explanation—your Lordships' rule ought to have had nothing to do with the absence of an appeal in *Jones v. Curling* (*supra*), for as *Huxley v. West London Extension Railway Company* (*supra*) subsequently showed, it would have imposed no barrier whatever to the appellant's progress to this House.

Secondly. The wider statement of the rule would seem to exclude from your Lordships' competence an appeal for his costs either by a trustee or by a mortgagee: and some colour for the suggestion that these costs are to be regarded like any other costs is to be found in the judgment of Lord Cottenham in *Home v. Pringle* (8 Cl. and Fin., 264, at p. 293). Mr. Jowitt, if I recollect aright, in his opening argument on the first discussion of this preliminary point contended that such costs were within the supposed rule, and most certainly no statement of the rule brought to your Lordships' notice has in terms excluded them. But no rule of practice could ever be supposed to go so far as to embrace within its operation questions touching the contractual right of trustees and mortgagees to their costs, and I can hardly suppose that any of your Lordships would desire to lay down or support a rule of practice for this House which would deprive either a trustee or a mortgagee of the privilege of having enforced here, if they had been denied elsewhere, his rights in this matter, as defined once for all by Lord Selborne in *Cotterell v. Stratton* (L.R., 8 Ch., 295, at p. 302) and by Sir George Jessel, Master of the Rolls, in *Turner v. Hancock* (20 Ch.D., 303, at p. 305).

But how eloquent upon the extreme vagueness of the rule, if carried beyond its admitted purview, is this necessary but hitherto unexpressed exception to it?

Thirdly. It is suggested that the rule of this House on this subject may properly be more strict than the rule either of the Court of Appeal or of the Privy Council, inasmuch as an appeal to your Lordships is always at least a third hearing. To my mind, this suggestion would be more convincing if the rule were applicable only where the findings below had been concurrent. But there is no such limitation upon its operation.

Fourthly. The rule as defined by the Lord Chancellor protects the House from every mischief in relation to appeals for costs alone, against which it needs protection. Any extension of the rule beyond that point can, I suggest, only be justified by clear and irresistible authority, for it is surely highly inexpedient that except to that extent the right to receive or the liability to pay costs representing frequently and in this case very large sums should be placed beyond your Lordships' cognizance not by statute but by your Lordships' own act.

In the result, I am of opinion that this preliminary objection from whatever angle it be regarded should not be sustained, and I concur in the motion which the Lord Chancellor has made.

[Solicitors—Messrs. Bull and Bull; Messrs. Wedlake, Letts and Birds.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. Apr. 28.

RADCLIFFE v. BUCKWELL.*

Merchant Shipping—Load-line—Not submerged at loading port—Heavy weather—Deck cargo—Saturation—Submersion of load-line on arrival—Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), s. 442 (1).

* Reported by J. W. Hall, Esq., Barrister-at-Law.

By s. 442 (1) of the Merchant Shipping Act, 1894, "If any owner or master of a British ship fails without reasonable cause to cause his ship to be marked as by this Part of this Act required, or to keep her so marked, or allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line . . . he shall for each offence be liable to a fine not exceeding one hundred pounds."

Held, that where the centre of the disc indicating the load-line is not submerged at the time of starting on the voyage but owing to the cargo being partly on deck and to its becoming saturated by heavy weather the centre of the disc is submerged on the arrival of the vessel at her destination, the master is liable to be convicted under the above provision.

This case, stated by the Hull stipendiary magistrate, was described by counsel as of great importance to shipowners and masters, and raised the question whether the master of a ship was liable to conviction for allowing his Plimsoll line to be submerged when such submersion was due solely to saturation in bad weather of the deck cargo, which was dry when the ship was loaded to the proper level.

The appellant, Albert John Radcliffe, was the master of the British ship Olavus. He was charged with unlawfully allowing the ship on September 22, 1926, at the Victoria Docks, Hull, to be so loaded as to submerge in salt water the centre of the disc indicating the load-line contrary to section 442 of the Merchant Shipping Act, 1894.

On September 14 the Olavus completed loading at a Finnish port a cargo of sawn boards. The total cargo was 695 standards, of which 194 standards were carried on deck. The cargo at the time of loading was very dry and it was loaded in fine weather. The hatches were properly secured.

The ship left port with the centre of the disc not submerged and almost at once encountered a gale of hurricane force. The master had to heave to for a whole day, the ship listed to starboard, and a quantity of water was shipped. When the Kiel Canal was reached the ship was deep, but the master did not do anything to lighten her, as he had faith in her ability to reach Hull, and there were no facilities for discharging at Kiel.

Heavy weather was again encountered in the North Sea. On entering the Humber the ship had a list and was found in the dock to have the centre of the disc submerged 8½in. after making the proper allowances for water in the bilges and the specific gravity of the water. That submersion indicated an excess of 134 tons over the proper load.

All the timber on the fore deck and 20 per cent. of that on the after deck was found to be saturated. That below deck was dry except just below the hatches. Ninety-seven standards of timber, weighing when dry 247½ tons, were found to be so saturated as to account for the 134 tons excess weight.

The magistrate was of opinion that the master had allowed the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line and accordingly convicted him and fined him £50 and £5 5s. costs, or 60 days' imprisonment.

Mr. Clement Davies, K.C., and Mr. Cyril Miller appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Bowstead for the respondent.

Mr. Clement Davies contended that the words of the Act were limited to the moment of completion of loading, over which the master had control. He referred to *Massey v. Morris* (10 *The Times* L.R., 517; [1894] 2 Q.B., 412). In that case the vessel was overloaded at the port of loading without the knowledge of the owner but with the knowledge of the master. The owner was prosecuted, and it was held that there was no evidence that he had allowed her to be overloaded.

The Lord Chief Justice.—Is the master not bound to exercise reasonable foresight and allow for bad weather? The Act makes the load-line the maximum point. Ought not the master, in the exercise of a reasonable and scientific imagination, to allow a margin of safety?

Mr. Clement Davies.—The margin of safety is provided by the load-line itself. The shipping of water on the voyage was not in his control.

Counsel for the respondent were not called upon to argue.

The Lord Chief Justice, in the course of his judgment, said that it was to be observed that the Victoria Dock was not the place where the process of putting the timber on board was carried out. That process was carried out on September 14 in Finland. Section 442 was one of a group of sections of the Merchant Shipping Act, 1894, dealing with the safety of those who go down to the sea in ships, and was not the least important of those sections. It provided:—

"(1) If—(*a*) any owner or master of a British ship fails without reasonable cause to cause his ship to be marked as by this Part of this Act required, or to keep her so marked, or allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line . . . he shall for each offence be liable to a fine not exceeding one hundred pounds. . . ."

No doubt as a mere matter of grammatical construction, the words "allows the ship to be so loaded" were ambiguous. They might refer to the actual process of loading, but they might equally refer to the condition of the loaded ship. In his opinion, they were wide enough to cover this case.

The very same words occurred in section 439 dealing with the detention of unsafe ships. If the contention of the appellant were correct, the moment, and the only moment, at which the question might be raised was the moment at which the process of putting the cargo on board had just been carried out.

If the vessel were then overloaded she would be liable under section 459 to be detained. But if she received a considerable addition from the sky or the waves to her cargo on the voyage and was driven to take refuge in another port, being then in a condition which would have made her an unsafe ship at the port of loading, still, if the appellant were right, she was not an unsafe ship there and could not be detained. With all respect to the counsel who had put forward that argument, it seemed to him to be a *reductio ad absurdum* of the matter.

He thought that the words meant the same in both sections and covered a case where a master was charged with allowing the mark, by reason of the way in which the vessel had been loaded, to be submerged at the port of arrival. In his opinion the magistrate was right.

Mr. Justice Avory and Mr. Justice Shearman delivered judgment to the same effect.

[Solicitors—Messrs. Pritchard and Sons for Messrs. Andrew M. Jackson and Co., Hull; the Solicitor to the Board of Trade.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. May 3.

BOWKER v. WOODROFFE. BOWKER v. PREMIER DRUG COMPANY, LIMITED.*

Sale of Food and Drugs—Extract of meat and malt wine—No fixed standard of quality—Analyst's certificate—Duty of Court to fix standard—Sale of Food and Drugs Act, 1875 (38 and 39 Vict., c. 63), s. 6—Wholesaler charged with aiding and abetting retailer—Not present at sale—No evidence of knowledge of composition of article sold.

Where an article of food or a drug has no recognized standard of quality, it is the duty of the Court before which a person is charged with supplying that article or drug not of the nature, substance and quality demanded by the purchaser, and to his prejudice, to fix a standard in the sense of considering whether the article supplied must be held to fall below a reasonable minimum, whatever it might in fact be. Where an analyst's certificate is before the Court, and is uncontradicted, the Court ought to act upon it, if it asserts that the article is deficient.

A wholesaler who supplies an article to a retailer for re-sale cannot be convicted of aiding and abetting if he is not present when the re-sale takes place, nor in the absence of evidence that he knew the composition of the article.

BOWKER v. WOODROFFE.

This was a case stated by the Stipendiary Magistrate of Salford.

An information was preferred by the appellant, Walter Stanley Bowker, under section 6 of the Sale of Food and Drugs Act, 1875, against Frederick James Woodroffe, the respondent, for that he on June 30, 1926, did sell to the appellant, and to his prejudice, a certain article of food, to wit, Extract of Meat and Malt Wine, which was not of the nature, substance, and quality demanded.

The appellant was an inspector under the Sale of Food and Drugs Act, 1875, and on June 30, 1926, he purchased from the respondent a bottle of Extract of Meat and Malt Wine for the purpose of analysis. The bottle was labelled "Extract of Meat and Malt Wine. Guaranteed prepared from Liebig's Extract of Meat. This Wine will be found invaluable as a stimulant to digestion. A tonic and a food. Non-alcoholic." The appellant paid 4s. 6d. for the bottle of Extract of Meat and Malt Wine, and complied with the formalities required by section 14 of the Sale of Food and Drugs Act, 1875.

The City Analyst gave a certificate in the following form, so far as material :—

"I am of opinion that the said sample contained the parts as under :—

Water	..	81.2 per cent.
Total sugars	..	16.4 ,,
Other extractive matter	..	2.4 ,,

"No change had taken place in the article that would interfere with the analysis. A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. The above 'other extractive matter' contains 0.06 per cent. phosphoric anhydride, indicating the possible presence of not more than 2 per cent. of a mixture of equal parts of meat and malt extracts. This opinion is based on the fact that a mixture of equal parts of meat and malt extracts contains about 3 per cent. phosphoric anhydride. The sample is therefore deficient of at least 60 per cent. of the minimum amount of meat and malt extract and is entirely deficient of wine. This is not a meat and malt wine. Its composition is little different from that of an ordinary flavoured cordial."

There was no fixed standard of quality for Extract of Meat and Malt Wine, but the amount of extract of meat and malt that had been put in the article supplied was very small—namely, 2.4 per cent.

The value of the bottle of Extract of Meat and Malt Wine, for which 4s. 6d. was charged and paid, did not exceed 6d., which included 3d. for the bottle.

The respondent did not tender any evidence.

The appellant contended that the use of the term "wine" implied the presence of the fermented juice of the grape, that in view of the certificate of the public analyst the sale in question was a sale of an article of food not of the nature, substance and quality demanded, and that the appellant was thereby prejudiced.

The respondent contended (*a*) that the article of food sold by him to the appellant was in accordance with the description specified on the label affixed to the bottle containing the said article, and the appellant was not thereby prejudiced ; (*b*) that the article had no recognized standard of quality and the sale in this case was not an offence within the Sale of Food and Drugs Acts ; and (*c*) that the term "wine" did not imply the presence of the fermented juice of the grape nor even that grape juice in any form was present.

The magistrate, whose attention was directed by the respondent to *Davidson v. Macleod* (42 J.P., 43) ; *Morton v. Green* (8 Rettie (J.C.), 36) ; *Smith v. Wisden* (18 *The Times* L.R., 92), was of opinion that the article of food purchased by the appellant was one for which there was no recognized standard of quality, and that he was bound by the decision in *Davidson v. Macleod* (*supra*), and on that ground dismissed the information.

Mr. T. Eastham, K.C., and Mr. E. L. Fleming appeared for the appellant ; Mr. Wingate-Saul, K.C. (Mr. Macbeth with him), for the respondent.

The Lord Chief Justice.—This is a case stated by the learned Stipendiary Magistrate for the City of Salford. The question arises in the following way :—An information was preferred by the present appellant under section 6 of the Sale of Food and Drugs Act, 1875, against the present respondent for selling to the appellant and to his prejudice a certain article of food—namely, extract of meat and malt wine, which was not of the nature, substance, and quality of the article demanded. The magistrate, having heard the information, dismissed it, and the question raised by this case is whether in so doing he came to a correct decision in point of law. It is not necessary to repeat all the findings of fact ; it is enough to say that on a certain day in June last the appellant, seeing in the window of the respondent's shop bottles of what was described as "extract of meat and malt wine," entered the shop and asked for a bottle of extract of meat and malt wine. It is found as a fact that that substance is a food. The label upon the bottle bore, amongst other

* Reported by J. W. Hall, Esq., Barrister-at-Law.

things, the words "Extract of meat and malt wine. Guaranteed prepared from Liebig's Extract of Meat. This wine will be found invaluable as a stimulant to digestion. A tonic and a food." The stuff in the bottle was analysed by the public analyst, and the certificate of analysis was offered in evidence. His conclusion was that the contents of the bottle were, water 81.2 per cent., total sugars 16.4 per cent., other extractive matter 2.4 per cent.; in other words, everything in this bottle was water or sugar except 2.4 per cent. The public analyst continued: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis. The above 'other extractive matter' contains 0.06 per cent. phosphoric anhydride, indicating the possible presence of not more than 2 per cent. of a mixture of equal parts of meat and malt extracts. This opinion is based on the fact that a mixture of equal parts of meat and malt extracts contains about 3 per cent. phosphoric anhydride. The sample is therefore deficient of at least 60 per cent. of the minimum amount of meat and malt extract, and is entirely deficient of wine. This is not a meat and malt wine. Its composition is little different from that of an ordinary flavoured cordial."

The case further finds that there is no fixed standard of quality for extract of meat and malt wine. It was a contention, and no doubt the main contention, of the respondent that the article purchased had no recognized standard of quality, and therefore the sale was not an offence. The learned magistrate having had an opportunity since December 16 last, when this case at the request of the respondent was remitted to the magistrate for further consideration, has re-stated the case in exactly the same terms as those which he first employed.

The opinion to which the learned magistrate came is as follows: "I was of opinion that the article of food purchased by the appellant was one for which there is no recognized standard of quality, and that I was bound by the decision in *Davidson v. Macleod* (42 J.P., 43)." Now, with regard to the decision in *Davidson v. Macleod* (*supra*), I think it is necessary to make two observations. The first is that it has no real bearing upon this case, and the second is that, if it had, it would not be binding upon the magistrate sitting in Salford. Section 21 of the Sale of Food and Drugs Act, 1875, provides as follows: "At the hearing of the information in such proceeding, the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness. . . ."

What are the facts stated in this certificate? The statements with regard to the constituent elements of this compound are undoubtedly statements of fact. The statement of the relative proportions in which those elements are found is undoubtedly a statement of fact. Then the certificate contains a sentence which it is suggested is really a statement of opinion, or it may be an aspiration: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts, with a wine basis." Speaking for myself, I read that sentence as meaning that a genuine meat and malt wine does normally contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis.

Starting from that axiom, the certificate proceeds step by step to demonstrate that there was here a deficiency to the extent of at least 60 per cent. of the minimum amount of meat and malt extracts, and having set out the stages and the factors in the conclusion, it sets out this final statement: "This is not a meat and malt wine." Now it is said that these are not statements of fact, but are expressions of opinion. The distinction between the two becomes a little metaphysical. In form they seem to me to be statements of fact, and if it had been desired to say that these are not statements of fact but mere statements of opinion, the proper course was for the respondent to require the attendance of the analyst so that he might be cross-examined, and it was open to the respondent to tender evidence *per contra*. This case, however, states in the clearest terms, in paragraph 6: "On the hearing of the information, the respondent did not tender any evidence."

In those circumstances, what was the true conclusion for the magistrate? I think that the matter is made quite clear by two cases. One is the case of *Harrison v. Richards* (45 J.P., 552), where Mr. Justice Lindley, as he then was, said at page 553: "The magistrate in this case seems to have treated the certificate as matter of opinion and not of fact. He sets out his own opinion against the certificate, but I think that cannot be done, for the certificate is *prima facie* evidence, and it could not be thrown over merely by an opinion not founded on the evidence. No evidence was given to contradict the certificate." That was a certificate in which, the constituent elements having been set out, the analyst said: "I am of opinion that the same is a sample of milk adulterated with 20 per cent. of water." That case was in the year 1881. In a much more recent case, in the year 1917, the case of *Robinson v. Newman* (81 J.P., 187), it was said by this Court (*per* Lord Reading, C.J.), at page 188: "The magistrates have to act upon the certificate of the analyst, which appears to be in the form in the schedule to the Act. The observation inserted in the certificate is justified by the note in the form in the schedule, and I do not think it is necessary to say more than that the analyst was entitled to express his opinion, and in the absence of a request that he should be called as a witness or of evidence to the contrary the justices should have acted upon it. The case of *Harrison v. Richards* (*supra*) is in point, and the appeal must be allowed." Finally, I should like to refer to a passage in the case of *Roberts v. Leeming* (69 J.P., 417) where, at page 419, Mr. Justice Ridley, who was one of the majority of the Court, said: "We have to consider the case of an article compounded for the purposes of commerce. It is not a natural product. You cannot say there is a certain standard which nature has laid down which is the proper standard for the qualities to be possessed by this particular article, and, as I think, it is like the Scotch case, *Wilson and M'Phee v. Wilson* (68 J.P., 175), quoted by Mr. Bartley, in which the Court must lay down for itself a standard. In this case, therefore, the justices had to make their own standard according to the evidence before them, and they had to say, Was this article in accordance with the standard, or was it not?" And in like manner, Mr. Justice Lawrance, at page 420, said: "That the Court can and must, unless the enactment is to be brought to nothing at all, fix some standard is, I should have thought, abundantly clear. There is nothing in the Act to show what margarine is. If it were not so, and if evidence of that kind were not admitted, it would be perfectly impossible to get at what margarine is under the Margarine Act at all"; and again, "But the decision in the case of *Wilson and M'Phee v. Wilson* (*supra*) is absolutely clear, and I think that the Court has power to, and must, dealing with an Act like the Margarine Act, fix some standard for itself."

Now, undoubtedly the words "fix some standard" are ambiguous. I do not think that those learned Judges meant that there must be a quantitative standard, drawing a hard and fast line. That is, of course, one way of fixing a standard, and in some cases it may be the best way, but there is clearly another way of fixing a standard, and that is, to have regard to a minimum and to say with regard to the contents of a particular admixture that, upon any reasonable view of the true minimum, this compound must fall short of it.

In the present case, the learned magistrate seems to have come to the conclusion that as there was no recognized standard of quality he was, so to say, *functus officio*, and anything could be sold under the name of "Extract of meat and malt wine." It has been suggested that there was some other evidence before him which caused him to doubt. It is upon no such matter that he has stated this case and re-stated it upon further consideration. The evidence in this case as to the contents of this bottle, and as to the real meaning of "Extract of meat and malt wine," at least so far as the minimum required is concerned, is to be found in this certificate. Having set out that certificate, the learned magistrate says that "On the hearing of the information, the respondent did not tender any evidence."

In those circumstances, that being the state of the evidence, I think it was the duty of the magistrate to say that this mixture fell below the requirements which were placed before him, by the only evidence worth regarding, as to the true nature, substance, and quality of extract of meat and malt wine, and, therefore, he ought to have convicted the respondents. In these circumstances and for these reasons, I think that this appeal ought to be allowed, and the case ought to go back to the magistrate with a direction to convict.

MR. JUSTICE AVORY.—I am of the same opinion. This certificate, upon its face, states as a fact that this article, which has been analysed, is not a meat and malt wine. In the absence of any evidence qualifying or contradicting that statement of fact, I think it was the duty of the learned magistrate to find that the article which had been sold had been sold to the prejudice of the purchaser, and I agree that the case should be remitted to him to do so.

MR. JUSTICE SHEARMAN.—I am of the same opinion, and I desire to say a few words about the authorities. Section 21 of the Sale of Food and Drugs Act, 1875, provides that: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated." That is usually paraphrased by saying that the certificate of the analyst is conclusive unless contradicted. I think a very serious question arises as to what is the meaning of those words. It is merely a certificate of an expert analyst, and it is conclusive as to the facts therein stated. I do not know whether extract of meat and malt wine, under the Food and Drugs Acts, is a food or a drug; it is said to be a food, but it certainly is not a well-known article of diet. In this particular case the analyst not only made an analysis, but he goes on in this form: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts, with a wine basis," and from that proposition he goes on to draw various inferences, and says that this does not comply with the standard. If it were not for the authorities, which, in my opinion, bind this Court, I should hesitate to say that those are facts stated in the analysis. To my mind it is an expression of opinion, and, having regard to this analysis, he thinks the Court ought to convict, and wants them to convict, and it amounts to no more. There is no doubt also that, since this Act was passed, there is a form of analysis which provides, in terms, that the analyst can express his opinion as to whether the mixture was for the purpose of rendering the article colourable or preservable, and state whether the excess is ordinary or not.

There are two authorities to which my Lord has referred; one is *Harrison v. Richards* (45 J.P., 552), and the second is *Robinson v. Newman* (81 J.P., 187). The last case is 10 years old, the other is a great many years old. Although in neither of those cases was more than one side represented, and that the side in whose favour judgment was given, it is quite clearly laid down in both those cases—I do not think it is possible to discriminate—that the analyst is entitled to express his opinion as to what the standard should be, and if that is uncontradicted, the magistrates are bound to accept it. The odd thing is that there are two reported cases: one *Reg. v. Field—Ex parte White* (11 *The Times* L.R., 240), and the other *Shortt v. Robinson* (63 J.P., 295), where this Court has decided the exact reverse, where the analyst had attempted to express a view and the magistrates declined to accept the view, and the Court declined to interfere with their finding, but in my opinion the two other cases to which I have referred have for a long time been regarded as the leading cases. The later one is 10 years old, and I do not think this Court ought to disturb the principle laid down by them. That principle is that the analyst is entitled to express his opinion as to what the standard of any article should be, in order that the thing sold should not be sold to the prejudice of the purchaser, and if he expresses his opinion in his analysis, the Court is bound to accept it unless it is contradicted. That, I think, is the present state of the law which we have to accept. That being so, I think that this appeal should be allowed.

BOWKER v. PREMIER DRUG COMPANY, LIMITED.

This case was connected with the previous one, 16 respondents in the present case being charged with aiding and abetting Woodroffe. These respondents were the wholesale firm who, on December 31, 1925, sold to Woodroffe for re-sale a dozen large and a dozen small bottles of extract of meat and malt wine. The magistrate, having dismissed the information against Woodroffe, also dismissed this information.

The same counsel appeared on both sides.

THE LORD CHIEF JUSTICE.—This is a case stated by the learned Stipendiary Magistrate for the City of Salford. It is closely connected with the case of *Bowker v. Woodroffe*, upon which we came to a conclusion earlier to-day. It is not necessary to repeat the details of this case.

The present respondents, the Premier Drug Company, Limited, were charged with aiding and abetting Woodroffe to commit the offence referred to in the previous case, namely, to sell to the appellant and to his prejudice a certain article of food, that is, extract of meat and malt wine, which was not of the nature, substance and quality of the article demanded, contrary to section 6 of the Sale of Food and Drugs Act, 1875. The learned magistrate came to the conclu-

sion that the information ought to be dismissed, and he dismissed it. The question for us is whether he came to a correct determination and decision in point of law. One thing at any rate is perfectly obvious : if he did come to a correct decision it was not for the reasons that he gives. His reasons are as follow in paragraph 9 : "Having dismissed an information preferred by the appellant against the said Frederick James Woodroffe in respect of an alleged contravention by him of section 6 of the Sale of Food and Drugs Act, 1875 . . . I was consequently of opinion that the facts did not disclose the offence charged in the information preferred by the appellant against the respondents." In other words, the learned magistrate seems to say, and to say clearly : "As I have dismissed the case against the principal offender I have no alternative but to dismiss the case against the alleged aiders and abettors."

We have now found that he was wrong in dismissing the case against the principal offender, and have sent back that case to him with a direction to convict. It is perfectly obvious, therefore, that this case cannot be decided in favour of the respondents upon the ground upon which the learned magistrate dismissed the information. Yet it may appear that there are facts stated in the case which show that accidentally the learned magistrate arrived at the right conclusion, and that the information ought to have been dismissed, although for quite different reasons.

It is found as a fact, and is not denied, that this compound or mixture was sold by the respondents to Woodroffe. It is further found that these respondents induced the unfortunate Woodroffe to buy this stuff for re-sale. It is further found that at the time when the stuff was delivered to Woodroffe it was labelled, as it was labelled when it was sold, amongst other things, as extract of meat and malt wine and so forth.

I have reluctantly come to the conclusion that these respondents could not be held liable, and that for more than one reason : First, they were charged as aiders and abettors, but they were not present at the time of the sale complained of ; secondly, there is no evidence to show that they knew at any material time that this mixture was not what it purported to be, and what the label said it was ; and, thirdly, there is no evidence to show they knew that although they sold this stuff labelled as extract of meat and malt wine Woodroffe was not going to sell it subject to the warning which he might conceive to be appropriate, as for example : "You ought to understand that this is really water," or "This is not wine at all."

In these circumstances I think that the learned magistrate was right in dismissing the case against these respondents, and I have reluctantly come to the conclusion that this appeal fails.

Mr. Justice Avory.—I agree that the learned magistrate was right in dismissing this summons against the respondents, not on the ground on which he did dismiss it, but upon the ground that there was no evidence that the respondents aided and abetted Frederick James Woodroffe to commit the offence of selling to the prejudice of the appellant a certain article of food. Even if the summons had been amended, as Mr. Eastham rightly says it might have been amended at the hearing, into a charge that they did counsel and procure Frederick James Woodroffe to commit that offence, there still, in my opinion, would not have been any evidence to justify their conviction for that offence.

Quite apart from the point that there was no evidence that they knew how this article was compounded, there was no evidence showing that they did not inform Woodroffe at the time when they sold it that it only contained 2 per cent. of malt and meat extract, and that he must therefore warn purchasers before he sold it. Further, there was no evidence that they knew that in selling it on this particular occasion on June 30 he was selling it to the prejudice of the purchaser, that is to say, selling it without any warning or notice to the purchaser that it was not actually what it was represented to be by the label.

For those reasons I think it was impossible upon the evidence that was before the learned magistrate for him to have convicted either of aiding and abetting or of counselling and procuring the commission of this particular offence.

Mr. Justice Shearman.—I am of the same opinion. The magistrate dismissed this charge against the Premier Drug Company, Limited, of being aiders and abettors because he had already dismissed the charge against the principals. Naturally, he had nothing more to consider. This Court has decided that he was wrong in his previous decision. There is no reason to suppose, however, that if he had considered this question on its merits he would have arrived at a wrong decision.

We are entitled to look at the stated facts, and if according to the stated facts he ought to have so decided we can dismiss the appeal. I know that moralists say that the person who provides the means to commit a crime is worse than, or just as bad as, the man who commits the crime, but that is not a sound maxim of criminal law. A crime must be a specific intentional act, and I know of no case saying that a man can be an aider and abettor if he knows nothing of the act or the date or the person against whom the criminal offence is committed. It will not do to say : "You gave the means of doing it." A man is not an aider and abettor unless he was present actively or constructively assisting the act which is an illegal act. There is no evidence of that at all, and therefore the magistrate, if he had considered the matter, would have been quite right in doing as we are doing now, namely, in dismissing the summons.

[Solicitors in both cases—Messrs. Sharpe, Pritchard, and Co., for Mr. L. C. Evans, Town Clerk of Salford ; Mr. A. R. Lord, for Messrs. Bernard Kuit and Co., Manchester.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. May 4.

HOLY LAW SOUTH BROUGHTON BURIAL BOARD v. FAILSWORTH U.D.C.*

Private Street Works—Apportionment—Exemption of burial ground "attached" to place of worship—Physical attachment or contiguity required—Private Street Works Act, 1892 (55 and 56 Vict., c. 57), s. 16.

The exemption from liability for the expenses of private street works given by s. 16 of the Private Street Works Act, 1892, to a burial ground "attached" to a "place appropriated to public religious worship which is for the time being by law exempt from rates for the relief of the poor" extends only to a burial ground in

* Reported by J. W. Hall, Esq., Barrister-at-Law.

physical attachment or contiguity to the building, and does not include a burial ground at a distance "attached" to the place of worship in the functional sense that it is owned and maintained by the congregation of the place of worship for their members.

This was a case stated by Lancashire justices.

An application was made by the Failsworth Urban District Council, the respondents (hereinafter called the Council), under the Private Street Works Act, 1892, against the appellants, the Holy Law South Broughton Burial Board (hereinafter called the Burial Board), to a court of summary jurisdiction for determining the matter of an objection made by the said Burial Board to a proposal by the said Council with respect to the charge on the said Burial Board, as owners of premises shown in the provisional apportionment as liable to be charged with £376 5s. 3d., a part of the expense of executing certain private street works on part of road No. 2, within the said urban district. On November 17, 1926, the said court of summary jurisdiction determined that the said objection of the said Burial Board was bad, and overruled it.

The following facts were admitted or proved [in addition to the due compliance by the Council with the several provisions of the Private Street Works Act, 1892, as to resolutions, specifications, plans, &c., and notices thereof to the Burial Board, who were charged in the provisional apportionment as owners of the Jewish burial ground abutting on the said street]. By letter dated May 25, 1926, the Burial Board gave notice of objection to the proposals of the Council, and claimed exemption under section 16 of the Private Street Works Act, 1892, on the ground that the cemetery or burial ground was attached to the synagogues of the Holy Law Congregation and the South Broughton Congregation, respectively situate at Red Bank, Cheetham, and Bury New-road, Strangeways, Manchester, and being places appropriated to public religious worship and exempt from rates for the relief of the poor within the meaning of that section.

The synagogue of the Holy Law Congregation was situate in Red Bank, Cheetham, in the City of Manchester, and the South Broughton Synagogue was situate in Bury New-road, Strangeways, in the City of Manchester. Both synagogues were situate about five miles distant from the said burial ground, and neither synagogue was within the district of the said urban authority.

Both synagogues were places appropriated to public religious worship and exempt from rates for the relief of the poor. The said burial ground was assessed for poor rate, and poor rate was paid in respect thereof to the said Council.

By an indenture made on October 25, 1922, between certain persons therein named as vendors, and certain other persons of the second part and of the third part therein named as purchasers, it was recited that the parties of the second part were members of the said Holy Law Congregation, a religious community of persons of the Jewish persuasion whose place of worship for the time being was known as the Holy Law Synagogue, and that the parties of the third part were members of the congregation of the South Broughton Synagogue, another religious community of persons of the Jewish persuasion whose place of worship for the time being was known as the South Broughton Synagogue, and that the plots of land and hereditaments thereby conveyed were conveyed to the use of the said parties thereto of the second and third parts thereinafter referred to as trustees upon trust to permit the same or such part or parts thereof as might from time to time be set apart and appropriated for that purpose to be used in perpetuity as a burial ground for the members of the said Holy Law Congregation and the members of the said South Broughton Synagogue, or, if the trustees should so permit, for the members of other congregations, subject to such payments and conditions as the trustees might from time to time determine.

A Burial Board was formed to carry out the terms of the said indenture, and was named the Holy Law South Broughton Burial Board. Rules were made by such Board.

The land which formed the premises of the Burial Board, and in respect of which the Council desired to levy the said charge, had at all material times been used by the said Burial Board as a burial ground only, and in accordance with the said indenture and the said rules.

On the hearing of the said application it was contended on behalf of the Council :—

(1) That the said burial ground was not attached to the said synagogues or either of them within the meaning of section 16 of the Private Street Works Act, 1892, in that the distance between the said burial ground and the said synagogues was five miles; (2) that the word "attached" in the said section 16 had a physical significance.

It was contended on behalf of the Burial Board :—

(1) That the said burial ground was attached to both of the said synagogues within the meaning of section 16 of the Private Street Works Act, 1892; (2) that the word "attached" in the said section 16 had not a physical significance; (3) that the word "attached" in the said section 16 had a purely functional significance.

The justices were of the opinion that the said burial ground was not attached to the said synagogues or either of them, within the meaning of section 16 of the Private Street Works Act, 1892.

The material words of the section are set out in full in the second paragraph of the judgment of the Lord Chief Justice.

Mr. N. J. Laski appeared for the appellants; Mr. W. Gorman, for the respondents, was not called upon to argue.

The Lord Chief Justice.—This is a case stated by justices for the county of Lancaster sitting in Manchester. The short question arises under the words of section 16 of the Private Street Works Act, 1892. The question was whether in respect of a burial ground situate some five miles from two synagogues in Manchester there was exemption from liability under the Private Street Works Act, 1892, by reason of the fact that the burial ground was in some sense connected or associated with each of those two synagogues.

It was contended on behalf of the respondents, the Urban District Council, that the word "attached" which is found in section 16 had a physical significance. On behalf of the present appellants it was contended that the word "attached" had no physical significance at all, and that it concerned only the purpose or function of the burial ground in relation to the place of worship. The words of the section are as follow: "The incumbent, or minister or trustee of any church, chapel, or place appropriated to public religious worship, which is for the time

being exempt by law from rates for the relief of the poor, shall not be liable to any expenses of private street works as the owner of such church, chapel, or place, or of any churchyard or burial ground attached thereto. . . ."

The topic which is being dealt with is the expenses of private street works, which, of course, must always be carried out in a particular street, and where there is liability for such works the proportionate part of the total expenses which any particular person has to pay depends upon the extent of the frontage of the premises in which that person is interested in relation to the street works that have been or are about to be carried out. What is being dealt with throughout is not something abstract, theoretical or notional, but physical and actual frontage, paving and streets. The section begins by postulating the existence of a physical place—a building—where there is public religious worship. In order that the section may have any application at all one must first find a church, a chapel, or a place appropriated to public religious worship. That physical structure having been identified, then if that structure is exempt from rates for the relief of the poor, it follows that it is also exempt from the expenses of private street works, and the exemption is carried beyond the four walls within which the religious worship takes place to that which is connected with it in a physical and also in a functional sense, if the word may be employed, namely, the churchyard or the burial ground. If there is a churchyard or burial ground attached to that church, chapel, or place appropriated to public religious worship, and that place is exempt from rates for the relief of the poor, then the burial ground also is exempt; the Act does not impose liability upon the owner of the church, chapel, or place by reason of the fact that it has a frontage upon the street or streets where the street works are being carried out.

In my opinion the whole scheme and framework of this section make it plain that what is being considered is physical connexion, physical contiguity. It may well be that that is not enough; in addition to the physical connexion and contiguity the churchyard or the burial ground must be the churchyard or burial ground of the particular church, chapel, or place appropriated to public religious worship which is exempt from rates. But I cannot imagine within the meaning of this term that a place which is five miles off is attached to the synagogue merely because it is associated with the synagogue as a place where members of the synagogue and other persons may be buried. It is not necessary to discuss the question how close the actual physical contiguity must be, but that there must be physical attachment and association I am satisfied, and on any fair view of the meaning of this word "attached" it could not be held that this burial ground, distant five miles, was "attached" to these synagogues within the meaning of section 16.

The justices were of the opinion that the burial ground was not "attached" to the said synagogues or either of them within the meaning of this section. The only question for this Court is whether in coming to that conclusion the justices came to a correct decision in point of law. Mr. Laski, if I may say so, has urged with ingenuity everything that can be urged on behalf of these appellants, but I am satisfied that these justices did not misdirect themselves, and that the contention of the respondents was right, namely, that the word "attached" in this section has a physical significance.

In these circumstances I think that this appeal ought to be dismissed.

MR. JUSTICE AVORY.—I am of the same opinion. The appellants here are the Holy Law South Broughton Burial Board, who, in fact, are in occupation of this burial ground, and who pay poor rates in respect thereof. The only question is whether this burial ground can be said, within the meaning of section 16, to be "attached" to the synagogue of the Holy Law Congregation, or the synagogue of the South Broughton Congregation, situate at Manchester.

I am of opinion for the same reasons that have been given by my Lord that this burial ground cannot be said to be attached to either of those congregations, and, therefore, it is not exempt under section 16.

MR. JUSTICE SHEARMAN.—I agree.

[Solicitors—Messrs. O. Collier, Littler and Kilbeg. Manchester; Messrs. H. Booth and Son, Oldham.]

K.B. Div. (Acton and Talbot, JJ.) 1927. May 12.

OAKLEY v. WILSON.*

Landlord and Tenant—Restrictions—Decontrol—Possession by landlord—Meaning of "landlord"—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1), "Where the landlord of a dwelling-house to which the principal Act [the Act of 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

Held, that "landlord" in the above section, as generally in the Rent Restriction Acts, includes not only an owner, freeholder, or head landlord, but also any person who has a tenant holding under him; and, accordingly, even a quarterly tenant, who has sublet on a weekly tenancy, may be a landlord for the purposes of the section.

This was the plaintiff's appeal from the Judge of the Guildford County Court, who had given judgment for the defendant in an action for trespass. The defendant, Mrs. Edith Matilda Wilson, was a quarterly tenant of a cottage known as the Princess Christian Cottage Home, Woking, and she had sublet the same to the plaintiff, Mr. Henry George Oakley, on a weekly tenancy. The cottage was a dwelling-house within the limits of the Rent Restriction Acts, and the defendant had taken proceedings for possession of the same before the justices under the Recovery of Small Tenements Act, 1838, and a warrant of possession had been granted by the justices.

The issue which the County Court Judge had to decide was whether the defendant was the landlord of the cottage in question within the meaning of

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, under the provisions of which, if the defendant were the landlord, the premises would be decontrolled and the defendant would therefore have a lawful right to possession.

The County Court Judge, in his judgment, referred to *Doulin v. Parcell* (43 *The Times* L.R., 140), where "Mr. Justice Horridge regarded the tenant as an effective landlord for the purpose of decontrol and would have held him to be such if the proviso to section 2 (1) of the Act of 1923 did not apply"; to *Catto v. Curry* (42 *The Times* L.R., 243; [1926] 1 K.B., 460), where Mr. Justice Talbot said: "If the Legislature had stopped there [at the end of the first paragraph of section 2 (1) and before the proviso], since by section 12 of the Act of 1920 "landlord" is to be interpreted as including a tenant who sublets to a subtenant, the Act of 1920 would have ceased to apply"; and to *Dunbar v. Smith* (42 *The Times* L.R., 196; [1926] 1 K.B., 360) in the following terms: "The point was taken in the Divisional Court that the landlord was a tenant and not the freeholder. That point was not raised in the County Court and Lord Justice Bankes declined to deal with it, observing that the landlord, who was treated in the Court below as the owner, had obtained actual possession, executed certain repairs and then relet. In these circumstances the tenant is estopped from saying that the landlord is not in effect the landlord." The County Court Judge then continued: "Apart from the expressions of judicial opinion I have referred to I should have been inclined to come to the conclusion that a quarterly tenant cannot come within the meaning of 'landlord' for the purpose of section 2 (1) of the Act; but, having regard to these opinions and to the fact that here only the first part of the section is applicable and not the proviso, and further having regard to the definition of 'landlord' in section 12 of the Act of 1920, I do come to the conclusion that Mrs. Wilson was a landlord of these premises within section 2 (1) of the Act of 1923 and that in these circumstances she had a lawful right to possession at the time when the warrant for possession was granted by the magistrates." Accordingly he gave judgment for the defendant.

The plaintiff appealed.

Mr. John Harris appeared for the appellant; Mr. F. W. Beney for the respondent.

The judgment of the Court, which was read by Mr. Justice Acton, was as follows:—

This was an appeal from a decision of His Honour Judge Harington giving judgment for the defendant in an action for damages for trespass. The defendant was a lady who was the local representative of a Sailors' and Soldiers' Help Society at Woking and as such she had taken, on a quarterly tenancy at a rental of £2 12s. a quarter, the tenant paying rates and taxes, a cottage which was a dwelling-house within the Rent Restriction Acts. She had been the tenant of this cottage for some 18 years. In the latter part of 1925 it was in the occupation of one Riordan to whom the defendant had sublet it, but on December 4, 1925, Riordan died and the cottage became vacant. The defendant then obtained the keys, took possession of the cottage, had it cleaned out, and after an interval of about ten days let it to the plaintiff as a weekly tenant at a rent of 2s. 6d. per week, as the County Court Judge found, though for some time after the plaintiff entered into occupation he had in fact paid no rent at all. From July, 1926, however, the plaintiff had been called upon to pay and had paid a rent of 2s. 6d. a week.

There was no question that the defendant between December 4 and 14, 1925, had come into actual possession of the cottage. In August, 1926, some differences arose between the plaintiff and the defendant, and the defendant gave the plaintiff notice to quit expiring on September 2, 1926. Subsequently other notices to quit were served, and on a notice to quit served on September 21, 1926, to expire on October 4, 1926, proceedings were taken under the Small Tenements Act Recovery, 1838, by the defendant against the plaintiff. These proceedings failed on the ground that that notice to quit was bad. A fresh notice to quit was then served on October 19, 1926, to expire on October 28, 1926, and upon this notice a warrant of possession was granted by the justices on November 13, 1926. On December 10, 1926, the plaintiff by plaint in the County Court brought an action for damages for trespass as he was entitled to do by virtue of section 3 of the Act of 1838, alleging that the defendant had not, when the warrant was granted, legal right to the possession of the premises, and it is from the decision of the County Court Judge in this action that the plaintiff now appeals to this Court.

On these facts the County Court Judge held that the defendant Mrs. Wilson was "the landlord" of the dwelling-house in question within the meaning of section 2 (1) of the Act of 1923. It is agreed that, if he was right in this, this appeal must fail, for there was no question that she had come into possession of the whole of the dwelling-house after the passing of the Act and before she let the dwelling-house to Oakley. The appellant's case therefore depends upon whether it can be shown that the Judge was wrong in so holding.

This raises a point for the decision of the Court which is, so far as we are aware, novel. It is convenient to consider the question from two points of view:—(1) What is the meaning in law, independently of the Rent Restriction Acts, of the word "landlord"? and (2) whether there is a special meaning to be given to the words "the landlord" in the particular section of the Act of 1923 with which the present case is concerned?

The relation of landlord and tenant in its ordinary legal significance arises whenever one party confers on another the right to exclusive possession of premises, *e.g.*, of a dwelling-house, for a time which is either subject to a definite limit originally, as in the case of a lease for a term of years, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from year to year or of a quarterly, monthly, or weekly tenancy. This relation is created by contract to which there is usually, though not necessarily, incident a right on the part of the landlord to receive from the tenant payment for the use of the premises in the shape of rent. "The word 'landlord' does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists" (per Baron Bramwell, in *Churchward v. Ford* (2 H. and N., 446)). The relation of landlord and tenant is, of course, fully established only when the tenant has entered on the premises let. If that has happened pursuant to a contract of the kind indicated the parties to such a contract are accurately described as the landlord and the tenant.

With regard, however, to the recent legislation on the restriction of rents, the argument for the appellant was that "the landlord" in section 2 (1) of the Act of 1923 means either the owner of the premises or what is somewhat vaguely described as the "head landlord," by which we understand to be meant the person who by contract first creates a tenancy of the

premises in question, subject perhaps only to the provisions of section 12 (7) of the Act of 1920 and the consequences of those provisions as illustrated by the case of *Finey v. Gougoltz* (42 *The Times* L.R., 501 ; [1926] 2 K.B., 322).

It was said that, in any event, one who is himself no more than a quarterly tenant and has sublet the premises of which he is but a quarterly tenant on a weekly tenancy cannot be said to be a head landlord within the meaning of section 2 (1) of the Act of 1923. It was not conceded that a lessee of a dwelling-house for a term of years, however long, who sublet the whole of the premises on a tenancy of an originally indefinite character, such as a tenancy from year to year, or a quarterly, monthly or weekly tenancy, could be the "landlord" within the meaning of section 2 (1) of the Act of 1923. But it was contended that, even if that had to be conceded, it was still correct to say that a quarterly tenant who sublet on a weekly tenancy was not "the landlord" within the meaning of this subsection.

These very words, "the landlord," appear not only in this subsection but elsewhere, and very frequently in the Act of 1923. It is, therefore, expedient to consider how these words are used elsewhere, for we are of opinion that the same meaning should be given to them wherever they occur, unless there is something in the context which clearly indicates that a different meaning is intended.

It is probably unnecessary, and it would be tedious, to consider separately all the passages in which the words are used ; but they are used in many cases where the context seems to show that their meaning cannot be limited to that of "owner," or "freeholder," or "head landlord," whatever that may mean. The most striking of such passages is, perhaps, that to be found in section 2 (6) of the Act of 1920—"Any question arising under subsection (1), (2), or (3) of this section shall be determined on the application either of the landlord or the tenant by the County Court . . . " as qualified by section 7 (3) of the Act of 1923 :—"In subsection (6) of section 2 of the principal Act the expression 'landlord' shall, in relation to a subtenancy, be taken to include not only the person who is immediate landlord of the subtenant, but also the landlord of that person."

Other examples of the use of these words with an apparently similar meaning are to be found in section 3 (2), section 5 (1) (*c*), (*d*), (*f*), and (*h*) (as substituted by section 4 of the Act of 1923), section 11, section 14 (1) and (2), and section 15 (2) and (3) of the Act of 1920.

These sections call for no comment, and in our opinion there is nothing which indicates that the words of section 2 (1) of the Act of 1923 intend any different meaning. It is, indeed, to be observed that the first proviso to section 2 (1) of the Act of 1923 appears to assume that a tenant of a dwelling-house may also in his turn be the landlord of that dwelling-house if he sublets the whole of or any part thereof which is in itself a dwelling-house within the meaning of the principal Act.

The authorities which were reviewed and discussed by the County Court Judge do not seem to us to contain anything which is in conflict with the conclusion at which he arrived, namely, that Mrs. Wilson was "the landlord" within the meaning of section 2 (1) of the Act of 1923. In our opinion, the Judge's comments upon the cases of *Dunbar v. Smith* (42 *The Times* L.R., 196 ; [1926] 1 K.B., 360), *Catto v. Curry* (42 *The Times* L.R., 243 ; [1926] 1 K.B., 460), and *Doulin v. Parcell* (43 *The Times* L.R., 140), were apposite and unexceptionable and led him to a correct conclusion.

We are, therefore, of opinion that this appeal should be dismissed. Mr. Beney, for the respondent, indicated other points upon which he proposed to rely, if necessary, but, in view of the conclusion at which we have arrived on the main question, consideration of these points is unnecessary.

Leave to appeal was granted conditionally upon payment into court by the plaintiff within 21 days of the rent and mesne profits due.

[Solicitors—Mr. Harry Hunt, Woking ; Messrs. Barton and Hanning.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P., and Bateson, J.) } 1927. Apr. 27.

PRATT v. PRATT.*

Husband and Wife—Jurisdiction of justices—Separation order discharged on ground of wife's adultery—Husband's divorce petition dismissed — Discharged order revived by justices — Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7—Criminal Justice Administration Act, 1914 (4 and 5 Geo. V., c. 58), s. 30 (3).

The decision of a Judge of Assize on a petition for dissolution of marriage that on a specified occasion the wife did not commit adultery is that of a court of record and, after the time for appeal has expired, is conclusive against all the world. Such a decision when brought to the knowledge of the justices is a new fact on which they can revive a separation order previously revoked by them on the ground of the wife's alleged adultery on the same specified occasion.

This was an appeal from an order made by the Leicester justices on December 4, 1926, reviving a separation order granted by them to Violet Elizabeth Pratt, wife of John St. Clair Pratt, on the ground of persistent cruelty, on November 28, 1924, when the husband was ordered to pay 20s. a week for the maintenance of his wife. She was granted the custody of the child of the marriage, a girl of eleven. On July 25, 1925, the order was revoked by the justices on the ground of the wife's alleged adultery. The husband filed a petition as a poor person for the dissolution of the marriage, charging the wife with the same act of adultery as that upon which the justices had revoked the separation order. On November 5, 1926, this suit was tried at Leicester Assizes by Mr. Justice Sankey who held that the wife had not committed the adultery alleged and dismissed the petition. On December 4, 1926, the wife's summons for the revival of the separation order under the Criminal Justice Administration Act, 1914, section 30 (3), was heard by the justices. They revived the order on the ground that fresh evidence had been given and the assize judgment was binding on them.

The husband appealed, as a poor person, on the following grounds : (1) that the decision of the justices was bad in law ; (2) that they had no power to revive the order ; (3) that they admitted evidence which was not legally admissible ; and (4) that the matter was *res judicata*.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

Mr. W. K. Scrivener appeared for the husband, and Mr. C. E. Loseby for the wife.

The Criminal Justice Administration Act, 1914, section 30 (3) provides :—

"Any order made either before or after the commencement of this Act by a Court of Summary Jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the Court, be revoked, revived, or varied by a subsequent order."

Mr. SCRIVENER said that in the Summary Jurisdiction (Married Women) Act, 1895, section 7 was the relevant section and that gave the justices no power to revive the order. The Criminal Justice Administration Act, 1914, did not apply in the circumstances of this case as the evidence upon which the finding of adultery was upset was not fresh evidence, since it was available at the time of the hearing at which the original order was revoked. He referred to *Colchester v. Peck* (42 *The Times* L.R., 535 ; [1926] 2 K.B., 366) and *Johnson v. Johnson* (16 *The Times* L.R., 26 ; [1900] P., 19).

LORD MERRIVALE.—Here was a case where the husband, who was the subject of a maintenance order obtained by his wife upon grounds sufficient to support such an order, had gone before the magistrates and had convinced the Bench which was sitting that his wife had committed adultery upon a specified occasion. The justices thereupon, as they had jurisdiction to do and as they had no alternative but to do upon their finding of fact, rescinded the order for maintenance. The statutes which govern their jurisdiction empower justices, if they do not direct them, upon proof of adultery by a wife after an order for maintenance, to discharge the order.

The husband, having obtained the discharge of the order, filed a petition in this Court for dissolution of his marriage on the ground of adultery, alleging the adultery which had been found in point of fact by the justices. The decision of the justices was effective for the purpose for which it was applied, but it did not conclude the matter. The difference as between that and the decision of the learned Judge who heard the petition for divorce was that the learned Judge could make a conclusive finding, and the learned Judge after hearing the evidence tendered by the husband came to the conclusion that the wife had not committed the alleged adultery, and he so found.

Thereupon the wife was advised to proceed before the justices under the Criminal Justice Administration Act, 1914, section 30 (3), for an order that the revoked order of the justices should be revived. The husband was represented before the justices. The wife was able to show to the justices that it had been conclusively established beyond challenge or appeal that she had not been guilty of the alleged adultery. This was a new fact.

On reading the notes of the proceedings before the justices I find other facts, an officer of a benevolent authority casting great discredit upon the evidence of the husband on the previous occasion. Those were facts which were alleged to have occurred since the making of the previous order, but as to the fact that the wife had not committed adultery and the establishment of that fact, that was a fact newly established, and the finding of the learned Judge was itself a fact. Those matters having been brought to the notice of the justices and they having statutory jurisdiction to revive an order which had been revoked, they exercised that statutory jurisdiction.

The justices acted not only within their jurisdiction but quite properly. I may say this with regard to this magisterial jurisdiction in respect of maintenance to find women guilty of adultery, that it is only by the most jealous care on the part of the magistrates to avoid injustice that the gravest injustice can be avoided. If it was once supposed that, because an order had been discharged upon an allegation of adultery which had been held by justices to be established, the matter was closed finally once and for all, it would be to my mind a means of injustice which would need most serious attention. No such injustice has occurred in this case. The Court below has taken a reasonable course, within its jurisdiction, and I think a proper course.

The appeal, therefore, fails in my judgment.

MR. JUSTICE BATESON.—I agree.

Mr. LOSEBY.—I ask your Lordship for an order for costs.

The PRESIDENT.—Yes.

[Solicitors—Messrs. Peacock and Goddard, for Mr. Basil W. Edwards, Leicester ; Mr. H. W. Clarkson, for Messrs. Herbert Simpson and Bennett, Leicester.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. May 4.

EVANS v. PIAUNEAU.*

Aliens—Name—Addition of "and Co."—Offence—Aliens Restriction (Amendment) Act, 1919 (9 and 10 Geo. V., c. 92), s. 7 (1).

The addition of "and Co." to a name makes a different name within the meaning of s. 7 (1) of the Aliens Restriction (Amendment) Act, 1919, and it is therefore an offence under that section for an alien to assume or use for any purpose the name by which he was known on August 4, 1914, with the addition of "and Co."

This was a case stated by a Metropolitan magistrate.

At Marlborough-street Police Court on November 5, 1926, an information was preferred by the appellant, Edward Evans, an inspector of the Metropolitan Police, against the respondent, Pierre Piauneau, for that he, being an alien—namely, a French citizen—did on September 15, 1926, use a name other than that by which he was ordinarily known on the 4th day of August, 1914—namely, "Pierre Piauneau and Co." —for the purpose of business, contrary to section 7 (1) of the Aliens Restriction (Amendment) Act, 1919.

By the Aliens Restriction (Amendment) Act, 1919, section 7 : "(1) An alien shall not for any purpose assume or use or purport to assume or use or continue after the commencement of this Act the assumption or use of any name other than that by which he was ordinarily known on the 4th day of August, 1914.

"(2) Where any alien carries on or purports or continues to carry on, or is a member of a partnership or firm which carries on, or which purports or continues to carry on any trade or business in any name other than that under which the trade or business was carried on on the 4th day of August, 1914, he shall, for the purpose of this section, be deemed to be using or purporting or continuing to

* Reported by J. W. HALL, Esq., Barrister-at-Law.

use a name other than that by which he was ordinarily known on the said date. . . ."

The following facts were proved or admitted :—

The respondent was a French subject registered as such. He had resided in London since the year 1907. On January 28, 1926, the respondent commenced business at 56, Poland-street, in the county of London, in the name of Pierre Piauneau and Co., as sole agents for Great Britain and Ireland of Félix Potin of Paris, a firm of wholesale grocers. His notepaper was headed :

PIERRE PIAUNEAU AND CO.
(Pierre Piauneau).

The true name of the respondent was Pierre Piauneau, and by that name he was ordinarily known on the 4th day of August, 1914.

On the part of the appellant it was contended that these facts constituted a breach of section 7 of the Aliens Restriction (Amendment) Act, 1919.

On the part of the respondent it was contended : (1) that the words "and Co." were a mere addition which did not amount to a change of name ; (2) that section 7 (1) of the said Act applied only to an individual and not to a business ; (3) that section 7 (2) had no application because the respondent did not on the 4th day of August, 1914, carry on any business.

The magistrate was of opinion and held that the addition of the words "and Co." did not constitute a change of name within the meaning of section 7 of the above statute, but amounted merely to a change of style, and that section 7 (2) had no application to a business not existing on August 4, 1914. He accordingly dismissed the information.

Mr. Christmas Humphreys (Sir Travers Humphreys with him) appeared for the appellant ; Mr. Claude Grundy for the respondent.

THE LORD CHIEF JUSTICE.—This is a case stated by one of the learned magistrates of the Police Courts of the Metropolis, and the point is quite a short one. The magistrate dismissed the information, and the question is whether he came to a correct decision in point of law.

The facts are not in dispute. The respondent's name is Pierre Piauneau ; he carried on business as Pierre Piauneau and Co. In order to contend that there has been no infringement it is necessary to contend that "Pierre Piauneau and Co." is the same name as "Pierre Piauneau." It seems an impossible proposition. It is the same as saying that $x+y=x$ if y is a comparatively small quantity. It seems to me manifest that "Pierre Piauneau and Co." is a different name from "Pierre Piauneau," and there was no course open to the magistrate but to convict.

The question what the penalty should be, or whether there should be any penalty at all in this case, is entirely for the magistrate.

MR. JUSTICE AVORY.—I am of the same opinion. Although subsection (2) of section 7 does not apply as the respondent was not carrying on any business on August 4, 1914, I have come to the conclusion that the appellant was assuming or using a name other than that by which he was known on that date.

MR. JUSTICE SHEARMAN.—I agree. I think the words "Pierre Piauneau and Co." constitute a name. If so, it is a name other than "Pierre Piauneau." The point is a fine one.

[Solicitors—Messrs. Wontner and Sons ; Messrs. Theodore Goddard and Co.]

K.B. Div.
(Acton and Talbot, JJ.) } 1927.
May 16.

MACNAGHTEN v. DOUGLAS.*

Medical Acts—Osteopath—Treatment—Advice—Fees—Recoverability—Medical Act, 1858 (21 and 22 Vict., c. 90), s. 32.

Section 32 of the Medical Act, 1858, though it precludes an osteopath who is not a registered medical practitioner from recovering for advice, does not preclude him from recovering for treatment and services rendered, at all events where they have not been accompanied by advice.

Hall v. Trotter (38 *The Times* L.R., 30) followed.

Quaere, whether where advice accompanies the treatment such an osteopath can recover anything at all.

This was the plaintiff's appeal from a decision of the deputy Judge of the Bloomsbury County Court. The case raised the question of the right of an osteopath to recover fees for treatment undertaken by him.

The plaintiff, Mr. Edmund Loftus Macnaghten, of 40, Weymouth-street, W., claimed £30 9s. for osteopathic treatment for nervous disability and facial neuralgia rendered by him to the wife of the defendant, Mr. Cecil Herbert Douglas, of 5, Grove-road, E.11. The defendant relied on section 32 of the Medical Act, 1858, which provides :—

"No person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

The deputy Judge stopped the case and entered judgment for the defendant, with costs.

The plaintiff appealed.

Mr. A. C. Jackson appeared for the appellant ; Mr. Laporte Payne for the respondent.

MR. JACKSON said that the claim arose in respect of osteopathic treatment rendered by the plaintiff to the defendant's wife between March 10 and April 25, 1926. The plaintiff was a B.A. of Trinity College, Dublin, but that degree was in subjects other than medicine. He had, however, an American degree of Doctor of Osteopathy, osteopathy being a recognized profession in that country. He had no British medical degree. The plaintiff claimed in respect of manual treatment and not for advice given, the defendant's wife having been perfectly acquainted with the nature of osteopathic treatment at the time when she first visited him.

Counsel submitted that in the case of *Hall v. Trotter* (38 *The Times* L.R., 30) it had been held that, in almost exactly similar circumstances, an osteopath was entitled to recover fees for treatment rendered. The deputy Judge was, he contended, wrong in holding that section 32 of the Medical Act, 1858, applied to treatment of this kind.

MR. PAYNE submitted that the plaintiff was not entitled to recover inasmuch as he had usurped the functions of a medical man. The plaintiff's occupation was analogous to that of a masseur who might be able to recover for treatment in certain circum-

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

stances, but not in a case where he had been called upon to give advice.

MR. JUSTICE ACTON.—This is an appeal from a decision of the learned deputy Judge of the Bloomsbury County Court, by which he decided that the claim of the plaintiff in this action was barred by the operation of section 32 of the Medical Act of 1858. The plaintiff is an osteopath, and it appears that he had taken his degree at Trinity College, Dublin, not in surgery or medicine, but in Arts. He gave evidence that he had studied osteology in America with a view of becoming an osteopath, that he had received a diploma from an American school or college of osteopathy, and that he had thereupon started in practice as an osteopath at 40, Weymouth-street, W. He said that his degree was taken in September, 1923, and he agreed that any qualification in the profession of osteopathy is not recognized in this country. The particulars of claim are expressed in these terms :— "The plaintiff's claim is for £30 9s. for professional services rendered by the plaintiff as an osteopath to the defendant's wife from March 10, 1926, to April 25, 1926"; and the plaintiff claims that on March 10, 1926, the defendant's wife came to him and said that she desired osteological treatment, that he thereupon examined her and came to a certain conclusion in regard to what she was suffering from and what was likely to prove remedial, and that he thereupon treated her according to the principles of osteopathy which he had studied. He treated the bones in the neck and other bones and the lumbar region, and he continued this treatment up to the last date mentioned in the particulars of claim, April 25, 1926. He said that the lady gave him a general description of her symptoms, that is to say, that she was not feeling well, and so on, and particulars of her sensations in the morning, and upon that he came to the conclusion that the treatment was likely to prove remedial. It would appear from what he said that he not only came to that conclusion, and put it into practice, but that he acquainted her with his conclusions, and advised that the kind of treatment which he was about to carry out was treatment which would be remedial.

It appears that the case was originally set down for hearing on a day on which it was not reached, and up to that stage the defence under section 32 of the Medical Act, 1858, which was ultimately relied upon, and which prevailed, had not been raised ; but before the case came on again notice had been given that the defence would be raised, and when the case was before the learned deputy County Court Judge he allowed an amendment to be made by the defendant setting up this statutory defence. The question which we have to decide is whether in these circumstances the plaintiff's claim is or is not wholly barred by section 32 of the Medical Act of 1858.

Now the question is undoubtedly one of some importance, and at first sight one which might appear to present some little difficulty ; but the very question raised in this case has already been raised and decided in this Court in the case of *Hall v. Trotter* (38 *The Times* L.R., 30). That was a case in which there was an appeal from a decision of His Honour Judge Bray, at the Bloomsbury County Court, in which the plaintiff sued the defendant for £58 17s., the amount of his fee for osteopathic treatment given to the defendant, his wife, and his daughter during the year 1920 ; and the female plaintiff in that case was in much the same position as the plaintiff in the present case, for she was a lady who had a diploma from an American college of osteopathy, but was not registered in England as a medical practitioner, though she was carrying on business as an osteopath and treating people for reward in that behalf. In that case the question before the learned County Court Judge was the same question as that which is raised here. It is perhaps to be regretted that such a case only appears in *The Times Law Reports*, and that the facts are not more fully set out than they are in that report. They are indeed very scanty in what we are invited to regard as an important part of the case, namely, whether any diagnosis or advice was given by the plaintiff as distinguished from the actual manual or manipulative treatment, and, if so, how far that diagnosis and advice went. A feature of the case, of which it seems to me that sight ought not to be lost, is that the learned County Court Judge held, according to the report, that osteopathic treatment was not within the Act, and he gave judgment for the plaintiff. There was then an appeal to this Court, a Court consisting of Mr. Justice Horridge and Mr. Justice Shearman, who dismissed that appeal, and it would appear from the report that in substance those learned Judges listened to the same kind of argument to which we have listened. In the result, Mr. Justice Horridge, after referring to the section of the Medical Act, 1858, and the Judge's finding of fact—the cardinal finding of fact being, according to this report, that osteopathic treatment is not within the Act—said : "In his view of the findings of the Judge the plaintiff did not give any advice. She gave certain treatment to the bodies of these three persons. He declined to be led into definitions. He was satisfied that this case did not fall within the Act. The judgment must therefore be affirmed and the appeal dismissed." Mr. Justice Shearman agreed, and said that "they had only to consider what this woman did ; she did not profess to advise anyone what was the matter, but, after having got a diploma from a college in America, she applied her knowledge of anatomy to help her to determine the part of the body to which she should apply the treatment which she had been specifically called in to give. In applying the section the Judge must bear in mind the recital in the Act." It would appear that that is not improbably a slip on the part of the reporter for "preamble," for the reference must be to the preamble of the Act. Mr. Justice Shearman continued : "He thought that the Judge here was right, but he was far from saying that anyone who chose to call himself an osteopath could charge for any service which he chose to render." Now Mr. Jackson, who has argued this case for the appellant, said that the attitude which he took up was that in the present case the whole claim for the £30 9s. was, as expressed in the particulars of claim, "for professional services rendered as an osteopath," and that there might be a question whether, if the charges were analysed, or capable of analysis, and if it were proved that any part of these charges was for advice, the plaintiff might not be in a position to recover them by reason of this section of the Medical Act, 1858. What he complained of was that, in the circumstances of this case, the learned deputy County Court Judge stopped the case after the evidence to which I have referred had been given, and said that by the operation of that section of this Act the plaintiff could not recover anything at all, and that his claim was wholly barred.

Speaking for myself, in view of the decision in *Hall v. Trotter* (*supra*), though it must be admitted that it would have been much more satisfactory if the report had been fuller and more detailed alike as to the facts and as to the judgment, it really is not open to this Court to do otherwise than follow the decision of the

learned Judges who constituted the Court on that occasion. In the result, in my view, this case ought to be sent back for a new trial on the ground that, apart from any question whether any charges for advice as distinguished from treatment or services may be recoverable, the deputy Judge was wrong in saying that no part of these charges could be recovered. Therefore the only course open to us is to send the case back in order that there may be a new trial.

MR. JUSTICE TALBOT.—I am of the same opinion.

I must say, had it not been for the decision in *Hall v. Trotter* (38 *The Times* L.R., 30), I should have thought there was a very strong argument in support of the judgment of the learned deputy County Court Judge. It is quite true that there are points on which the facts are distinguishable, and in particular the matter to which attention was called in the course of the argument, that in this case it appears that the plaintiff gave certain advice to the defendant's wife. It is very difficult to imagine any case of this kind in which some advice would not be given. It seems undesirable in view of that decision to distinguish this case on a narrow ground, and on the whole I think we are doing what we ought to do if we follow the case of *Hall v. Trotter* (*supra*), and hold, in the circumstances of this case, that the learned deputy Judge was not right in declining to proceed further with the case and in deciding that the whole of the plaintiff's claim was barred by the Act.

I express no opinion whether it is possible in the interests of either party to split up the case into treatment and advice, and I content myself with saying that I agree that the case must go back.

MR. JUSTICE ACTON.—I should like to associate myself with the remark that my brother has expressed. I also desire to express no opinion upon the question whether this case is or is not capable of any such analysis.

Leave to appeal was granted.

[Solicitors—Messrs. Lucas and Bailey; Messrs. Blewitt and Son.]

K.B. Div. (MacKinnon, J.) } 1927. May 17.

JAMES DURNFORD AND SONS, LIMITED v. GREAT WESTERN RAILWAY COMPANY.*

Contract — Indemnity — Undertaking to indemnify against all claims—Whether inclusive of claims by the persons giving the undertaking—Claim for negligence—Whether the damage arose out of such negligence.

The plaintiffs took a lease of premises from the defendant railway company, and, by an agreement supplemental to the lease, the defendants gave the plaintiffs permission, on certain terms, to use for the transport of materials a portable gangway which could be moved over certain of the defendants' railway lines. One of the terms was that the plaintiffs "agree and undertake to indemnify the said [railway] company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway." When the plaintiffs were using the gangway some trucks were shunted down the line, and the gangway was destroyed. In an action for damages for negligence and/or breach of duty the defendants denied liability and pleaded the aforesaid term of the supplemental agreement. On a preliminary point as to the construction of the agreement,

Held, that although the words "all claims whatsoever" included a claim arising out of negligence on the part of the defendants' servants, and although, even if such negligence might have been the cause of the accident, the damage "arose out of or in connexion with the user of the gangway," yet the undertaking was only one to hold the defendants harmless against claims by third parties, and the preliminary point must be decided in favour of the plaintiffs.

This case, placed for argument in the Special Paper, raised a question as to the construction of an agreement.

Mr. Wilfrid Lewis and Mr. J. A. Stainton appeared for the defendants, the Great Western Railway Company; and Mr. Rayner Goddard, K.C., and Mr. E. H. C. Wethered appeared for the plaintiffs.

The action was brought by the plaintiffs to recover damages for negligence, and an order had been made that before dealing with the claim on the facts a preliminary point of law, turning on the true construction of an agreement between the parties, should be tried before the Judge taking the Special Paper.

The facts out of which the case arose were as follow:—

In 1914 the Great Western Railway Company let certain premises to the plaintiffs at Bristol. The plaintiffs were contractors, and, in the course of their business, required to move large quantities of materials by rail. To facilitate the transport of materials they constructed a portable gangway which could be moved over certain railway lines belonging to the Great Western Railway Company. The railway company gave them permission to use the said gangway upon certain terms, which were embodied in a memorandum drawn up in 1921 and indorsed on the plaintiffs' lease.

The plaintiffs proceeded to make use of the gangway, and on August 27, 1926, they were using it for the purpose of discharging a load of lime from a motor-lorry into a railway truck when shunting operations were in progress on the railway. While the lorry was on the gangway some trucks were shunted down the line over which it was standing, with the result that the gangway was struck and destroyed and the motor-lorry was thrown to the ground and so badly damaged that it was rendered useless.

The plaintiffs claimed damages for negligence and/or breach of duty. The Great Western Railway Company denied liability, and relied on a condition in the memorandum of 1921. The condition was in the following words:—

"[The plaintiffs] agree and undertake to indemnify the said company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway. . . ."

Mr. WILFRID LEWIS submitted that the expression "claims and demands or liability whatsoever"

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

covered every kind of claim whether made by third parties or by the plaintiffs themselves. "Whatsoever" was equivalent to "however caused and by whomsoever made." The wording of the condition showed that the railway company intended to protect themselves against that very kind of accident. In view of the course of business it was most probable that if any accident occurred at all it would be the plaintiffs who would be damaged. The words "in connexion with" were very wide and, though there seemed to be no authority as to their true construction, he submitted that they must cover a claim by the plaintiffs themselves.

He referred to *Joseph Travers and Sons, Limited v. Cooper* (30 *The Times* L.R., 703 ; [1915] 1 K.B., 73) ; *Rutter v. Palmer* (38 *The Times* L.R., 555 ; [1922] 2 K.B., 87) ; and *Ashendon v. London, Brighton, and South Coast Railway Company* (5 Ex. D., 190).

Mr. Rayner Goddard submitted that the contract was one of indemnity and of indemnity only. In law a contract of indemnity was a contract by A to hold B harmless against a claim made by C and did not release B from any liability which he might be under to A. The words of the clause in question were not apt to release the railway company from a claim by the plaintiffs themselves. The words must be construed strictly against the company and it was for them to show that the words were apt to give the protection desired.

Further, the damage in this case did not arise out of or in connexion with the existence or user of the gangway. The real cause, the *causa causans*, of the accident was the negligence of the servants of the railway company. The word "whatsoever" in the condition was only comprehensive of the claims, not of the causes of claims.

Mr. Wilfrid Lewis, in reply, submitted that the railway company was in the position of a landlord and was not an insurer. If the words of the condition were to be construed strictly as Mr. Goddard contended, then the condition really was an insurance granted by the plaintiffs and must be read strictly against them as it would be against an insurance company. The words "arising out of" might refer only to proximate causes, but the further words "in connexion with" must have some meaning given to them and were wide enough to cover this case.

He referred to *Coxe v. Employers' Liability Assurance Corporation, Limited* (32 *The Times* L.R., 664 ; [1916] 2 K.B., 629).

Mr. Justice MacKinnon, in giving judgment, stated the facts and said that the action had been brought for negligence on the part of the railway company's servants,' and, besides raising other defences, the railway company relied on a condition in the supplemental agreement of 1921. The company contended that even if the accident was due to the negligence of their servants the plaintiffs could not recover because they had agreed to hold the company indemnified against claims for damage to property arising out of or in connexion with the user of the gangway.

The case involved three questions of construction, each of them very difficult owing to the slovenly and inartistic language employed. The first question was : Did the undertaking to "indemnify" include the abandonment of any claim which the plaintiffs themselves might have against the company ? The second was : Did the words "all claims whatsoever" include a claim arising out of negligence by the servants of the railway company ? The third was : Did the damage in this case arise out of or in connexion with the user of the gangway ?

Dealing with the latter questions first, he thought that the words "all claims whatsoever" were wide enough to cover claims arising out of negligence on the part of the railway servants. The case seemed most near to *Rutter v. Palmer* (38 *The Times* L.R., 555 ; [1922] 2 K.B., 87), where the words employed were held to protect against negligence. He also thought that the damage in this case was damage to property arising out of or in connexion with the user of the gangway. But the first question still remained for consideration. On the whole, he had come to the conclusion that the plaintiffs were right and that the undertaking was only one to hold harmless against claims by third parties. *Prima facie*, the word "indemnify" meant "insure against third party risks," and the word was inapt if the intention was to exclude a claim by the plaintiffs themselves. At the least the expression was ambiguous and must be construed *contra proferentem*. The result was, therefore, that he must decide the preliminary point in favour of the plaintiffs.

On the application of Mr. Wilfrid Lewis leave to appeal was given.

[Solicitors—Messrs. Calder Woods and Sandiford, for Messrs. Wansbroughs, Robinson, Tayler and Taylor, Bristol, for the plaintiffs ; Mr. A. G. Hubbard, for the Great Western Railway Company.]

K.B. Div. (Rowlatt, J.) 1927. May 17.

LEIGH v. INLAND REVENUE COMMISSIONERS.*

Revenue—Supertax—Arrears of interest on bonds—Several years' arrears paid in one sum—Whether income of year in which payment was made—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 5 (3) (*c*).

Where a taxpayer purchases bearer bonds on which the interest for several years is in arrear and his purchase confers upon him the right to the arrears, and several years' arrears are subsequently paid to him in one sum, the whole of that sum forms for the purpose of supertax, under s. 5 (3) (*c*) of the Income Tax Act, 1918, part of his income for the year in which payment was received.

This was a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Special Commissioners held on September 17, 1924, Mr. A. H. Leigh, the appellant, appealed against an assessment to supertax in the sum of £3,603 for the year ending April 5, 1923, made upon him under the provisions of the Income Tax Acts. The sole question which was raised by the appeal and upon which the opinion of the Court was desired was whether certain arrears of interest received by the appellant in August, 1921, in respect of mortgage bonds of the Mexican Electric Light Company, Limited (which interest had accrued due and was payable on dates prior to the purchase of the bonds by the appellant), ought to be included in the computation of his income for the purposes of supertax for the year ending April 5, 1923.

The appellant made purchases to a total amount of $25,000 between August 9 and August 16, 1918,

* Reported by J. W. Hall, Esq., Barrister-at-Law.

through a firm of brokers on the London Stock Exchange, of 5 per cent. mortgage bonds to bearer of the Mexican Electric Light Company, Limited, a company incorporated in Canada. The interest on those bonds was due and payable half-yearly on January 1 and July 1 in each year, and coupons for each half-year's interest were attached to the bonds, each coupon bearing the half-yearly date on which such interest became due.

Owing to the unsettled condition of affairs in Mexico the company had not been able to pay any half-year's interest since that which became due and payable on July 1, 1914, and the coupons for the interest which had become due and payable on January 1 and July 1 in each year from 1915 onwards were still attached to the bonds purchased by the appellant. In accordance with the rules of the London Stock Exchange they became his property at the dates when he made the purchases.

The company resumed payment of interest in 1921. In May, 1921, a scheme of arrangement was put forward by a committee which had been formed to protect the interests of the bondholders of the company and other allied companies. Under that scheme, which was approved by the bondholders in June, 1921, and sanctioned by the Canadian Courts in July, 1921, it was arranged that concessions should be made by the bondholders as to the payments due to be made to a sinking fund for redemption of the bonds and as to the date of maturity of the bonds. The arrears of interest were to be paid to the bondholders, as to the coupons due from January 1, 1915, to July 1, 1919, inclusive, immediately upon the sanction of the Court to the scheme; as to the coupons due January 1, 1920, and July 1, 1920, on or before June 30, 1922; and as to the coupon due January 1, 1921, on or before June 30, 1923. The payment of current interest was to be resumed with the payment of the coupon due July 1, 1921. In accordance with the scheme arrears of interest up to and including that due on July 1, 1919, were paid to the bondholders in August, 1921.

In the case of the bonds belonging to the appellant the arrears of interest due on the coupons dated January 1, 1915, to July 1, 1919, inclusive, and the interest on the coupon dated July 1, 1921, were collected by the Westminster Bank, Limited, on behalf of the appellant in August, 1921. Income-tax at the rate of 6s. in the £, being the rate in force for the year ending April 5, 1922, was deducted from that interest and paid over to the Revenue authorities in accordance with the provisions of Rule 7 of the Miscellaneous Rules applicable to Schedule D of the Income Tax Act, 1918. The balance of the interest was credited to the appellant's account at the Westminster Bank, Limited. The appellant was not required by the contracts of purchase to pay over any part of that interest to the persons from whom he had purchased the bonds, and he did not in fact do so.

It was contended by the appellant that the interest which had accrued due and was payable on January 1, 1915, and on succeeding half-yearly dates down to and including July 1, 1918 (in arrear at the time when he purchased the bonds), had not arisen or accrued to him; that the interest was not receivable by him, but was receivable by the vendors of the bonds; that such interest had been purchased with his capital and was in his hands capital and not income; that the fact that the vendors of the bonds had sold the right to interest which had accrued to them and which had become payable to them before the sale did not transfer to the appellant any liability for supertax in respect thereof; and that such arrears of interest ought not to be included in the computation of his income for the purposes of assessment to supertax.

It was contended on behalf of the Crown, *inter alia*, that the whole of the interest received by the appellant in August, 1921, formed part of his income for the year in which payment was received from the company—namely, the year ending April 5, 1922, and was properly included in the computation of his income for the purposes of assessment to supertax for the following year—namely, the year ending April 5, 1923.

The Special Commissioners held that the sum of £1,858 7s. 11d. paid to the appellant as interest on the bonds in August, 1921, was part of his income for supertax purposes for the year ending April 5, 1923, and confirmed the assessment.

Mr. Cyril King appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt, in giving judgment, said that the appellant in August, 1918, bought a number of bonds of a company incorporated under the laws of Canada. The bonds bore interest, but at the time of his purchase the interest was unpaid since July 1, 1914. After his purchase those arrears remained unpaid, and the succeeding instalments of interest remained unpaid until the middle of 1921, when a scheme was adopted and sanctioned by the Court in Canada in that year. In consideration of certain terms as to sinking fund and repayment, the company undertook to pay the arrears of interest, and they at once paid the arrears up to 1919, as the scheme provided.

The appellant, therefore, soon after the decision of the Court, was paid the arrears for 1914-19, inclusive, subject to deduction of income-tax before payment. The Revenue authorities had assessed him to supertax for the next year on the basis that all that income was the income of 1921, and, therefore, assessable to supertax for 1922-23. That assessment was objected to on the ground that those payments were "received," but not "receivable" in 1921; that they were "receivable" in 1914 and subsequent years, and, therefore, the liability to supertax belonged to those years, and the sellers of the bonds were in the position of having the income "receivable" down to 1918.

The Attorney-General took a point that, even assuming that that was the correct construction of the statute, on the facts of this case this interest only became payable under the order of the Court—*i.e.*, in 1921. He (his Lordship) did not think that that was a good point. It was "receivable" at each date as the coupons fell due; it continued "receivable." The Court did not fix a new date, but provided that there should be no more delay. It was not suggested that the old debts were merged in a new debt. The payments of interest due on particular dates were made under the order because they were already due on those dates.

That conclusion brought him to the real point, which was of great importance. The taxable income for supertax was the total income for the previous year, and one had to find out what that was. If it had been directly assessed to income-tax that settled the matter, but if it had not it remained to be dealt with. Mr. King said that the matter was settled by section 5 of the Income Tax Act, 1918.

That section, in his (his Lordship's) judgment, was designed to eliminate any question of accrual or gradual growth of the income. In certain cases for income-tax purposes when tax was deducted before receipt it was deducted according to the rate in force

when the money accrued, which in some cases meant an average rate. But for supertax purposes there was to be one rate only. It was intended in the case of supertax to avoid any variation in the rate. In doing so the statute had used the word "receivable" —and that was the whole trouble and that was what Mr. King had fastened upon.

It was to be remembered that, for income-tax purposes, "receivability" without receipt was nothing. Before a good debt which was due was paid there was no such thing as income-tax upon it.

The meaning of the section must be "receivability," speaking of a debt which had been received, and meant the date on which it was paid as distinct from the date on which it was accruing. He did not know if he had expressed it properly, or if it could really be expressed.

He would not have had any doubt about it but for a Scottish case which caused him considerable doubt. In *Inland Revenue Commissioners v. Earl of Haddington* (8 Tax Cas. 711), a man who had come into some estates found them burdened with payment of a jointure to his mother. Owing to some dispute as to the amount he did not pay it in the first year, but paid two years together in the second year. It was held that he could not deduct the whole payment in the second year, but must spread it over the two years. It seemed to follow that "payable" and "receivable" were correlatives and that the mother was entitled to spread the receipt over two years. But the point was never argued there and never occurred to anyone. The whole question was the liability of the Earl.

He (his Lordship) thought that if the point had been taken, and if his judgment in the present case was correct, the decision in that earlier case would have had to be the other way. But in view of the terrible confusion which would arise if he accepted the appellant's arguments, he thought that he must have courage and dismiss the appeal, with costs.

[Solicitors—Messrs. Godden, Holme, and Ward; the Solicitor of Inland Revenue.]

K.B. Div.
(Acton and Talbot, JJ.) } 1927. May 17.

TEMPERANCE LOAN FUND v. ERWOOD.*

Practice—Costs—County court—Moneylenders' action — Harsh and unconscionable transaction — Excessive interest — Transaction reopened—Reduction of claim—Discretion to deprive plaintiffs of costs — County Courts Act, 1888 (51 and 52 Vict., c. 43), s. 113—Moneylenders Act, 1900 (63 and 64 Vict., c. 51), s. 1 (1).

In an action by moneylenders in the county court for money lent and interest, where the Judge is satisfied that the transaction was harsh and unconscionable and the interest excessive, and where, after reopening the transaction, he gives judgment for the plaintiffs for a reduced amount, he has a discretion to deprive the plaintiffs of costs.

This was the plaintiffs' appeal from a decision of the Judge of the Wandsworth County Court, who had refused to give costs to moneylenders who had recovered a sum of £26 10s. on a claim on a promissory note for £50.

The plaintiffs, the Temperance Loan Fund, who were registered moneylenders carrying on business at 12A, Station-parade, Balham, S.W., sued the defendant, Mr. William Leycester Erwood, of 12, Stamford Brook-mansions, on a promissory note for £50. The original transaction between the parties was a loan of £30 in February, 1925. From that sum 15s. was deducted or retained by the plaintiffs for expenses, and in consideration of the loan the defendant gave the plaintiffs his promissory note for £50. The note was twice renewed, and an action was brought on the third note. Before action the defendant had paid altogether £24. No money was paid into Court and there was no counterclaim.

The defendant relied on section 1 (1) of the Moneylenders Act, 1900, alleging that the interest charged was harsh and unconscionable. On each renewal a further 15s. was charged for expenses, which the Judge found were never incurred.

The Judge, being satisfied that the transaction which culminated in the promissory note sued on was harsh and unconscionable, and that the interest charged in respect of the sum actually lent was excessive, reopened the transaction and gave judgment in favour of the plaintiffs for £26 10s. That sum, according to his calculation, gave the plaintiffs interest at the rate of about 50 per cent. on their advance. He gave no costs, stating as his reason that the defendant had succeeded in getting the transaction reopened.

The plaintiffs appealed.

Mr. Charles Bray and Mr. E. Terrell appeared for the appellants. The respondent appeared in person.

At the request of MR. JUSTICE ACTON, the considered judgment of the Court was read by MR. JUSTICE TALBOT.

MR. JUSTICE TALBOT, after stating the facts, continued: The plaintiffs appealed to this Court on the ground that the county court Judge had no power to deprive them of costs. It was said that they had a good legal cause of action to which there was in law no defence; that they had no alternative but to bring this case into Court; and that, in the absence of any payment into Court, it was impossible for them to do anything but sue for the whole sum due on the note.

It was said that if a defendant who has made a contract good at law seeks and obtains discretionary relief from the full obligation of it under the special provisions of a statute, he should do so on the terms of paying the costs necessarily incurred by the plaintiff in recovering what is due. On the other hand, the bulk of the costs was, no doubt, incurred in the discussion of the question whether the defendant had made a case for relief under the Act and to what extent it was just to relieve him. The Judge appears to have considered that, the bulk of the costs having been so incurred, it was not right to give the whole of the costs to the defendant. There is obviously much to be said on each side of the question, and we have no doubt that the Judge fully considered it. If he had a discretion in the matter, there is nothing to justify us in interfering with the conclusion to which he came. The appellants' case is that he had no discretion, but that he was bound by law to give them their costs.

Though the Moneylenders Act, 1900, has been in force nearly 27 years, and though we do not doubt that in many cases judgment has been given without costs both in the High Court and in the county court where the moneylender has recovered a substantial sum, this point has, so far as we know, never come

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

up for decision. And it is remarkable that the Act itself is silent in regard to costs.

The matter of costs in county courts is regulated by section 113 of the County Courts Act, 1888, which provides :—

"All the costs of any action or matter in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter. . . ."

This clearly contemplates that it is within the power of the Judge to give a special direction in regard to costs and it may be taken that his power to do so is generally the same as that of a Judge of the High Court in a case tried without a jury. In such cases he has discretion, but the discretion must be exercised judicially—that is to say, there must be some grounds upon which, acting judicially, he is justified in making an exception to the ordinary rule.

Most of the reported cases upon this subject have turned upon the question what, on trial with a jury in the High Court, amounts to "good cause," within the meaning of Order LXV., Rule 1, of the Rules of the Supreme Court, justifying an order of the Judge by which the costs do not follow the event. In such cases the powers of a Judge, so far as they differ from his powers at a trial without a jury, are less ; and therefore it is safe to take the language of judgments referring to cases tried with a jury as being at least not too wide for application to cases tried without a jury ; for example, the judgment of Lord Justice Bowen in *Forster v. Farquhar* (9 *The Times* L.R., 338 ; [1893] 1 Q.B., 564, at p. 568).

On these principles it seems to us impossible to say that where a plaintiff makes a claim which the Court, acting under statutory powers, materially reduces on the ground that it is in respect of a transaction harsh and unconscionable and involves a charge of excessive interest, the Judge has not, in the absence of some enactment to the contrary, power to refuse to impose upon the defendant the payment of the plaintiff's costs. We may observe that one of the examples of good cause for a special order in regard to costs, given in *Jones v. Curling* (13 Q.B.D., 262, at p. 268), is the fact that a plaintiff "has made an exorbitant claim by carelessness or recklessness."

It was further argued that, even if the Judge had power to give a special direction in this case, he should, instead of making the order which he did make, have apportioned the costs and have given the general costs of the action to the plaintiffs and the costs incidental to the question whether the transaction should be reopened under the Money-lenders Act, 1900, to the defendant. There are no issues in the technical sense in the county court, but costs can be apportioned according to the way in which different questions are decided. See *Dunn v. South-Eastern and Chatham Railway Company* (19 *The Times* L.R., 161 ; [1903] 1 K.B., 358). We do not say that it was not within the power of the Judge to make some such apportionment in the present case, but we do not think he was bound to do so, and there are considerations which might well lead him to the conclusion that the order which he has made is the more appropriate in the circumstances.

In our opinion the contention that the Judge had exceeded his powers in refusing to allow the plaintiffs their costs cannot be supported, and the appeal must be dismissed, with costs.

[Solicitors—Messrs. Webster Butcher and Sons.]

K.B. Div. (MacKinnon, J.) } 1927. May 19.

AKTIESELSKABET DAMPSKIBS STEINSTAD v. W. PEARSON AND CO.*

Ship—Charterparty—Discharge—Total expense paid by shipowners — Mistaken belief as to effect of custom—Settlement with charterers on this basis—Subsequent judicial decision as to real effect of custom—Partial liability of charterers — Action by shipowners against charterers to recover charterers' share of expense.

The plaintiffs, as owners, chartered a steamer to the defendants to bring to West Hartlepool a cargo of pit props, to be "taken from alongside at the charterers' risk and expense as customary." The custom at West Hartlepool varied according as the discharge was to be into railway wagons or on to the quay. In this case the discharge was into railway wagons, and the props, after being swung over the wagons by a crane, had to be stowed in the wagons. The plaintiffs and the defendants settled accounts on the basis that the plaintiffs were liable for the whole cost of discharge, but afterwards it was held in *The Rensfjell* (40 *The Times* L.R., 458) that by the custom at West Hartlepool from the moment when the cargo was released from the sling the cost of handling it and stowing it in the wagons fell on the charterers. The shipowners, therefore, in this action sought to recover from the charterers such share of the cost of discharge as ought to have been borne by the latter, the claim being for breach of contract in not providing the men to stow the cargo, and alternatively for money paid to the defendants' use.

Held, that as both parties believed it to be the duty of the plaintiffs to provide the men for stowage and therefore the defendants had not committed a breach of contract, and as the plaintiffs had made a voluntary payment under the mistaken belief that they were liable to make it, the action failed.

In this action the plaintiffs, Aktieselskabet Dampskibs Steinstad, as shipowners, claimed from the defendants, W. Pearson and Co., as charterers, a sum of money as damages for breach of contract, or, alternatively, as money paid to the use of the defendants or at their request.

Mr. Le Quesne, K.C., and Sir Robert Aske appeared for the plaintiffs ; Mr. Clement Davies, K.C., and Mr. Guy Cooper for the defendants.

In August, 1921, the plaintiffs, as owners, chartered a steamer, the Steinstad, to the defendants to go to Finland and bring a cargo of pit props to West Hartlepool. The charterparty was in the Scanfin form and contained, *inter alia,* a provision that the cargo should be "taken from alongside at the charterers' risk and expense as customary." It also

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

contained a provision that the shipowners should employ stevedores nominated by the charterers.

The Steinstad arrived at West Hartlepool on October 3, 1921, and the local agents of the plaintiffs instructed certain stevedores nominated by the defendants to discharge the cargo. The customary method of discharge at West Hartlepool varied according as the discharge was to be into railway wagons or on to the quay, and the custom was fully stated in the judgment of the President in *The Rensfjell* (40 *The Times* L.R., 458, at p. 459).

In this case the discharge was to be into railway wagons, and that the wagons should be properly loaded it was necessary that two men should be placed in a wagon to stow the props which were lifted out of the steamer's hold and swung over the wagon by a crane. The stevedores duly carried out the discharge. After it was completed accounts were settled between the plaintiffs, their local agents, and the defendants, and the whole matter then passed out of mind.

Subsequently, in 1922, the case of *The Turid* (38 *The Times* L.R., 423; [1922] 1 A.C., 397) raised a doubt as to the liability of the shipowner to pay the whole cost of discharging. Other cases followed on the point, and, in 1924, the respective rights and liabilities of shipowner and charterer at the port of West Hartlepool were made clear by *The Rensfjell* (*supra*).

It then became clear that where discharge was made into railway wagons the duty of the shipowner was to sling the cargo out from the ship over the wagon, and that from the moment when the sling was loosened and the cargo was released in the wagon the cost of handling it and stowing it properly in the wagon must be paid by the charterer.

In this case the stevedores had sent in an account for £509 odd to cover the whole process of discharge, and the plaintiffs had paid the amount believing at the time, as the defendants also believed, that the whole cost should properly fall on the shipowners. But now that subsequent litigation had shown that part of the cost ought to have been borne by the charterers the plaintiffs brought this action to recover from the defendants the amount which the defendants ought to have paid as their share of the cost. The actual figure was not material, the only question for the Court being whether the defendants were under any legal liability.

Mr. Justice MacKinnon, after stating the facts, said that the plaintiffs were claiming for breach of contract, or, alternatively, for money paid to the use of the defendants or at their request. As to the first point, it was suggested that the defendants committed a breach of contract by not providing the necessary two men to stow the cargo in the railway wagons. But the reason why they did not have the men there was that both they and the plaintiffs themselves thought at the time that it was the duty of the plaintiffs to provide them, and the plaintiffs actually did provide them. In those circumstances it was quite impossible to hold that the defendants had committed a breach of contract.

On the second head of claim, that the money had been paid to the use of the defendants or at their request, cases such as *Bleaden v. Charles* (7 Bing., 246) and *Pownal v. Ferrand* (6 B. and C., 439) showed that where a person was compelled to pay a sum of money for which another person was legally liable he could recover the amount from that other person. But alongside that principle was the equally clear principle that a person who of his own free will paid the debt of another did not acquire any right of action against that other. That was clear from *Leigh v. Dickeson* (15 Q.B.D., 60) and *North v. Walthamstow Urban Council* (67 L.J., Q.B., 972).

In his judgment the payment made by the plaintiffs in this case was a purely voluntary payment. No doubt if they had known the law as it was laid down in the subsequent cases they would not have made it, or would have only made it subject to a reservation of their rights. But as matters were they made a voluntary payment under the mistaken belief that they were under a liability to make it, and there was no legal ground on which they could now recover the money from the defendants. There must be judgment for the defendants, with costs.

[Solicitors—Messrs. Botterell and Roche; Messrs. Middleton, Lewis and Clarke, for Mr. R. S. Middleton, West Hartlepool.]

K.B. Div. (Horridge, J.) 1927. May 20.

COLLINS v. H. WHITEWAY AND CO., LIMITED.*

Defamation—Libel—Privilege—Absolute privilege—Unemployment insurance—Proceedings before Court of Referees—Letter written to official of Ministry of Labour—Whether part of proceeding before a judicial tribunal—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 11.

A letter written by an employer to the Divisional Controller of the Ministry of Labour on the subject of an employee's claim to unemployment benefit, in regard to which the decision of the Court of Referees under the Unemployment Insurance Act, 1920, has not been promulgated, although it has been arrived at, is not absolutely privileged, and therefore is actionable, if defamatory and written with malice, inasmuch as the Court of Referees, though they have to bring a judicial mind to bear on the performance of their duties, are nevertheless acting administratively and are not a body deciding between parties to a judicial proceeding, and as consequently such a letter cannot be said to form part of the proceedings before a tribunal acting in a manner similar to the procedure of a Court of justice.

His Lordship delivered his considered judgment in this case, in which the jury on May 13, 1927, awarded the plaintiff £150 damages in respect of a libel contained in a letter of July 17, 1926, which they found the defendants wrote with malice. The defendants succeeded on the other issues.

The action was brought by Miss Louisa J. Collins, of 16, Bolney-street, Clapham, who, suing by Mr. William James Collins, her next friend, claimed from her late employers, Henry Whiteway and Co., Limited, cider manufacturers, of Whimple, Devonshire, and Albert-embankment, Vauxhall, damages for alleged malicious prosecution, false imprisonment, and libel.

* Reported by W. E. Hurt, Esq., Barrister-at-Law.

The defendants denied that they acted maliciously or without reasonable cause in prosecuting the plaintiff, and that she was falsely imprisoned. They admitted publication of the alleged libels, but they denied that the words complained of were defamatory and pleaded privilege.

Mr. E. J. C. Neep and Mr. G. A. Edinger appeared for the plaintiff; Mr. Norman Birkett, K.C., and Mr. St. John Micklethwait, K.C., for the defendants.

The plaintiff was a girl of 18 and was formerly in the employment of the defendants. On June 7, 1926, she and others were charged with stealing tin foil. Mr. Henderson, the defendants' works manager at Vauxhall, gave evidence, and in the middle of his cross-examination the magistrate stopped the case, and the plaintiff and the others were discharged.

The plaintiff had been dismissed from her employment, and she subsequently called at the Brixton labour exchange for unemployment pay, and the exchange, having been informed that she had been dismissed, sent to the defendants the following request for information: "Will you please furnish your observations on the applicant's statement overleaf, giving any further particulars regarding the termination of her employment which may assist the Court of Referees to arrive at a decision in this case? Was this her first offence? Had she prior to dismissal been warned against a repetition of the offence?"

To this Mr. Henderson replied on behalf of the defendants as follows:—

"July 13, 1926.

"The Divisional Controller, Ministry of Labour, Employment and Insurance Department, 59-63, Queen's-gardens, Bayswater.

"Dear Sir,—The charge before your committee is 'misconduct—wasting and taking valuable foil belonging to the company.'

"Our forewoman states that she has frequently warned the girls not to waste foil, and the claimant must have heard these warnings, but it does not seem to be material whether she did or not.

"As regards taking new foil, the claimant admitted this in the presence of Detective-Sergeant Smith and the writer. The foil taken is costly (about 3s. 3d. to 4s. 3d. per lb.), and was smuggled out without the knowledge of the company, and the claimant must have known she was stealing it.

"As soon as we became aware of what was going on we called in the police.

"We are not bound to warn our employees against theft.

"A charge of stealing foil was preferred against the claimant and three others at Westminster police-court.

"After the magistrate had addressed the prisoners and, in our view, admonished and warned them, he dismissed them.

"Although the claimant has issued a writ for malicious prosecution and false imprisonment, this does not affect the matter.

"We are resisting the writ, and if we had anticipated it we would have appealed against the magistrate's decision.

"In any event we press the charge which is before your committee, and the writer will endeavour to attend the Court on July 15 at 2 p.m.

"Yours faithfully,

"H. Whiteway and Co., Ltd.,

"J. Henderson, Works Manager."

The plaintiff's case was considered by the Court of Referees, and, after they had arrived at their decision but before it had been promulgated, the defendants on July 17, 1926, wrote the following letter:—

"The Divisional Controller, Ministry of Labour.

"Dear Sir,

"Unemployment Claim—Miss L. Collins, Brixton.

"With reference to your inquiry form dated July 12 and our letter of July 13, you will gather from the correspondence and the evidence given at the Court of Referees that this is one of four cases of dismissal in which we have the following:—

"(1) The seizure by us of a quantity of foil on the premises of a local metal merchant.

"(2) The arrest of four employees for theft of foil and of the receiver of the foil.

"(3) A magistrate's decision which was obviously not in accordance with the evidence or of the prisoners' admission of guilt.

"(4) Failure on our part to realize the gravity of the situation and omission to give notice of appeal.

"(5) An attempt by certain of the parties concerned to make capital out of what was evidently a faulty decision.

"In compliance with your request our works manager (Mr. J. Henderson) attended the Court of Referees and gave evidence.

"We understand also that Miss Collins attended the Court and again admitted having taken foil.

"We look for a verdict in accordance with the evidence and admission of guilt, unbiased by any feeling of compassion or by any improper suggestions that the claimant should have been warned.

"We are not in any doubt as to what the result ought to be, but please inform us as to the decision of the Court of Referees.

"Yours faithfully,

"H. Whiteway and Co., Ltd.

"Secretary."

The Court of Referees informed the plaintiff that they had recommended that she should be disallowed benefit for three, instead of six, weeks. Thereupon she appealed to the umpire, denying that she had been guilty of the alleged misconduct, and the umpire allowed her appeal, with the result that she was allowed benefit.

His Lordship asked the jury to answer the following questions:—

1. Did the plaintiff admit having taken any tin foil other than waste?

2. Did the defendants take reasonable care to inform themselves of the true facts of the case?

3. Did the defendants honestly believe the case which they laid before the magistrate?

After an absence of about an hour the jury returned into Court and said that they could not agree upon answers to the first two questions, but that they could upon the third, the answer to which was in the affirmative.

His Lordship said that in view of that answer—that the defendants honestly believed the case which they laid before the magistrate—he did not think that there was any evidence of malice to go to the jury with regard to the alleged malicious prosecution, and he ruled accordingly.

That left only the alleged libels of July 13 and 17, 1926, and the question for the jury was whether in writing the letters of those dates or either of them the defendants were actuated by any indirect motive or whether they acted honestly and without malice.

His Lordship then asked the jury to answer the following further questions:—

Were the letters of July 13 and 17, or either and which of them, written with malice?

Damages with regard to the letters of (*a*) July 13, (*b*) July 17 ?

The jury having retired,

Mr. BIRKETT submitted that the two letters were absolutely privileged, having been written in the course of judicial proceedings.

Mr. NEEP argued that the Court of Referees was an administrative and not a judicial body. He pointed out that the persons before the Court could not be represented by solicitor or counsel, and that the parties in the present action were not before the Court, which had simply to decide whether or not the claimant was entitled to unemployment pay.

The jury found that the letter of July 13 was written without malice, and that the letter of July 17 was written with malice, and they awarded the plaintiff £150 damages in respect of that.

Mr. NEEP asked for judgment for the plaintiff for the £150, with the costs to which she was entitled.

Mr. BIRKETT asked for the costs on the issues of false imprisonment and malicious prosecution and the alleged libel on which the defendants had succeeded.

His LORDSHIP said that the plaintiff claimed damages for (1) false imprisonment, (2) malicious prosecution, (3) alleged libel contained in a document dated June 17, 1926, (4) alleged libel contained in a letter of July 13, 1926, and (5) alleged libel contained in a letter dated July 17, 1926.

As regarded the claim for false imprisonment, there was no evidence in support of the claim, and Mr. Neep did not press it.

As regarded the claim for malicious prosecution, the jury found that the defendants honestly believed the case which they laid before the magistrate, and there being no other evidence of malice on that issue he held that the defendants were entitled to succeed.

With regard to the claims for libel he held that all the letters were written on privileged occasions.

As to the first claim for libel, there was no evidence of malice to go to the jury, and as to the letter of July 13 the jury found that it was written without malice.

The only remaining question, therefore, related to the letter of July 17 in respect of which the jury found that it was written with malice and they assessed the damages at £150. But it was contended before him that that letter was written on an occasion which was absolutely privileged.

It was written in the following circumstances :— The plaintiff had applied to the insurance officer, and the tribunal which was called in the Unemployment Insurance Act, 1920, a "Court of Referees" had investigated the matter. The letter in question had been written to the Divisional Controller, Ministry of Labour, who, on the evidence, was proved to be the person to whom communications with regard to unemployment insurance ought to be addressed. It was stated by Mr. Henderson, on behalf of the defendants, that he wrote the letter after he had heard that the Court of Referees had arrived at their decision, although it had not been promulgated.

By section 11 (1) of the Unemployment Insurance Act, 1920, all claims for unemployment benefit and certain other matters were to be determined by one of the officers appointed under that Act, referred to as insurance officers. By subsection (2) of that section, where unemployment benefit was refused or was stopped, or where the amount of the benefit allowed was not in accordance with the claim, the person claiming the benefit could require the insurance officer to report the matter to a Court of Referees constituted in accordance with the Act. That Court, after considering the circumstances, must make to the insurance officer such recommendations on the case as they thought proper and the insurance officer, unless he disagreed, must give effect to those recommendations.

By subsection (3), if the insurance officer disagreed with any recommendation made by a Court of Referees under this section he must, if so requested by the Court of Referees, refer the recommendation, with his reasons for disagreement, to the umpire appointed under the Act.

By subsection (5), where a recommendation had been made under section 11, in the case of any person, by a Court of Referees, any association of employed persons of which that person was a member, and with the consent of the Court that person, might require the insurance officer to refer the matter to the umpire, and by subsection (6) the decision of the umpire was to be final and conclusive.

By subsection (9) the Arbitration Act, 1889, was not to apply to proceedings under the Act except so far as it might be applied by regulations under the Act, but he had not found that any regulation applying the Arbitration Act, 1889, had been made.

By section 22 penalties were imposed for making any false statements for the purpose of obtaining benefit or payment.

Certain regulations called Courts of Referees Regulations and Courts of Referees Amending No. 2 Regulations, 1921, laying down certain matters with regard to the Courts of Referees, were made with regard to the constitution and procedure of the Courts of Referees.

It was contended before him that, as the letter in question was written after the Court of Referees had given a decision and before the insurance officer had promulgated it, it formed part of the proceedings before a tribunal acting in a manner similar to a Court of justice, and, therefore, any such communication was entitled to absolute privilege.

He was informed by counsel that the question whether statements made in connexion with such inquiries were absolutely privileged had arisen at Leeds Assizes before Mr. Justice Acton, who had disallowed the claim for absolute privilege, but no report of the case was produced.

In the case of *Copartnership Farms v. Harvey-Smith* (34 *The Times* L.R., 414 ; [1918] 2 K.B., 405) Mr. Justice Sankey held that a local military tribunal was such a judicial body and the decision was approved by Lord Justice Bankes in the case of *Gerhold v. Baker* (35 *The Times* L.R., 102).

Mr. Justice Sankey stated in his judgment that he conceived the principle to be that where a tribunal was a Court of justice or a body acting in a manner similar to that in which a Court of justice acted, any statement made by a member thereof was absolutely privileged and no action could be brought thereon.

In *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (8 *The Times* L.R., 352 ; [1892] 1 Q.B., 431) Lord Justice Fry, at page 447, said :—

"Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this ? I say not.

I say that there is ample protection afforded in such cases by the ordinary law of privilege."

MR. JUSTICE HORRIDGE went on to say that on the best consideration which he could give to the sections of the Unemployment Insurance Act, 1920, and the regulations thereunder he thought that the result was that by such Act and regulations the Court of Referees was created for the purpose of deciding claims made upon the insurance funds. It was not a body deciding between parties, nor did the decision affect criminally or otherwise the status of an individual. He therefore did not think that he ought to extend the protection which was given in *Dawkins v. Lord Rokeby* (L.R., 8 Q.B., 255; L.R., 7 H.L., 744) to the present case, which, in his opinion, came within the second definition in the following passage of the judgment of Lord Justice Lopes in the *Royal Aquarium* case (*supra*) at page 452:—

"The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a Judge or by justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration."

The Court of Referees was merely discharging such administrative duties.

He thought that the communication in question was not entitled to be regarded as absolutely privileged, and that inasmuch as the jury had found malice the plaintiff was entitled to succeed in respect of the £150.

There would be verdict and judgment for the defendants on the issues of (1) false imprisonment; (2) malicious prosecution; (3) libel alleged in the letter of June 17, 1926; and (4) libel alleged in the letter of July 13, 1926; and verdict and judgment for the plaintiff for £150 for libel in the letter of July 17, 1926.

[Solicitors—Messrs. Palmer and Robinson; Messrs. Field, Roscoe and Co.]

K.B. Div. } 1927.
(Acton and Talbot, JJ.) } May 18.

WITTS v. MACKAY AND OTHERS.*

Education — Non-provided school — Teacher's salary—Burnham Report—Adoption by local education authority — "Carry-over" — Payment by instalments—Alleged unsatisfactory service after adoption—Refusal to pay third instalment — Powers of local education authority.

The plaintiff was appointed head teacher of a non-provided school in 1904, and in 1921 the Burnham Report on Standard Scales of Salaries for Teachers in Public Elementary Schools was adopted by the local education authority. That report provided by clause 9: "All teachers shall be brought to their correct positions on the standard scale adopted by the authority in the following manner. . . . (*e*) Nothing in this Report is intended to preclude an authority from dealing specially, for the purposes of the 'carry-over,' with the case of a teacher whose service has been declared to be unsatisfactory and continues to be so regarded, provided always that no teacher shall be penalised in respect of years of satisfactory service." The "carry-over" meant the difference between the salary which a teacher would have received at the date of the adoption of the report by the local education authority if throughout the teacher's service the Burnham scale had been in operation, and the salary which at that date the teacher was in fact receiving. The effect of the adoption of the report was that the plaintiff became entitled to an increase of salary, and it was agreed that the payment of the "carry-over" should be spread over three years. The education committee, however, refused to pay the third instalment of the "carry-over," namely, for the year ending March 31, 1924, on the ground that in 1923 the plaintiff's service had been unsatisfactory. In an action by the plaintiff against the managers and the local education authority for the third instalment,

Held, that the local education authority had no power, under the terms of the report, to withhold from a teacher any part of the "carry-over" by reason of unsatisfactory service after the date of the adoption of the report, and the plaintiff was entitled to recover.

This was the plaintiff's appeal from a decision of Judge Lias given at Sheffield County Court in a case involving the interpretation of one of the clauses of the Burnham Report on Standard Scales of Salaries for Teachers in Public Elementary Schools. The appeal, it was stated, affected the cases of a large number of teachers.

The plaintiff, Mrs. Louisa Mary Witts, a certificated school teacher and the head teacher of the St. Silas Church of England non-provided School for Girls at Sheffield, claimed from the Rev. H. W. Mackay, the Rev. Harold Ewbank and the Rev. W. G. Largie, the managers of St. Silas School, and from the Sheffield Corporation, the local education authority, an instalment of the "carry-over" to which she said that she was entitled under clause 9 of the Burnham Report.

That clause provides:—

"All teachers shall be brought to their correct positions on the standard scale adopted by the authority in the following manner. . . .

"(*e*) Nothing in this Report is intended to preclude an authority from dealing specially, for the purposes of the 'carry-over,' with the case of a teacher whose service has been declared to be unsatisfactory and continues to be so regarded, provided always that no teacher shall be penalised in respect of years of satisfactory service."

The "carry-over," it was explained, meant the difference between the salary which a teacher would have received at the date of the adoption of the Report by his education authority if throughout his service the Burnham scale had been in operation, and the salary which at that date he was in fact receiving.

Mrs. Witts was appointed head teacher of St. Silas School in 1904 and was re-engaged under a new agreement in 1925. On February 28, 1921, the Burnham Report on Standard Scales of Salary was adopted by the education committee of the Sheffield

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

Corporation, who paid Mrs. Witts's salary, and Mrs. Witts became entitled to an increase of salary amounting to £46 19s. Subsequently, it was agreed that the payment of the carry-over should be divided over three years so that too great a strain should not be thrown on the finances of the education authority.

In 1922 the Sheffield Education Committee instituted an examination for entrance to secondary schools to which children of from 11 to 12 years of age submitted themselves. In March, 1922, and again in March, 1923, children from Mrs. Witts's school did badly, and in November, 1923, the committee complained to her and to her managers that her service had not been satisfactory. They informed her that they were unable to recommend that the third instalment of her "carry-over," which would otherwise have been due for the year ending March 31, 1924, be granted to her.

Mrs. Witts therefore brought this action in the county court claiming £15 13s., the amount of the third instalment. The County Court Judge gave judgment against her, and she appealed against his decision.

Mr. Willoughby Jardine, K.C., and Mr. A. A. Thomas appeared for the appellant; Mr. Montgomery, K.C., Mr. Paley Scott, and Mr. W. A. Macfarlane for the respondents.

MR. JUSTICE ACTON, in giving judgment, said that it had been argued on behalf of the defendants that paragraph (*e*) of clause 9 of the Burnham Report conferred on them the right to withhold the money which they had withheld from Mrs. Witts on the ground that her service had been unsatisfactory. For Mrs. Witts it had been contended that the words "has been declared" in paragraph (*e*) of clause 9 related only to a declaration of unsatisfactory service anterior to the adoption of the Burnham Report by the education authority.

In his view the County Court Judge had taken an erroneous view of the true construction of clause 9. It was important to observe the introductory words of the clause—"All teachers shall be brought to their correct positions . . ." In his opinion, those were the controlling words of the clause, and they indicated that the clause had the primary object of giving instructions regarding how the case of each teacher was to be dealt with in computing his or her "carry-over." The scheme was that the period of service of each teacher must be reviewed and figures prepared by the authority up to the date of the adoption of the Report, which would show (*a*) the salary of the teacher on the existing scale at the date of the adoption of the Report; and (*b*) the salary which the teacher would have reached at that date if throughout his term of service he had served on the terms of the Burnham scale. The difference between those figures formed the minimum "carry-over."

For the purpose of that computation the term of service would be assumed in the first place to have been completely satisfactory. There might, however, be cases where, on one or more occasions before the adoption of the Report, a teacher's service had been declared to be unsatisfactory, and it was, therefore, contended that paragraph (*e*) of clause 9 gave the authority a discretion to "deal specially" with the cases of such teachers so as to secure fairness to the authority and to other teachers.

The construction of paragraph (*e*) contended for on behalf of Mrs. Witts seemed to be quite proper and clear when applied to the process which a person would have to follow in computing the "carry-over" applicable to a number of different teachers in the way in which he had indicated. The wording of paragraph (*e*), however, seemed singularly inappropriate to express that the education authority should have power to withhold from a teacher by reason of unsatisfactory service after the date of the adoption of the report any part of the "carry-over" which had become payable to him.

MR. JUSTICE TALBOT delivered judgment to the same effect.

The appeal was accordingly allowed with costs.

Leave to appeal was given.

[Solicitors—Mr. Eric G. Floyd; Messrs. Rollit, Sons, and Haydon, for Sir William Hart, Town Clerk, Sheffield.]

Judicial Committee of the Privy Council.
Lord Phillimore, Lord Sinha, Lord Blanesburgh, Sir John Wallis, and Sir Lancelot Sanderson.) 1927. May 17.

LALA INDAR PRASAD AND ANOTHER v. LALA JAGMOHAN DAS AND ANOTHER.*

India — Oudh — Partition suit — Affirmations before a family deity—Indian Oaths Act, 1873.

In partition proceedings in a Hindu family one of the parties (the first plaintiff) made an offer to the other party to give up such items as the other, in the presence of the family deity, might claim to own. After the admissions and denials before the deity had been recorded by Commissioners who were present the first plaintiff contested the agreement on two grounds—(1) that the condition had not been carried out, and (2) that it was not binding under the Indian Oaths Act, 1873.

Judgments of the two Indian Courts affirmed and both objections rejected. What took place before the deity was evidence on oath or solemn affirmation within the meaning of section 8 of the Act, and was binding on the first plaintiff.

This was an appeal from a decree of the Court of the Judicial Commissioner of Oudh affirming a decision of the Subordinate Judge of Lucknow.

Mr. De Gruyther, K.C., and Mr. S. Hyam were counsel for the appellants; Mr. Dunne, K.C., and Mr. B. Dube for the respondents.

LORD BLANESBURGH, delivering their Lordships' judgment, said:—

This appeal arises out of a partition suit which has been pending in the Court of the Subordinate Judge of Lucknow for a period of nearly 12 years. The plaintiffs and defendants are, in each case, father and son, all members of a Hindu family governed by the Mitakshara School of Hindu law and at one time joint. The first plaintiff is the elder brother of the first defendant. The sons, being both of them infants during the greater part of the critical period, do not, except for one incident concerning the second plaintiff, enter into the story. It will be convenient, therefore, frequently throughout this judgment to refer to the respective fathers as if they represented the entire interest on either side. When their Lord-

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

ships refer to them as plaintiff or defendant they will do so in this sense.

The family owned property, both moveable and immoveable, of considerable extent and value, including a banking and pawnbroking business. Some time in 1914 the first plaintiff left the family house, not, as has been found, on account of any differences with the first defendant, but because of illness. Subsequently, however, differences arose between the brothers, so acute that the resumption of joint residence was apparently regarded by both as impracticable. It was in these circumstances that this suit for the partition of the entire family property, including that relating to the business, was commenced on September 23, 1915. It has been proceeding ever since.

To the plaint are attached lists, particularizing the properties to be partitioned. These included the immoveable properties, the debts due, and the gold and silver ornaments pledged to the firm, together with brass and silver articles and other moveables in possession of the parties.

In the plaint it is also alleged that in kothris, in the family dwelling-house, there had been locked up by the first defendant joint property in the shape of jewellery and cash, and also ornaments pledged to the firm. These articles the plaintiff could not completely specify, but he claimed that with any other joint property later discovered they should be included in the suit. The existence or non-existence of this property so referred to is the dispute which has mainly led to the altogether inordinate prolongation of the proceedings.

At first it seemed that there would be no serious difference on any question. On January 31, 1916, there were filed in Court two petitions for compromise, intimating the intention of the brothers to partition the immoveable property amicably out of Court, and praying that a Commissioner of partition should be appointed to divide the moveables. On that day a preliminary decree of partition was made. Peace was in the air, and so far as the immoveable properties were concerned it has not been broken. These were shortly afterwards duly partitioned by mutual agreement, and no further question arises with reference to them.

But with regard to the moveable property, disputes were resumed and became highly embittered. The first defendant denied possession of any such further property as had been referred to in the plaint, and contested many payments alleged by the plaintiff to have been made on the joint account. The proceedings before the Commissioner were interrupted by proceedings in Court; there were several interlocutory orders; some of these were carried to appeal. The first plaintiff was examined and cross-examined in Court for nine days; the first defendant, called by the plaintiff, for 33 days. On May 6, 1921, the learned Subordinate Judge delivered a judgment in which, in a sense very unfavourable to the first defendant, he reviewed the history of the protracted litigation up to that date. The first defendant, he found, was in possession of and had not discovered moveable properties of very considerable value, and he made an order in the following terms:—

"I therefore order that the Commissioners will find out from the statements of [the first plaintiff] and his wife the special items of properties and their value. Any property on which the Commissioners can identically lay their hands will be taken in possession by them. The value of such property will be determined from the evidence of the first plaintiff and his wife already on the record and by obtaining expert opinion if necessary. Such of the properties as are not forthcoming will be valued so far as possible from the evidence contained in the statements of [the first plaintiff and his wife]. The value of them to the extent of the plaintiffs' share shall be debited against the share of the defendants to be arrived at as a result of the partition of the entire property which is the subject of the suit."

This was, of course, an order which, in an evidentiary sense, if their Lordships may be permitted such an expression, was highly favourable to the plaintiff, and the defendant appealed against it to the Court of the Judicial Commissioner, but on August 29, 1921, his appeal was dismissed as incompetent at that stage. The proceedings accordingly continued on the basis of the order appealed from. Lists and counter-lists were exchanged between the parties; the first plaintiff was further cross-examined for four days between February 28, 1922, and March 4, 1922, and, as a result of it all, the first plaintiff and first defendant on March 16, 1922, appeared before the Subordinate Judge and made the following statements, which were duly recorded by the Judge. The defendant, Jagmohan Das, said:—

"Whatever lists Indar Prasad (plaintiff) gives written with his own hand of the village collections, house rents and other accounts, including Ugahi, I shall accept as true and correct. And I shall admit whatever moveables with their value he says upon his belief remained with me."

The plaintiff, Indar Prasad, said:—

"I shall give written with my own hand to Lala Jagmohan Das whatever the accounts are, including village collections, house rents, Ugahi account, &c., and I shall write with my own hand and verify upon my belief a list of moveables with their value that remained with Lala Jagmohan Das."

In pursuance of that agreement the first plaintiff, on March 30, 1922, filed seven lists, of which six only remain material. These six were all in his handwriting. With the exception of the immoveable property, as to which the dispute was ended, they covered the whole range of the suit. If they were conclusive, as by the agreement of the defendant they were to be, they would have secured for the plaintiff a decree for practically the whole of his claim and there would have been due to him from the defendant a sum exceeding two lakhs of rupees.

But then a strange thing happened. For some reason unknown—the Subordinate Judge describes it as "a fit of responsive generosity" on the part of the first plaintiff—he on March 30, 1922, when filing his lists, made in Court, in the presence of the first defendant, the offer on which everything now turns. It is thus recorded by the Subordinate Judge:—

"Lala Indar Prasad says he will give up out of his lists such items as Jagmohan Das denies before the deity Lachmi Narsinghi. Jagmohan Das accepts this."

It would appear that, unexpected though the first plaintiff's offer must have been, the first defendant was not slow to see the advantage which this agreement gave him, and a few days later he took a further step to make it completely effective. The first plaintiff's son and co-plaintiff had recently attained majority, and on April 4, 1922, the first defendant applied that it should be placed on record whether he also relied or not on the special oath of the first defendant. On April 7 the young man appeared in Court. He had already intimated that he, too, rested the matter on the special oath of the first defendant as his father, the first plaintiff, had done,

and he replied to the learned Judge, who explained the whole position to him, that he was willing it should be so, even if the first defendant struck out all the items claimed by the plaintiff. "Now," comments the Judge, "both the plaintiffs were within the eagle claws of the defendant No. 1."

On April 8, 1922, the Commissioner, appointed by the Judge in terms to be referred to later, went to the plaintiff's house, and in a kothri of the family deities and in the presence of the Dibba known as Lachmi Narsinghia Dibba he recorded the admissions and denials by the defendant Jagmohan Das of the items in the lists filed by the plaintiff.

On April 10 the Commissioner submitted to the Court his report of the proceedings, together with the first defendant's recorded statement. Plaintiff No. 2 had indeed been taken at his word. By admitting, as the Judicial Commissioner put it, practically all the items which involved any liability on the part of the first plaintiff, and denying practically all the items which involved any liability on his own, the first defendant had transformed lists which disclosed an indebtedness of over two lakhs from him to the plaintiff into a bill ultimately adjusted at Rs.93,672.15.3 due by the plaintiff to himself and his son.

The plaintiff, now thoroughly alarmed, on April 11, protested to the Subordinate Judge that the proceedings of March 30, 1922, and anything done thereunder were not warranted by the Indian Oaths Act No. 10 of 1873; that the first plaintiff's offer of that day was vague and indefinite in its wording and did not contemplate a total denial of some of the lists as recorded by the Commissioner; that the denial by the first defendant of the possession of any joint family property—this he had done—was opposed to the Court's finding in its judgment of May 6, 1921, and that the denials showed that the first defendant had taken undue advantage of the offer of the first plaintiff, and that the Court should not consider the result to be binding and conclusive on the plaintiff.

After a full hearing the learned Subordinate Judge, on May 22, 1922, declared that the admissions and denials of the first defendant recorded in the presence of the deity Lachmi Narsinghi stood good, and he directed the Commissioners to make a report of the net result of all that had gone before. This report the Commissioners made on July 6, 1922, and thereon a final decree was passed on July 25, 1922, awarding as to the moveables to the defendant the above sum of Rs.93,672.15.3 with future interest on that amount from decree until realization. The plaintiff appealed to the Court of the Judicial Commissioner, which by its judgment of March 10, 1924, upheld the decree of the Subordinate Judge. The plaintiff's present appeal is from that judgment.

Their Lordships have been at pains to set forth in some detail the facts which have led to the existing situation. They recognize that the appellants, by their own act, have completely thrown away the favourable position which in this litigation they had obtained for themselves by the order of May 6, 1921—a position which may well have induced the first respondent's concessions of March 16, 1922. Accordingly their Lordships have thought it right, before proceeding further with the consideration of this appeal, to assure themselves that the appellants had, to the full extent alleged, become bound by the agreement of March 30, 1922.

Their Lordships were, in the light of the earlier proceedings in the suit, particularly struck by one feature of that agreement as interpreted by the Courts in India. As so interpreted it binds the plaintiff by the special oath of the first defendant, not only to matters which were directly within the first defendant's own knowledge—for example, as to the jewellery, cash, and ornaments retained by him—but even to matters immediately within the knowledge of the first plaintiff and testified to by himself, and only at second hand, if at all, within the knowledge of the first defendant. To their Lordships' minds this seems, in the circumstances, a strange arrangement for the first plaintiff to have offered the first defendant, and they have scrutinized very narrowly the terms of the recorded agreement to see whether such is its effect, or whether it could not fairly be interpreted as directed, for example, to the plaintiff's list numbered 1, which comprised the property of the first class, and as excluding, for example, list numbered 3, which recorded the first plaintiff's own transactions. But, on full consideration, their Lordships are, in this matter, constrained to adhere to the view of the agreement taken by the Courts below. It was common ground between the parties there that the recorded statements of March 16 and March 30, 1922, were to be read together. So read these statements relate to all, and not to some only, of the plaintiff's final lists which, as has been said, covered the whole range of the suit. There is no room for any discrimination in either statement, each of which the Board must assume to be correctly recorded. Their Lordships accordingly must conclude that if the agreement of March 30, 1922, is effective for any purpose at all it is effective to the fullest extent of the six lists, so that the result in figures arrived at on that footing must inevitably follow.

But it is, however, contended by the appellants that, however the agreement be construed, they, for two separate and distinct reasons, are no longer bound by it. The first reason is that it has not been observed by the first defendant. The second is that the statements made by the first defendant and recorded as above set forth are not, as a result of defects in procedure, made binding upon the appellants by the Indian Oaths Act, 1873.

As to the first contention, it is said that in two respects the agreement was not observed by the first defendant in the proceedings before the Commissioner of partition. First of all, it is asserted, the deity was not present on that occasion. His Dibba was in the kothri, but the deity was not himself within it. To this assertion their Lordships can give no countenance. It was indeed only faintly made before them, although apparently strongly urged in the Court of the Judicial Commissioner. It cannot survive examination. The deity in question was the family deity of the plaintiff; the proceedings took place in the first plaintiff's presence in a kothri of the deities in his house; the Dibba of the deity was there by the first plaintiff's own direction; he knew exactly what the first defendant had to do, because he himself had dictated the procedure; he made no objection at the time to any irregularity or omission; he and the first defendant acted as if they both believed, as their Lordships cannot doubt they did, that the deity was present in the Dibba. If, to the knowledge of the first plaintiff, the deity was not so present, the whole proceeding was reduced to a farce, if not to something worse. There is, however, no affidavit or sworn statement by the first plaintiff or anyone else that the deity was not actually present. The point was not, it seems, taken at all before the Subordinate Judge. It appears for the first time on October 3, 1922, in the plaintiff's grounds of appeal to the Court of the Judicial Commissioner. Like that Court, their Lordships are

unable to countenance the suggestion, which was, they think, to say the least of it, ill-advised on the part of the plaintiff.

But there is, it is alleged, another respect in which the agreement was not observed. It was thereby contemplated, so it is said, that the deity would be actually invoked by the first defendant when he attended to make in the presence of the god his admissions and denials. And no such invocation was made. The agreement, therefore, say the appellants, has not been performed in an essential particular. Now, it is the fact that on the occasion in question there was no invocation of the deity. It is not, however, true to say that the agreement made between the parties called for any such invocation. Their Lordships feel no doubt that the actual proceedings before the Commissioner amounted to a literal compliance with the terms of that agreement, and a substantial compliance also. For their Lordships are of opinion that the learned Subordinate Judge correctly interprets the views on this subject both of the plaintiff and of the defendant when he says that "the very presence of the god or idol on the spot when the statement was made, so to speak, within his sight and hearing was tantamount to his invocation by name in case of his absence. When the god or idol had been brought purposely on the scene to witness the statement of defendant 1, it was by no means necessary to call upon him to bear witness, for having been brought to the scene he could not be suspected to be inattentive or asleep."

The first objection therefore fails in both respects.

The second objection may be expanded thus: apart from such an invocation as has just been referred to and which was never made, and in the absence of anything done on the occasion that could properly be described as the administration to the first defendant of an oath or affirmation in the ordinary sense of these words, his admissions and denials are not, within the Indian Oaths Act, 1873, binding on the plaintiffs. As an aid to the consideration of this objection, which is much more formidable than any of the others, it will be convenient to set out, for facility of reference, the sections of the Indian Oaths Act, 1873, on which its determination must mainly turn.

The sections are the following:—

"5. Oaths or affirmations shall be made by the following persons:—

"(*a*) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or persons having by law or consent of parties authority to examine such persons or to receive evidence;

"(*b*) Interpreters of questions put to, and evidence given by, witnesses, and

"(*c*) Jurors.

"Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

"6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

"or has an objection to making an oath,

"he shall, instead of making an oath, make an affirmation.

"In every other case the witness, interpreter or juror shall make an oath.

"IV. Forms of Oaths and Affirmations.

"7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

"And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use. . . .

"8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

"9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

"Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

"10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

"11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

The judgment of the learned Subordinate Judge makes a careful record of the Indian authorities on this subject. The result of them, their Lordships are inclined to think, is that the point now raised has not so far been the subject of express decision. Safe, however, it is to say that in the decisions which have been brought to their Lordships' notice where a so-called "special oath" has been upheld there is no clear indication, one way or the other, whether the person who took that oath recited any formula by way of invocation or did anything else which in the ordinary sense of the words amounted to the making of an oath or affirmation. The question, accordingly, now that it has been raised must be determined on principle, and to this task their Lordships proceed.

It is not denied that the statements made by the first defendant here in the presence of the deity were specially binding on his conscience by reason of the fact that they were so made. It is also recognized that the Subordinate Judge before he appointed a Commissioner was himself satisfied that the particular ritual to be followed fulfilled the conditions of section 8 of the Act. Equally clear is it that the learned Judge intended to act in pursuance of section 10, when on March 30, 1922, he made this order of appointment:—

"With the consent of parties I appoint Bahu Mahesh Prasad pleader for going with the plaintiff's list before Lachmi Narsinghi in plaintiff's house and take defendant's admissions and denials of the list items before the deity."

The question, therefore, is whether the evidence of the first defendant, given in the presence of the Commissioner before the deity, was, in these circum-

stances, evidence on oath or solemn affirmation administered by the Commissioner within the meaning of sections 8, 9, and 10 of the Act, and their Lordships, in agreement both with the learned Subordinate Judge and the Judicial Commissioner, are of opinion that this question must be answered in the affirmative. In their judgment, upon a sound construction of the sections, neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in section 8 of the Act.

Their Lordships are led to this conclusion by reference to the sections alone. They are confirmed in it, however, by recalling the stage of development which the law of India had reached on the subject of oaths by the date when the Act came into force.

Upon the point of construction the cardinal consideration to note is that the "oath or solemn affirmation" referred to in section 8 and following sections is something quite distinct from the oaths and affirmations referred to in section 5. These are to be in such form as the High Court shall prescribe (section 7). With regard to the oath or solemn affirmation referred to in section 8, however, all that is said is that it may be "in any form common amongst, or held binding by, persons of the race or persuasion to which [the deponent] belongs, and not repugnant to justice or decency." That is to say, it may be as infinite alike in form and content as racial custom or the dictates of any religious persuasion may, within the prescribed limits, sanction or require. But from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra-racial or secular administrative authority. It would or might at once lose its essential distinctive sanction if any such outside interference were permitted to have effect. And this brings their Lordships to the second matter which it is necessary to note in the construction of these sections. There is no suggestion in either section 8, 9, or 10 that when the separate "oath or solemn affirmation" is permitted the ordinary oath or affirmation, as prescribed, or any part of it, is to be administered as well. The "oath or solemn affirmation" when permitted is a complete substitute for the other. There is in the sections no warrant for the suggestion that any part of a procedure which, be it remembered, is only appropriate where it is gone through before any evidence at all is given, and is designed to cover that evidence when given, is to be transferred to a taking of evidence which, as in the present case, is solemnized only by its being given and while it is given in the actual presence and hearing of the deity himself.

Indeed, this case shows that such a requirement, not, their Lordships think, made by the sections, would in many cases be entirely out of place. When, as here, the whole meaning of the procedure is that a statement made by a witness in the corporeal presence and hearing of his god will be true by reason of the fact that it is so made, introductory words of invocation, appropriate enough in other circumstances, become entirely unsuitable. For if the deity be removed before the statement is made the words are nugatory; if the statement be made in his presence they are superfluous.

It is said further, however, that this construction of the sections attaches no adequate signification to the words "oath or solemn affirmation" in section 8. Their Lordships, on consideration, do not agree. It appears to them that the use of the alternative expressions "oath" and "*solemn* affirmation" as a description of the special ritual envisaged in section 8 is intended to indicate that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The words, their Lordships opine, were selected primarily to put it beyond the possibility of doubt that the temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for the other: they are descriptive of the nature and result of the ritual: they are in no way concerned with its form—a conclusion which is confirmed by the consideration that historically an affirmation, technically so-called, is merely a substitute for an oath: that the description includes both "oath" and "affirmation," although, except in the quality of solemnity, these are quite distinct, the one from the other, and that its purpose is revealed by the addition to the word "affirmation" of the adjective "solemn," which is not in use in connexion with affirmations in the technical sense of the word.

But, lastly, it is said that the "oath or solemn affirmation" must, as appears from section 10, be something which either the Court or a Commissioner appointed by the Court can "administer" to the witness; it must, under section 8, be something that can be "tendered" to him. Upon this it is to be remembered that "administer" is, in the law, a word of wide and not of restricted import. It would be for instance beyond question that an oath is "administered," not only where the English form is adopted, but where, in the presence of the Court, it is "taken" by the witness in the Scottish form. Their Lordships do not doubt that the terms of the section were here in this respect fully complied with when the admissions and denials of the first defendant were made, not only before the deity, but in the presence of the Commissioner. The word "tendered," in section 8, does not appear to their Lordships to create any difficulty.

On construction alone, therefore, their Lordships reach the same conclusion as the Courts below. That conclusion is, however, in their judgment, confirmed by a reference to the course of development of the Indian law on this subject. That law was derived from the English law, with some modifications suggested by Indian conditions. Just as in England, so also in India, it was at one time the rule that there could be no evidence without an oath in the strict sense of the word, and only gradually were exceptions grafted by statute upon that rule. Before 1840 the privilege of making an affirmation instead of taking an oath was enjoyed only by Quakers, Moravians, and Separatists. By that time it had been found that the taking of an oath was highly objectionable to Hindus and Mahomedans, and Act V. of 1840 was passed for the purpose of prohibiting the administration of oaths to persons belonging to those communities, a form of affirmation being substituted for an oath. With some extension in 1869 the law so remained until the Act VI. of 1872 was passed. By that Act it was provided that every witness who objected to take an oath might instead make a simple affirmation, and in section 4 will be found the statutory provision which, before 1873, enabled volunteers to make oaths in special cases. Sections 8 to 13 of the present Act of 1873 correspond to and have taken the place of that section, and their Lordships can have no doubt that long before that time the Indian view, embodied afresh in the Act, had come to be that which may, briefly, be taken from the words of the Lord Chancellor in *Omychund v.*

Barker (1 Atk., 22, at pp. 49-50), and quoted by the Judicial Commissioner :—

"The next thing I shall take notice of is the form of the oath. It is laid down by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."

For all these reasons their Lordships dealing on this branch of the appeal with the one aspect of the matter brought before them by the appellant for consideration are constrained to agree with both Courts in India that the statements made by the first defendant in the presence of the family deity and before the Commissioner were conclusive upon the plaintiff.

An objection was taken by the appellants to certain items in the accounts which their Lordships at the hearing intimated that they could not entertain for reasons which they then gave. They do not repeat these reasons. In their Lordships' judgment the order of the Judicial Commissioner objected to was in all respects right, and they think that this appeal should be dismissed, with costs.

And their Lordships will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Barrow Rogers and Nevill ; Messrs. T. L. Wilson and Co.]

K.B. Div. (MacKinnon, J.) 1927. May 20.

NORSKE ATLAS INSURANCE COMPANY, LIMITED v. LONDON GENERAL INSURANCE COMPANY, LIMITED.*

Arbitration — Award—Reinsurance contract—Provision for arbitration in Norway—Contract not a policy—Not properly stamped as a policy — Action on award — Proper law applicable.

The plaintiffs, an insurance company in London, and the defendants, an insurance company in Norway, entered into a written contract headed "Reinsurance contract—Marine insurance." The contract was not a policy as it did not contain the particulars required by the Marine Insurance Act, 1906, and was not stamped as a policy, but it contained the usual terms of a reinsurance treaty, the plaintiffs being the reinsured and the defendants the reinsurers, and there was a clause providing that in the event of disputes an arbitration should take place in Norway. The contract was signed by the plaintiffs in Norway and by the defendants in London and was stamped with an English sixpenny stamp, but it was not stamped in accordance with the English law as to contracts of marine insurance. It was, however, valid by the law of Norway. An arbitration under the contract was held in Norway, and an award was issued in favour of the plaintiffs. In an action on the award the defendants submitted that, as the defendants resided in England and therefore the award against them could be enforced only in the English Courts, the law applicable to the whole contract must be the law of England, and that, since the contract neither was a policy as required by English law nor was properly stamped as such a policy, the plaintiffs could not recover on the award.

Held, that as the action was brought on the award and not on the contract of reinsurance, and as the proper inference from the provision as to the arbitration being held in Norway was that the parties intended the law of Norway to govern the contract, the plaintiffs were entitled to recover the sum awarded.

In this case the plaintiffs, the Norske Atlas Insurance Company, Limited, claimed a sum of £4,675, and also interest on a smaller sum, which they alleged to be due to them from the defendants, the London General Insurance Company, Limited, under an award.

Sir Robert Aske (Mr. Porter, K.C., with him) appeared for the plaintiffs ; Mr. Le Quesne, K.C., and Mr. McNair for the defendants.

In 1919 a treaty of reinsurance was entered into between the plaintiffs and the defendants, the plaintiffs being the reinsured and the defendants being the reinsurers. The treaty was terminated at the end of 1921, and in an arbitration for the settlement of transactions between the parties the award was made which was the foundation of the present action.

The defendants admitted the making of the award, but they denied that they owed anything under it. They contended that the treaty of reinsurance was a contract of sea or marine insurance, and was not expressed or embodied in a policy so as to satisfy the Stamp Act, 1891, section 93, or the Marine Insurance Act, 1906, sections 22 and 23. They also contended that the sums granted by the award were payable in respect of risks of sea insurances ceded by the plaintiffs to the defendants under the treaty of reinsurance, and that neither the treaty nor certain addenda to it were properly stamped and that the sums were, therefore, irrecoverable by virtue of section 97 of the Stamp Act, 1891.

By their reply the plaintiffs contended that the contract was to be performed in Norway, and must be governed by Norwegian law, and that by that law the contract was valid and enforceable.

Sir Robert Aske submitted that on the wording of the treaty it was not a mere contract of indemnity, but was something in the nature of a partnership, or an agency, or an equitable assignment of risks. The case of *Admiralty Commissioners v. Ropner and Co.* (33 *The Times* L.R., 362) showed that a contract might have the results of a contract of marine insurance without being such a contract. In this document there was no agreement in terms to reinsure. It was not a contract of insurance at all, but an agreement to share profits and losses in partnership. Further, the contract was first executed by one party in Norway and later by the other party in England and the proper law applicable to it was the Norwegian law.

What law to apply was ascertained by seeing what law the parties themselves intended to apply. (Dicey on "The Conflict of Laws," 4th edit., p. 609) ; *Royal Exchange Assurance Corporation v. Sjoforsakrings Aktiebolaget Vega* (18 *The Times* L.R., 714 ; [1902] 2 K.B., 384) ; *Hamlyn and Co. v. Talisker Distillery Company* (10 *The Times* L.R., 479 ; [1894] A.C., 202). The Courts would always hold, if pos-

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

sible, that the parties were making a contract which could be enforced and which was not illegal.

Evidence was given that the contract was a valid contract under Norwegian law.

Mr. Le Quesne submitted that the treaty was clearly a contract of marine insurance and the law applicable to it must be decided from all the circumstances. There was in the treaty an arbitration clause which said that proceedings must begin with an arbitration in Norway. But the defendants resided in England and an award made against them in Norway could only be enforced in the English Courts and the law applicable to the whole contract must be the law of England. He referred to *Genforsikrings Aktieselskabet (Skandinavia Reinsurance Company of Copenhagen) v. da Costa* (27 *The Times* L.R., 43 ; [1911] 1 K.B., 137) ; *Home Marine Insurance Company, Limited v. Smith* (14 *The Times* L.R., 459 ; ([1898] 2 Q.B., 351).

The contract was one of marine insurance, and the plaintiffs could not evade that fact by saying that they were suing on the award and not on the contract ; for the award and the original cause of action were not separable. As this contract was not a policy since it did not contain the particulars required by the Marine Insurance Act, 1906, and, though it was stamped with an English sixpenny stamp, it was not stamped with the stamp proper for a contract of marine insurance, it was inadmissible in evidence.

Mr. Porter replied.

Mr. Justice MacKinnon, in giving judgment, said that the plaintiffs were an insurance company in Norway and the defendants were an insurance company in London. In 1919 the parties entered into a written contract headed :—"Reinsurance contract—Marine insurance." That document contained the usual terms of a reinsurance treaty. It also contained an arbitration clause providing that if any dispute should arise under the contract the parties should not resort to any Court of law, but that arbitrators should be appointed, who should be chairmen or directors of marine insurance companies in Norway, and if either party should fail to appoint its arbitrator the chief officer of the maritime Court of Christiania should appoint. The arbitrators were to meet in Christiania. That document was signed by the plaintiffs at Christiania on November 28, 1919, and by the defendants in London on December 9, 1919.

Under that contract business went on for a time between the parties, but disputes arose and the plaintiffs claimed arbitration. The defendants refused to appoint their arbitrator, and the plaintiffs, in accordance with the contract, got the officer of the Christiania Court to appoint an arbitrator on the defendants' behalf. On April 14, 1926, an award was issued, and on May 18, 1926, the plaintiffs started this action to recover the sum awarded.

If the plaintiffs had been suing here on the treaty of reinsurance for marine losses incurred in insurances the defence raised would have been fatal to them, because the contract was one of marine insurance which was not effected by a policy and was not properly stamped. The plaintiffs, however, were not suing on the contract, but on the award, and the only things to be proved by them were (1) the submission ; (2) the conduct of the arbitration in accordance with the submission ; and (3) the fact that the award was valid according to the law of the country where it was made.

As to (1), the defendants admitted that the award was made pursuant to the contract. The treaty had been put in with a 6d. stamp on it and a statement that it had been adjudicated on by the Commissioners. If it had been put in as evidence of a contract of marine insurance it could have been objected to, but it was only put in as evidence to prove the submission and for that purpose was admissible.

As to the validity of the award, the law applicable depended ultimately on the question what was the law which the parties intended to apply. If the intention was not expressly stated it could be inferred from the general tenor of the document, or from the place where the contract was drawn up. In this case the contract was signed both in Norway and in London, so no guidance could be obtained from the place of signature. But from the provision that arbitration should take place in Christiania he thought that the proper inference was that the parties intended the law of Norway to be the law governing the contract. Evidence had been given that the contract was valid by the law of Norway and the defendants had not suggested that any impropriety had occurred in the conduct of the arbitration. The award, therefore, was a Norwegian award and was perfectly good and the plaintiffs were entitled to recover the sum awarded.

There must be judgment for the plaintiffs for the amount claimed.

A stay of execution was granted on terms.

[Solicitors—Messrs. Holman, Fenwick and Willan ; Messrs. Ballantyne, Clifford and Co.]

K.B. Div. (MacKinnon, J.) } 1927. May 23.

ROYAL COMMISSION ON SUGAR SUPPLY v. HARTLEPOOLS SEATONIA STEAMSHIP COMPANY, LIMITED.*

Ship—Charterparty—Bill of lading—Construction of clauses — Cargo of sugar in bags — Discrepancy between bill of lading number and out-turn tally — Meaning of "error" — Proof by inference excluded.

The claimants chartered a ship from the respondents, the owners, to convey a cargo of sugar from Cuba to a British port, the charterparty providing that mate's receipts should be signed for each parcel and that bills of lading in accordance therewith should be signed by the master, and "Quantity stated on bills of lading to be conclusive evidence as to number of bags of sugar shipped unless error or fraud can be proved." The mate signed receipts and the master signed bills of lading in accordance with the receipts. The bills of lading provided that "the carrier shall not be concluded as to the correctness of statements herein of . . . quantity." The bags discharged at Greenock were found to be short of the number in the bills of lading, and a claim by the charterers against the shipowners in respect of the shortage went to arbitration. No fraud was alleged, and the arbitrator held that there was no evidence how the discrepancy arose and that under the conclusive evidence clause in the charterparty the shipowners were liable in the absence of proof

* Reported by Charles Clayton, Esq., Barrister-at-Law.

of some definite error in the bills of lading or tallies otherwise than by inference from the fact that all the bags shipped were discharged, and he made an award in favour of the charterers.

Held, that variations of the bill of lading from the charterparty were of no account, and that on the conclusive evidence clause in the charterparty the shipowners could not escape liability by giving evidence from which a mistake might be inferred but they must prove a mistake in the mate's receipts so that it could be seen how the mistake arose, and therefore the award must be upheld.

The Court upheld the award of the arbitrator, Mr. Harold Claughton Scott, K.C., who found in favour of the claimants, in a special case stated dealing with the liability of the respondents in respect of an alleged short out-turn of a cargo of sugar in bags.

By a charterparty dated March 10, 1920, made between Messrs. Hessler and Co., on behalf of the Hartlepools Seatonia Steamship Company, Limited (the respondents), and the Royal Commission on Sugar Supply (the claimants) it was agreed that the steamship Seatonia should proceed to certain ports in Cuba and there load a full cargo of sugar in bags and thence proceed to one safe port in the United Kingdom. It was also provided that the mate's receipts should be signed for each parcel of sugar when on board, and that bills of lading in accordance therewith should be signed by the master. The following clause was also included in the charterparty: "Quantity stated on bills of lading to be conclusive evidence as to number of bags of sugar shipped unless error or fraud can be proved."

The Seatonia duly proceeded to Cuba and loaded at Manzanillo and Cienfuegos. The mate duly signed receipts for each parcel of sugar put on board and the captain signed bills of lading for each parcel in accordance with the mate's receipts. No dispute arose with regard to the cargo loaded at the former port. When the portion of the cargo loaded at Cienfuegos was discharged at Greenock it was found according to three independent tallies that the out-turn of a parcel of bags marked "San Lino" was 183 short of the total of 2,860 as stated in the bills of lading signed by the master. The bills of lading provided (*inter alia*): "It is mutually agreed . . . that the carrier shall not be liable for any loss or damage arising from the insufficiency of packages . . . and that the carrier shall not be concluded as to the correctness of statements herein of quality, quantity. . . ."

The claimants claimed in respect of the alleged shortage the sum of £1,460 11s. 1d. and deducted that sum from the respondents' freight account. On agreement that the dispute should be submitted to arbitration the claimants paid to the respondents £1,460 11s. 1d., and thus became the claimants in the arbitration.

At the hearing the claimants based their claim upon the charterparty and the "conclusive evidence" clause therein. The respondents relied upon the terms of the bills of lading, and denied that the bills of lading number of bags were received on board, and alleged that all the bags received on board were discharged at Greenock. The arbitrator found (*inter alia*): (*a*) That the out-turn tallies at Greenock were correct; (*b*) that all the bags of sugar shipped under the mark "San Lino" were discharged and delivered; (*c*) that there was no evidence to show how the discrepancy between the bills of lading number and the out-turn number arose; (*d*) that the bills of lading, taken in conjunction with the charterparty, were conclusive evidence against the respondents as to the number of bags shipped, save on proof by them of error or fraud in regard thereto; (*e*) that the words "unless error or fraud can be proved" meant, upon the true construction of the charterparty, unless some definite error in making out the bills of lading or in the tallies, such as clerical error or error in copying or addition or omission or the like or some definite fraud be proved, and that it excluded proof by or inference from the fact that all the bags of sugar shipped were discharged.

The question for the opinion of the Court was whether upon the facts and upon the true construction of the charterparty and bills of lading the arbitrator had come to a correct determination in point of law.

Mr. Langton, K.C., and Mr. G. E. Cooper appeared for the respondents; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. W. Bowstead appeared for the claimants.

Mr. Langton, after referring to the facts and the material clauses of the charterparty and the bills of lading, dealt with the meaning of the word "proved." He submitted that clerical errors were demonstrable and did not require proof, and referred to Best on Evidence, 12th Edition, page 5: "The word 'proof' seems properly to mean anything which serves . . . to convince the mind of the truth or falsehood of a fact or proposition; and as truths differ, the proofs adapted to them differ also." In this case the word "proved" was used both for fraud and error. He contended that the respondents had proved that an error had been made, and he added that an error was not necessarily either small or blameworthy. Fraud would certainly mean that someone had written in a number knowing it to be untrue and for a purpose; error, in the broadest sense, would be a mistake made in tallying in. He further submitted that both the charterparty and the bills of lading must be looked at for the contract, and that the bills of lading were a most highly qualified receipt. On this point he referred to page 56 of the 12th Edition of Scrutton on Charterparties and Bills of Lading. He had two submissions: (1) the error could be any error, and not necessarily a special error; (2) the bills of lading were not conclusive at all.

The Solicitor-General submitted that the conclusive evidence clause meant something very definite, and was put in for a definite purpose—to serve as a protection. The error would be one which a charterer ought to be in a position to correct. Definite evidence could be given by the production of the mate's receipts and the bills of lading; but the error as submitted by Mr. Langton was wider than this. He (the Solicitor-General) contended that on the construction of the whole clause it was not enough to say that one must infer from the facts proved that there must have been a mistake, but the mistake must be proved

Mr. Langton replied.

Mr. Justice MacKinnon, in giving judgment, said that the case raised the shortest point possible, founded on a clerical mistake. He referred to the facts and cited the material clauses of the charterparty and the bills of lading. There were two points to consider; (1) whether the whole effect of the conclusive evidence clause in the charterparty was wiped out by the clause in the bills of lading as to the liability of the carrier as to quantity; and (2) whether if the shipowners failed on that point they

escaped liability by reason of the provision in the conclusive evidence clause "unless error or fraud can be proved." On the first point there was no difficulty whatever. The contention of the shipowners amounted to this: that the charterers and shipowners had come to a mutual agreement to substitute the provision in the bills of lading for the conclusive evidence clause in the charterparty. It was very old law that variations between a bill of lading and a charterparty were of no account; also the master would have no authority to vary the charterparty. He referred to the findings of the arbitrator and said that the real question in the case arose under the clause "Quantity stated on bills of lading to be conclusive evidence as to number of bags of sugar shipped unless error or fraud can be proved." It was a necessary inference from the first and second findings of the arbitrator that the figure 2,860 in the bills of lading was erroneous. He referred to Mr. Langton's contention that "error" had been proved, and said that if the proof of any mistake was sufficient it was immaterial whether it arose through negligence, carelessness, or fraud. Dealing with the Solicitor-General's submission that proof of mistake must not be inferred from facts, but must be proved, his Lordship said he thought it was an extremely difficult question, but on the whole he agreed with the arbitrator. It was not enough for the respondents to give evidence from which it might be inferred that there had been a mistake. What must be proved was a mistake in the mate's receipts so that it could be seen how the mistake arose. In those circumstances the award must be upheld.

[Solicitors—Messrs. Middleton, Lewis, and Clarke, for Messrs. Middleton and Co., West Hartlepool; the Solicitor for the Board of Trade.]

K.B. Div. (Wright, J.) | 1927. May 23.

GOSSE MILLARD, LIMITED v. CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED.*

Contract—Carriage of goods by sea—Obligations of shipowners—Alleged breach of duty—Damage to cargo—Negligence—Onus of proof—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. III., rr. 2, 6, 8; Art IV., r. 2.

The plaintiffs had a quantity of tinplates shipped for conveyance by the defendants' steamer from Swansea to Vancouver, and after the tinplates had been taken on board the ship went to Liverpool and had to be detained there for repairs. For this purpose part of the cargo had to be shifted, and rain got into the hold, and when the tinplates were discharged at Vancouver they were found to have been damaged by rust. In an action for damages for breach of duty in the carriage of the tinplates, the Court found that the facts were as above stated and that if the damage was not caused by rain getting into the hold the cause was unexplained.

Held, that the defendants had failed to carry out the obligation imposed on them by Art. III., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, carefully to stow, keep, and care for the goods, and that, even if the cause of the damage was unexplained, the onus was not on the cargo-owners to prove negligence but on the shipowners to prove that neither they nor their servants had been guilty of negligence contributing to the loss, and the plaintiffs were entitled to recover.

In this action the plaintiffs claimed damages from the Shipping Department of the Canadian Government for breach of duty in the carriage of tinplates.

Mr. Jowitt, K.C., and Mr. Pilcher appeared for the plaintiffs; Mr. Miller, K.C., and Sir Robert Aske for the defendants.

The plaintiffs were engaged in the canning industry in Vancouver, and in February, 1925, they had ordered a quantity of tinplates from Baldwins, Limited, in South Wales. The plates were shipped at Swansea on a steamer, the Canadian Highlander, belonging to the defendants. After they had been taken on board, the steamer went to Liverpool to discharge certain other cargo. While at Liverpool the steamer was damaged by collision with a dock wall, and when the defendants began to do the repairs necessitated by that collision they found that a shaft liner was defective and must be repaired also. In the result part of the cargo had to be shifted, and the steamer was detained at Liverpool for ten weeks. She eventually went to Vancouver and discharged the plaintiffs' tinplates, which, it was found, were to a large extent ruined by rust.

The plaintiffs contended that the plates were in good condition when shipped, and had been damaged owing to the negligence of the defendants in allowing water to reach the cargo.

Another action, brought by the American Canning Company, raised a similar claim in respect of a consignment of tinplates shipped from the works of Richard Thomas and Co. to Vancouver by the same steamer on the same voyage. The two actions were heard together.

By their statement of claim the plaintiffs pleaded that the goods were loaded in good order and condition; that the defendants loaded and/or stowed the boxes containing the plates so negligently that many of them were broken and their contents exposed; and that the defendants had also been negligent in shifting and re-stowing the boxes in order to carry out the repairs to the steamer at Liverpool.

By their defence the defendants put in a general denial and referred to conditions in the bill of lading—to the words (*a*) "shipped in apparent good order and condition," which, they said, amounted only to a description of the goods by the shippers and did not constitute an acknowledgment by the carriers; (*b*) "tinplates to be deemed insufficiently packed unless in boxes tin-lined and iron-hooped"; and (*c*) "any statement herein that metal goods of any description have been shipped in apparent good order and condition does not involve any admission by the carrier as to the absence of rust or fresh water damage or other deterioration between tinplates . . . , for which the carrier accepts no responsibility."

They pleaded further that if the plates were damaged it was due to inherent vice, or to insufficient packing because the boxes containing the plates were not tin-lined and were made of unseasoned wood; and that the plaintiffs themselves had been negligent in shipping the goods in wet weather. They further

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

relied on Article IV., rule 2 (*a*), (*c*), (*d*), (*i*) and (*q*), of the Schedule to the Carriage of Goods by Sea Act, 1924.

By their reply the plaintiffs pleaded that the delay at Liverpool constituted a deviation and that the defendants could not, therefore, rely on the exceptions ; and that the defendants had been negligent in not taking care that the plates should not be damaged while the repairs were being carried out.

Mr. JOWITT, in discussing the pleadings, submitted that, if the bill of lading differed from the provisions of the Act, the Act must prevail and the shipowners could not rely on the bill of lading. If delay was necessary for the purpose of making the repairs at Liverpool the defendants should have exercised the power which the contract gave them to trans-ship the goods and should have sent them forward by another ship. Article IV., rule 4, of the Schedule to the Act dealt with the question of deviation and provided that the shipowner should not be liable for any reasonable deviation. Though the delay at Liverpool for repairs might be reasonable from the point of view of the ship, it was not reasonable from the point of view of the cargo-owner.

Evidence having been called for the plaintiffs, Mr. MILLER submitted that the effect of the clause in the bill of lading "shipped in apparent good order and condition," coupled with the fact that complaint was not made at the time of delivery, was that the plaintiffs must prove negligence by the defendants. That was clear from Article III., rule 6, of the Schedule to the Carriage of Goods by Sea Act, 1924. which provided as follows :—

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading."

That was not inconsistent with the provisions of the earlier rule 2 in Article III., which laid a general obligation on the carrier to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

The shipper under such a bill of lading as this must prove affirmatively that the carrier had been negligent.

Evidence was then called to show that in loading, stowing, and carrying the goods the servants of the defendants had taken every care. It was suggested that the damage to the plates must have been due to the fact that the boxes containing them were made of wood containing excessive moisture, which had sweated out during the voyage, whereas the plaintiffs had contended that the boxes must have been allowed to get wet by exposure to rain at the time of, or subsequently to, loading, and had remained wet in the hold owing to bad ventilation.

At the conclusion of the evidence, the hearing of which occupied several days, Mr. MILLER addressed the Court. The first matter to be considered was the contract. The policy of the Act was to allow the parties to make contracts for themselves, but subject to a general control provided by the Act. The shipowner was now not under the obligations of an insurer or of a common carrier, but was only under the obligation of an ordinary bailee to take reasonable care. In effect, the Act declared that the shipowner should now be liable only for negligence. He could if he pleased, however, by Article V., accept any further liabilities by special contract.

Mr. JOWITT, interposing, submitted that if a bailee redelivered goods in a worse condition than that in which he received them the burden was on him to show that the deterioration was not due to his negligence.

Mr. MILLER, continuing, submitted that the Act was international in character and, therefore, it was irrelevant to consider the particular law of any one country as it existed before the Act. If other defences failed, the defendants would rely on Article IV., rule 2 (*q*), and would submit that the words "or without" there must not be read as equivalent to "and without," and that as there had been no actual fault or privity on the part of the defendants themselves there was no liability.

Article III., rule 6, said that if the goods were taken away without notice of damage being given that was *prima facie* evidence that the goods had been delivered in proper condition, but that provision, relating merely to *prima facie* evidence, did not justify an inference as to any definite obligation on the shipowner. It was not that the shipowner must pay unless he could bring himself within one or other of the exceptions ; it was for the owner of the goods to show affirmatively that the shipowner had been negligent. It would be enough if he could prove that the condition of the article on delivery was consistent only with negligence by the shipowner. In cases where there was no definite evidence and the shipowners relied on subsection (*q*) it was enough if their evidence showed that they had been careful in the general performance of their duty (*City of Baroda* (*Cargo Owners*) *v. Hall Line, Limited*, 42 *The Times* L.R., 717). And even if there was negligence in this case the defendants could rely also on exception (*a*) of Article IV., rule 2, which provided that the shipowners should not be liable for damage due to the act, neglect, or default of their servants in the management of the ship.

Mr. MILLER then discussed the evidence and submitted that on the facts there was no negligence on the part of the defendants, but that the damage must have been caused by the use of unseasoned wood in making the boxes. All the evidence was consistent with that view, and no alternative had been established.

Mr. JOWITT replied. As to the law, the position was made quite clear by Lord Justice Atkin in *The Ruapehu* (21 Ll. L., 310). If a man accepted goods as a bailee and failed to return them, or returned them in a damaged condition, the burden of proof was on him to show that he had not failed to exercise reasonable care and skill. *Dollar v. Greenfield* (reported only in *The Times*, May 19, 1905) set out the law correctly. Apart from the general law, the Act, by Article III., rule 2, of the Schedule, laid an absolute obligation on the shipowner subject only to the exceptions set out in Article IV., rule 2.

As to the clauses in the bill of lading, Clause 18 provided that tinplates should be deemed insufficiently packed unless packed in tin-lined boxes. But that was only a presumption and did not exclude proof of actual sufficiency of the packing. And on the face of it this clause appeared to be avoided by Article III., rule 8, of the Schedule. In Clause 21 the words "shipped in apparent good order and condition" were only a statement by the shipper and were only intended to prevent any admission by the shipowner as to the condition of goods which he had had no opportunity of seeing.

He referred to *Hordern and Sons, Limited v. Commonwealth and Dominion Line, Limited* (33 *The Times* L.R., 344; [1917] 2 K.B., 420), and *Rowson v. Atlantic Transport Company, Limited* (19 *The Times* L.R., 668; [1903] 2 K.B., 666, at p. 677).

On the facts, the evidence showed that for many years tinplates had been shipped in boxes like those under discussion, and there had never been any complaint, but on this voyage the boxes had been roughly handled on the ship and many of them had been broken.

MR. JUSTICE WRIGHT stated the facts and said that the damage done to the tinplates was admittedly fresh-water damage. Apart from the delay and detention at Liverpool the voyage was of a normal character.

The plaintiffs had put in affidavits dealing very fully with the damage found at Vancouver, but the defendants' evidence was neither full, precise, nor clear, and he was therefore substantially dependent on the evidence of the plaintiffs. The damage to the Gosse Millard plates was exceptionally serious, and that to the American Canning Company's plates amounted to about 20 per cent.

The real issue was how the damage was caused. Two rival theories had been put forward, one, that it was caused by the inherent defect of the article through the use of unseasoned wood for the packing; and the other, that it was due to wetting from external causes, in particular to exposure to rain during the long stay at Liverpool. It was clear that the goods were not wetted on the way from the works to the dock at Swansea; that no wetting took place during the operation of loading; and that the holds were well ventilated throughout the voyage.

The cause of the damage must be a matter of inference from all the circumstances, and on a review of all the evidence he found it quite impossible to hold that there was anything wrong with the boxes which could account for the damage complained of. On the other hand, during the long stay at Liverpool there must no doubt have been much coming and going in the hold and the hatches must have been removed in whole or in part. Unless exceptional precautions were taken there would be opportunities for rain to get into the hold. He had come to the conclusion that rain did get into the hold at Liverpool in sufficient quantities to account for damage of the kind complained of.

So far as concerned the Gosse Millard shipment, he found as a fact that the damage was due to wetting from rain at Liverpool. The defendants, in ordinary circumstances, exercised great care and skill in dealing with the goods which they carried, and their officers appeared to be admirable seamen. Still, though the negligence was not very blameworthy, he found that they had in this case failed to carry out the obligation imposed on them by Article III., rule 2, of the Act. If he was wrong in that finding the only alternative conclusion was that the cause of the damage was unexplained.

With regard to the claim of the American Canning Company, on the whole of the evidence he had come to the conclusion that the cause of the damage was quite unexplained.

His LORDSHIP continued:—The alternative conclusion at which I have arrived as regards the claim of the plaintiffs Gosse Millard, and the conclusion I have arrived at as regards the claim of the American Canning Company—namely, that the precise cause of the damage cannot be ascertained—makes it necessary to determine as a matter of law on whom is the onus of proof under the Carriage of Goods by Sea Act, 1924, which applies to the shipment in question. The bills of lading were issued in accordance with that Act, as indeed is obligatory under section 3 of the Act, and the bills of lading duly contain an express statement that they are to have effect subject to the rules scheduled to the Act. These rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers or liable to the obligations of common carriers, but were entitled to the utmost freedom of restricting and limiting their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the rules, which cannot be varied by any bill of lading, their liabilities are precisely determined, and so also are their rights and immunities. In particular Article III. (2) of the rules is in the following terms: "Subject to the provisions of Article IV., the carrier" (which means the carrier and any person employed by him to do the work) "shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." The word "discharge" is used, I think, in place of the word "deliver," because the period of responsibility to which the Act and rules apply (Article I. (*e*)) ends when they are discharged from the ship. Article III. (3) requires the bill of lading to state, *inter alia*, "the apparent order and condition of the goods," that is, on shipment. The words "properly discharge," I think, mean deliver from the ship's tackle in the same apparent order and condition, unless the carrier can excuse himself under Article IV. Hence the carrier's failure so to deliver must constitute a *prima facie* breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Article IV. (1), which deals with unseaworthiness, which, for the purpose I am considering, I disregard, but in respect of which the carrier must prove the exercise of due diligence. Article IV. (2) contains a long list of matters in respect of loss or damage arising or resulting from which the carrier is not to be liable; these excepted causes (*c*) to (*p*) inclusive, except (*l*), are all matters beyond the control of the carrier or his servants, such as sea perils, acts of God, restraint of princes, riots, inherent vice of the goods, &c.; (*l*) relates to deviation to save life and property; (*a*) deals with neglect in the navigation and management of the ship, which falls, I think, under a category different from the case of the cargo; (*b*) relates to fire and gives, following previous statutory protection, a wide exemption. Finally (*q*) is in these terms: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." I read the second "or" in the above paragraph as meaning "and." In this I agree with the recent decision of Mr. Justice MacKinnon.

The words of the paragraph last cited expressly refer to the carrier as claiming the benefit of the exception, and I think impliedly as regards each of the other exceptions the same onus is on the carrier: he must claim the benefit of the exception, and that is because he has to relieve himself of the *prima facie* breach of contract in not delivering the goods in condition as received from the ship. I do not think

the terms of Article III. put the preliminary onus on the goods owner to give affirmative evidence that the carrier was negligent. It is enough if the goods owner proves either that the goods were not delivered or were delivered damaged. The carrier is a bailee and it is for him to show that he took reasonable care of the goods while in his custody (which includes the custody of his servants on his behalf) and bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailees that the defendant (the bailee) is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for the defendant to explain or offer valid excuse for not having done so. It was for him to prove that reasonable care had been exercised. This was the language of Chief Justice Erle in delivering the judgment of the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company* (3 H. and C., 596), adopted by the House of Lords in *Dollar v. Greenfield* (*The Times*, May 19, 1905). In *Travers v. Cooper* (30 *The Times* L.R., 703; [1915] 1 K.B., 73), Lord Justice Buckley, at page 88, to the same effect used the following language: "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus." The Lord Justice also quotes from an unreported case of *Morison, Pollexfen and Blair v. Walton* the words of Lord Halsbury: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." The principle is also discussed by Lord Justice Atkin in *The Ruapehu* (21 Ll. L., 310), who points out that it is wrong to say that the onus does not arise until the bailor has first shown some negligence on the part of the bailee. I think this principle of onus of proof is applicable to the carrier under the Act; indeed in the general exception of Article IV., 2 (*q*), it is expressly laid down. In the facts of this case, if the shipowners claim (as they do in their pleading) the benefit of that exception, in that the damage was due to wet or damp, they can only so claim on the terms of negativing fault or privity.

So far I have limited my consideration to the terms of the Act and rules. But the bill of lading, after acknowledging receipt of the goods in apparent good order and condition, contains an express term "for delivery from the ship's tackle at Vancouver." This means, in my opinion, in like apparent good order and condition, and is an express undertaking to that effect. If (contrary to my opinion) that express undertaking goes beyond what the carrier's liability is under the Act and rules, that more extended liability will bind him by reason of Article V. of the rules.

Finally, I rely on the language of Lord Sumner, used with reference to the Australian Sea Carriage of Goods Act, 1904 (now repealed by the Australian Sea Carriage of Goods Act, 1924), which sums up principles equally relevant to the Sea Carriage of Goods Act which I am considering. The reference is *Bradley and Sons, Limited v. Federal Steam Navigation Company, Limited* (27 Ll. L., 395), where at page 396 Lord Sumner said: "The bill of lading described the goods as 'shipped in apparent good order and condition' and proceeded 'and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London.' Though the usual words 'in the like good order and condition' do not appear after the word 'delivered,' it was common ground that the ship had to deliver what she received as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers, and crew with regard to the apples during the voyage and the discharge in this country."

On the above grounds, if the true conclusion be that the cause of the damage to the tinplates has not been ascertained but is left in doubt, I think the defendants have not discharged the onus upon them to negative negligence of their servants and to prove some excepted peril, and hence must be held liable.

Mr. Miller further relied on Article IV., 2 (*a*), and contended that if there was neglect on the part of the defendants' servants, it was "in the management of the ship," so that the defendants would be excused. But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship, its safety as such, which however might incidentally affect the cargo, such as improperly opening sea connexions, so as indirectly to damage the cargo. The principle was so stated in *Rowson v. Atlantic Transport Company, Limited* (19 *The Times* L.R., 668; [1903] 2 K.B., 666), where it was somewhat subtly applied to the management of refrigerating machinery, on the ground that its functions were not limited to cooling cargo. I think that in the present case the protection of the tinplate cargo fell under Article III. (2), and not Article IV., 2 (*a*). Any other view would largely nullify the former provision.

I need only refer to one other matter. Mr. Miller relied on Article 18 of the bill of lading, "The following are not to be deemed sufficiently packed: (*a*) Tinplates in boxes unless tin-lined and iron-hooped." This provision, if it received effect, would relieve the shipowner from his statutory liability in respect of the actual goods he received for carriage. It would substitute a conventional for an actual liability because the boxes were not tin-lined and no one according to the evidence thought they were. Such a fictitious case of insufficiency of packing involves, I think, an infringement of Article III. (8), because it lessens the shipowners' liability to deliver the actual goods received as received otherwise than as provided by the rules, and is, I think, accordingly null and void and of no effect. (See *Hordern and Sons, Limited v. Commonwealth and Dominion Line, Limited* (33 *The Times* L.R., 344; [1917] 2 K.B., 420), and *Australasian United Steam Navigation Company v. Hunt* ([1921] 2 A.C., 351).

The result is that there will be judgment for the plaintiffs, with costs.

A stay of execution was granted.

[Solicitors—Messrs. William A. Crump and Son; Messrs. Botterell and Roche.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Lord Shaw of Dunfermline, and Lord Warrington of Clyffe.)
1927. May 24.

A. H. BULL AND CO. v. WEST AFRICAN SHIPPING AGENCY AND LIGHTERAGE COMPANY.*

Master and Servant—Negligence—Servant lent—Responsibility for negligence.

When one person lends his servant to another for a particular employment, the servant, for anything done in it, must be regarded as the servant of the man to whom he is lent, though remaining the general servant of the person who lent him.

This was an appeal from a judgment of the Supreme Court of Nigeria (Mr. Justice Maxwell dissenting) reversing a decision of Mr. Justice Tew in the Divisional Court.

Mr. George Langton, K.C., and Mr. D. N. Pritt, K.C., appeared for the appellants; Mr. Neilson, K.C., and Mr. G. St. C. Pilcher for the respondents.

Lord Shaw, in delivering their Lordships' judgment, said:—This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria reversing, on March 8, 1926, by a majority, the judgment of the Divisional Court, dated December 21, 1925. The Divisional Court had given judgment in favour of the appellants (the plaintiffs) for £2,376 5s. 2d. with interest and costs.

The substance of the claim was for the value of a lighter which became a total loss in circumstances about to be mentioned.

The facts are very simple. Both parties are shipowners, and according to the requirements of their trade the one is in the habit of letting lighters to the other. In June, 1925, the plaintiffs, as agents for the United Shipping Board Corporation Emergency Fleet, let on hire to the defendants a lighter. There was no written agreement of hiring. Part of the agreement was that the lighter should be, as is usual, manned by two lighter boys, that is, coloured labourers. The lighter was transferred on June 2, and the mischance sued for occurred upon the night of June 5. The coloured labourers were, from the moment of the transfer, out of the control of the plaintiffs, and subject to the orders and under control of the defendants.

The use to which the defendants put the lighter was for the purpose of loading ground nuts on to their steamship Rijnland. She was lying in the harbour of Lagos, and on the evening of June 5, 1925, a strong ebb tide was running. Among the duties to be performed by the labourers was, of course, the obedience to all orders regarding the attachment of the lighter to the Rijnland: and it was a necessity of the case that they, or one of them, should be on board to do for themselves, or to obey orders to do, what was required should the ropes be unable to stand the strain of the current. The simplest of all things would have been to catch a rope if thrown from the Rijnland, and the boatswain of the Rijnland explains that if one of the boys had been there he would have thrown a rope.

Unfortunately both of the labourers had decamped; and they had forsaken the duties which they were bound to perform, both of taking charge of the barge, and of giving obedience to the orders of the officers of the Rijnland. The consequence was that the barge, having parted her moorings, drifted with the current out of the harbour of Lagos, and subsequently ran ashore at a point about six miles distant therefrom and broke up before she could be salved.

These are substantially the relevant facts as found in the judgment pronounced by the learned Judge, Mr. Justice Tew. Their Lordships think it right to say in a word, with regard to that judgment, that in their opinion the learned Judge not only came to a right conclusion upon the facts, but that his review as a clear and accurate review of this part of the law, and the decided cases thereon, meets with the Board's entire approval.

The Full Court (Mr. Justice Maxwell dissenting) reversed this judgment—in particular upon the ground that there was no evidence that the lighter boys were at any time necessary except when the craft was under way or in active use. One of the plaintiffs' witnesses had said, "I do not think it advisable as a precaution for one lighter boy to remain on board all night. I don't think it could do any good." Upon this the learned Chief Justice observes:—

"I can find nowhere in the other evidence before the Court an expression of an opinion to the contrary of that held and expressed by the plaintiffs' representative."

Their Lordships have some difficulty in understanding this opinion, which seems to be quite out of accord, not only with the defendants' evidence, but with the admissions made in the Court below.

Fontein, the defendants' agent, swore:—

"When a lighter is alongside a ship at night my boys have orders to remain on board the lighter all night."

Brunt, the master of the Rijnland, says:—

"There was nobody on board that lighter. If there had been anybody to throw a line to, lighter would have been saved."

And on the special point in issue Van Duyn, the boatswain of the Rijnland says plainly:—

"In my opinion all lighter boys ought stay on lighter."

It is somewhat difficult to understand how such evidence should have been disregarded or rather stated to have been non-existent. Their Lordships do not refer further to the matter except to say that they think that the proved facts are correctly viewed by Mr. Justice Tew and not by the Full Court.

The Full Court, however, went further, and held on the question—"Would the owner of a lighter taking reasonable precautions for the safety of the lighter . . . keep a boy on board the lighter at night?" in the negative. In the opinion of their Lordships this was wrong. The plaintiffs had entrusted for the period of the hiring the control of their chattel to the defendants. The lighter was manned by two coloured labourers, and from the very nature of the case the lighter and the men both went out of the control of the plaintiffs, and it is unreasonable to suggest that this control only lasted while the active work of lighterage was being carried on; and the suggestion that the lighter boys passed into the control of the defendants during that active lighterage, but out of the control and back into the service of the plaintiffs when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law, of the position is that during the entire period of hiring the barge had to

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the chattel might not be lost.

Upon the law of the case, it may be said, the facts being as just put, that the cleavage of opinion in *Laugher v. Pointer* (5 B. and C., 547), in which the Judges were equally divided, has been long disposed of in *Quarman v. Burnett* (6 M. and W., 499). Baron Parke thus dealt with it at p. 509 :—

"We are therefore compelled to decide upon the question left unsettled by the case of *Laugher v. Pointer* (*supra*). . . . We have considered [the judgments] fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale."

Quarman's case (*supra*) was stronger on the facts than that of *Laugher* (*supra*). In *Laugher's* case (*supra*) the facts had been that the owner of a carriage hired a pair of horses to draw it for a day, and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person. In *Quarman's* case (*supra*) the owners of the carriage were in the habit of hiring horses from the same person, to drive them for a day, or for a drive. The owner provided a driver through whose negligence an injury was done to a third party, and it was held that the owners of the carriage were not liable to be sued for such injury. It appeared that the hiring was quite a customary thing, so much so that the owner of the carriage even provided the driver with a livery which he left at his house at the end of each drive.

Their Lordships think it only necessary to refer to *Donovan v. Laing* (9 *The Times* L.R., 313 ; [1893] 1 Q.B., 629) for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say, a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

In *Donovan's* case (*supra*) the defendants contracted to lend to a firm who were engaged in loading a ship a crane with a man in charge of it ; the man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. It was held that though the man in charge of the crane remained the general servant of the defendants, yet as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

Lord Justice Bowen put the matter thus :—

"The law on the matter now before us seems to me to be perfectly clear. . . . We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. . . . It is clear here that the defendants placed their man at the disposal of Jones and Co., and did not have any control over the work he was to do."

The same law had practically been laid down in *Rourke v. White Moss Colliery Company* (2 C.P.D., 205). In the opinion of their Lordships the law stands exactly where Chief Justice Cockburn there put it, namely, as follows :—

"When one person lends his servant to another for a particular employment the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

These cases have a habit of repeating themselves, and there are others in the books to the same effect, but their Lordships think it only necessary to refer to *Bain v. Central Vermont Railway Company*, decided by this Board ([1921] 2 A.C., 412), in which Lord Dunedin approves of the language of Mr. Justice Cross in the Court of the King's Bench of Quebec, who had adopted the suitable phraseology of "patron momentané" and "patron habituel." The responsibility in respect of which negligence on the part of a servant in circumstances such as of that and of the present case attaches to the former and not to the latter.

Two further points may be mentioned in a word. It is argued that the men's absence from the barge was not negligence. They had deserted their duty at a moment, as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place, in what was a continuous duty. It seems out of the question to suggest that these circumstances did not constitute negligence for which the respondents were responsible.

Their Lordships will humbly advise his Majesty that this appeal ought to be allowed ; the judgment of the Full Court set aside with costs ; and the judgment of the Divisional Court restored.

The respondents will pay the costs of the appeal.

[Solicitors—Messrs. Lawrence Jones and Co. ; Messrs. Botterell and Roche.]

K.B. Div. (Rowlatt, J.) 1927. May 19.

EASTMAN'S, LIMITED v. SHAW.*

Revenue — Income-tax — Trading profits—Deduction—Multiple shops—Control by head office—Shops opened and closed as demanded by business as a whole—Difference between cost of fitting new shops and receipts from sale of equivalent second-hand fittings from closed shops—Capital expenditure—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Case I.

A trading company, carrying on business through a number of branch shops which were all subject to control by the head office, followed a policy of opening and closing branch shops as was demanded by the business as a whole.

Held, that the difference between the cost of new fixtures, fittings and utensils for the new shops and the receipts from the sale of equivalent second-hand fixtures, &c., from the shops that were closed was a capital expenditure and was not a revenue expenditure which could be debited to the trading account of the company to ascertain the profits which were assessable to income-tax.

This was a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Finsbury in the county of Middlesex.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Finsbury, Middlesex, held on January 27, 1926, for the purpose of hearing appeals, the appellants, Eastman's, Limited, appealed against assessments made upon them under Schedule D of the Income Tax Acts for each of the years ending April 5, 1922, 1923, and 1924 in the undermentioned amounts in respect of the profits from their business as butchers and meat retailers carried on by them at their registered office, 91, Charterhouse-street, Finsbury, and at their various retail shops throughout Great Britain and Ireland, viz. :—

For the year ending April 5,	1922 ..	£256,000
„ „ „	1923 ..	300,000
„ „ „	1924 ..	300,000

These assessments were made upon the appellants in respect of their profits from the business as a whole, and no allowance for wear and tear of machinery or plant had been claimed or made.

The following facts were admitted or proved :—

It was part of the policy of the appellants in carrying on their business to open retail shops throughout the British Isles for the disposal of meat.

In selecting the places and positions in which such shops should be acquired, and in acquiring such shops, the appellants had to bear in mind, not only the potentialities of such shops in themselves, but also the probable effects of carrying on such shops in relation to their business as a whole, the shops being merely branches or departments of that business. In these circumstances it became necessary to open and close shops as the bearing of the business done through them could be estimated in relation to their business as a whole.

The appellants found it less expensive and generally advantageous to dispose of the fixtures, fittings, &c., in shops given up and to acquire other such fixtures, fittings, &c., for new shops acquired by them rather than to transfer the fixtures, fittings, &c., from one shop to another.

Where a new shop was opened in place of a shop that had been given up and the fixtures, &c., installed in the new shop were equivalent to the old fixtures, the excess of the cost of the new fixtures over the price obtained for the old fixtures was treated as revenue expenditure and was debited in the trading account. The sole question before the Court arose in respect of such excess expenditure.

The following statement shows the number of shops employed in the appellants' business in each of the years 1911-22 :—

In the year	1911	1,447
„ „	1912	1,404
„ „	1913	1,291
„ „	1914	1,148
„ „	1915	910
„ „	1916	860
„ „	1917	787
„ „	1918	750
„ „	1919	749
„ „	1920	756
„ „	1921	766
„ „	1922	804

For the three years ending December 31, 1922, the number of shops actually closed and the number of shops opened were :—

During the year	1920 ..	Closed 23	Opened 30
„ „	1921 ..	„ 7	„ 17
„ „	1922 ..	„ 6	„ 44

The expenditure incurred in providing utensils for and in fitting up the new shops for the purpose of carrying on trade therein and the amounts received from the sale of the fittings of the shops closed during the same years were :—

For the year 1920 :—		
Expenditure		£833
Receipts		393
		£440
For the year 1921 :—		
Expenditure		£4,808
Receipts		434
		£4,374
For the year 1922 :—		
Expenditure		£8,067
Receipts		757
		£7,310

It was contended on behalf of the appellants (*inter alia*) :—(1) that in determining whether expenditure was revenue or capital expenditure it was necessary to look at the nature, scope and policy of the trade assessed, and (2) that on the facts and in the circumstances of this case the excess expenditure referred to was revenue expenditure and, on income-tax principles, an admissible deduction from profits.

The following cases, amongst others, were referred to :—

Smith v. Incorporated Council of Law Reporting (30 *The Times* L.R., 588 ; [1914] 3 K.B., 674).

Gresham Life Assurance Society v. Styles (8 *The Times* L.R., 618 ; [1892] A.C., 309).

Usher's Wiltshire Brewery Company, Limited v. Bruce (31 *The Times* L.R., 104 ; [1915] A.C., 433).

St. Andrew's Hospital, Northampton v. Shearsmith (3 *The Times* L.R., 732 ; 19 Q.B.D., 624).

Smith v. Westinghouse Brake Company (4 *The Times* L.R., 649).

Granite Supply Association, Limited v. Kitton (8 F., 55).

Southwell v. Savill Brothers, Limited (17 *The Times* L.R., 513 ; [1901] 2 K.B., 349).

The respondent, the Inspector of Taxes, contended (*inter alia*) :—(1) that the deduction claimed by the appellants in respect of the expenditure incurred by them in fitting up and opening new shops was not authorized by Rule 3 (*d*) of the Rules applicable to Cases I. and II. of Schedule D of the Income Tax Act, 1918, or otherwise, and (2) that the said expenditure was capital expenditure and was not a proper debit item to be charged against the incomings of the trade when computing the balance of the profits for the purpose of assessment to income-tax.

It was agreed between the parties hereto that in the event of the General Commissioners giving their decision in favour of the appellants the profits liable to assessment to income-tax as disclosed by the accounts should be taken to be :—

For the year ending

April 5, 1922 : £236,781, less wear and tear, £3,132,

April 5, 1923 : £300,777, less wear and tear, £30,915,

April 5, 1924 : £298,660, less wear and tear, £31,332,

but that if the decision were adverse to the appellants the amounts assessable to income-tax should be taken to be

For the year ending

April 5, 1922 : £236,921, less wear and tear, £3,132.

April 5, 1923 : £302,301, less wear and tear, £30,915.

April 5, 1924 : £302,499, less wear and tear, £31,332.

The General Commissioners, having heard and considered the appeal and the evidence and contentions, were of opinion :—

(1) That it was part of the policy of the appellants to open and to close shops whenever the state of trade made it desirable.

(2) That the question whether the expenditure incurred in opening shops was or was not of a capital nature was not affected by the fact that the appellants owned a large number of shops.

(3) That the expenses of fitting up new shops less the sums received for the fittings of shops that had been closed were expenses incurred at a time anterior to the carrying on of the trade and were of a capital nature and not an allowable deduction as an expense of running the business.

(4) That the assessments to income-tax made upon the appellants ought to be adjusted as follows :—

For the year ending

April 5, 1922, to £236,921, less wear and tear, £3,132,

April 5, 1923, to £302,301, less wear and tear, £30,915,

April 5, 1924, to £302,499, less wear and tear, £31,332,

and the General Commissioners adjusted the assessments accordingly.

Dissatisfaction with this determination was expressed on behalf of the appellants as being erroneous in point of law, and in due course the General Commissioners were required to state this case for the opinion of the High Court.

Mr. Raymond Needham appeared for the appellants ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt delivered judgment in favour of the Crown as follows :—

The figures which are given in the case in respect of the number of the appellants' shops in 1920, 1921, and 1922 reveal that many more, and increasingly many more, shops were opened by them than were closed, and that there was a consequently increasing difference between the expenditure of fitting up new shops and the receipts from dismantling old shops. The contention that a trader is entitled to bring into revenue account any part of an expenditure which he makes so that he may add to the number of his shops would be unarguable, and I cannot believe that that is the point which arises here. One of the paragraphs in the case states : "Where a new shop was opened in place of a shop that had been given up and the fixtures, &c., installed in the new shop were equivalent to the old fixtures, the excess of the cost of the new fixtures over the price obtained for the old fixtures was treated as revenue expenditure. . . ." and I understand that the question for my decision arises in respect of the excess described there, namely, the excess of the cost of new fittings and utensils over the receipts from the sale of equivalent second-hand fittings and utensils. The expenditure of the appellants was not to maintain or replace fittings and utensils, but was for the cost of equivalent fittings and utensils rendered necessary by the circumstance that the appellants "scrapped" those which they had and bought new ones for their new shops.

I do not think that it is disputed that, if a trader has one shop and he gives that up and takes another shop somewhere else, selling the fittings and utensils of his old shop and buying new ones for the new shop, and loses money in the process, he cannot deduct the amount of that loss from his profit for income-tax purposes. The loss on the old fittings is a capital expenditure. The cost of the new fittings is a capital expenditure. If, by selling some of the old fittings, he secures some salvage of his loss on them it is so much the less capital expenditure in amount. That seems to me to appear from *Smith v. Westinghouse Brake Company* (4 *The Times* L.R., 649) and *Granite Supply Association, Limited v. Kitton* (8 F., 55).

Does it make any difference that a man has 20 shops and moves each of them in the same way ? If he does he merely multiplies the expenditure by 20, and it cannot be argued that the multiplication makes the expenditure a revenue expenditure. Mr. Needham says that in the appellants' business there is another element—that their business was not a group of 800 separate businesses but was one business in London with shops throughout the country which were merely parts of the business, and that the appellants have not moved the whole of any business. I cannot see how that circumstance can make any difference. The fact remains that the appellants moved these shops and incurred expense in doing so. The fact that they conducted all their shops from London, thus placing them under one control, cannot possibly make any difference.

Mr. Needham points out that it is found in the case that it was of the essence of the appellants' business that they should keep moving their shops. The General Commissioners find that "it was part of the policy of the appellants to open and to close shops whenever the state of trade made it desirable." Mr. Needham says that the business was really that of a travelling butcher. A travelling butcher who has his stall in one town to-day and in another town to-morrow may very well charge the expenses of travelling and moving his stall and other belongings from town to town as the expenses of his business, but that argument fails here, as this is not a travelling business. It is, to borrow an expression from *Granite Supply Association, Limited v. Kitton* (*supra*), a "flitting" business. The appellants substitute a shop which is of a permanent nature, however short may be the time during which it is occupied by them, for another shop which has also been of a permanent nature. That is different from travelling with their business from place to place.

In these circumstances I feel no doubt that my decision must be in favour of the Crown.

The appeal was accordingly dismissed with costs.

[Solicitors—Mr. Charles H. Wright ; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. May 24.

ATTORNEY-GENERAL v. PAINE.*

Insurance (Unemployment) — Contributions — Employer's failure to pay — Jurisdiction of justices — Limitation of 12 months' arrears—Claim to recover previous arrears—Effect of justices' order — Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 22 (3) (6).

Under s. 22 of the Unemployment Insurance Act, 1920, the jurisdiction of the justices, on a

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

conviction for failure to pay contributions under the Act, is limited to 12 months' arrears.

Held, that if the jurisdiction of the justices is invoked under that section and they make an order for payment of the 12 months' arrears, the sum paid under the order is not to be treated as a payment in satisfaction of all arrears in respect of the same employee, and other proceedings can be taken in any competent Court to recover the arrears for any period preceding the 12 months.

Decision of Rowlatt, J. (43 *The Times* L.R., 378) reversed.

This was an appeal by the Attorney-General from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 378).

On an information the Attorney-General claimed from Mr. Ernest James Paine, of Market-street, Wisbech, the sum of £5 0s. 2d., being the balance of arrears of contributions alleged to be payable by him under the provisions of the Unemployment Insurance Acts, 1920 to 1926, in respect of two men employed by Mr. Paine for various periods between April 14, 1924, and February 6, 1926.

The full amount of unpaid contributions in respect of the two men was £10 15s. 11d., but on April 22, 1926, the respondent was convicted by justices on two informations for non-payment of contributions in respect of the two men and was ordered, after due notice, to pay, and had paid, the sum of £5 3s. 1d., being a sum equal to the amount of the contributions unpaid for 12 months preceding the informations. Credit was also given for stamps irregularly affixed to the value of 12s. 8d.

The respondent contended that the payment of the amount ordered by the justices was a satisfaction of his liability by virtue of section 22 (3) of the Unemployment Insurance Act, 1920, which provides :—

"Where an employer has been convicted under the foregoing provisions of this section of the offence of failing or neglecting to pay any contribution under this Act, he shall be liable to pay to the unemployment fund a sum equal to the amount which he has so failed or neglected to pay, and on such a conviction, if notice of the intention to do so has been served with the summons or warrant, evidence may be given of the failure or neglect on the part of the employer to pay other contributions in respect of the same person during the year preceding the date when the information was so laid, and on proof of such failure or neglect the employer shall be liable to pay to the unemployment fund a sum equal to the total of all the contributions which he is so proved to have failed or neglected to pay. Any sum paid by an employer under the foregoing provision shall be treated as a payment in satisfaction of the unpaid contributions. . . ."

By subsection (6) :—"Nothing in this section shall be construed as preventing the Minister from recovering any sums due to the unemployment fund by means of civil proceedings, and all such sums shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt."

Mr. Justice Rowlatt held that, the civil jurisdiction of the magistrates having been invoked and an order for payment made thereunder, no other civil proceedings could be taken. He dismissed the information.

The Attorney-General appealed.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. C. W. Lilley appeared for the appellant; Mr. Linton Thorp for the respondent.

The MASTER OF THE ROLLS, in giving judgment, said that the appeal must be allowed. By section 1 of the Unemployment Insurance Act, 1920, employed persons as defined by reference to the Schedule were to be insured against unemployment. Section 2 gave insured persons the right to receive payments specified in the Act and referred to as unemployment benefit. By section 5 certain contributions were to be made by employers. Section 14 provided for the establishment of an unemployment fund into which contributions were to be paid. The Act contemplated the possibility of failure or neglect on the part of the employer to pay his contributions, and section 22 (2) provided that that failure or neglect should be an offence for which he could on conviction be fined a sum not exceeding £10. Every time that an employer failed to pay a contribution he committed a separate offence.

So far, therefore, there was punishment for non-compliance. Then subsection (3) provided that where an employer had been convicted for failing to pay any contribution he became liable to pay to the unemployment fund a sum equal to the amount which he had failed or neglected to pay. And notice might be served on the employer requiring him to pay other contributions which he was proved not to have paid in respect of the same person within the year preceding the date of the information.

His LORDSHIP read the final words of section 22 (3), and proceeded. So far, there was a scheme for the recovery before the magistrates of money due. Mr. Justice Rowlatt had held that that was a special and exclusive remedy, in spite of subsection (6). His LORDSHIP read the subsection, and, proceeding, said that Mr. Justice Rowlatt seemed to have thought that the scheme provided under subsections (2) and (3) was a scheme which, although not entirely exclusive, yet, if once put into force, excluded any other remedy by civil proceedings. That construction appeared to overlook the proviso contained in subsection (6), the words of which appeared plainly to indicate that the rights given to the Minister to recover sums due to the unemployment fund were not merely alternative, but cumulative.

He (his Lordship) was quite unable to accept the view of the Judge below, which had the effect of saying that the Minister might collect as much as he could by taking criminal proceedings, but that he had no alternative rights. In his (the Master of the Rolls') opinion, the right to recover unpaid contributions as a civil debt was preserved. The appeal must be allowed and judgment entered for the informant for £5 0s. 2d.

LORD JUSTICE SCRUTTON said that he agreed and would not add anything, but for the fact that the Court was differing from the judgment delivered below. But for that judgment he would have thought that the case was perfectly clear. Parliament had provided that if a man was prosecuted for failure to pay weekly contributions towards unemployment insurance, the Crown might give evidence of his failure or neglect to pay other contributions in respect of the same person during the year preceding the information, and he might be ordered to pay the total of such contributions, "which he is so proved to have failed or neglected to pay," "In satisfaction of the unpaid contributions" meant in satisfaction of the contributions due and unpaid in the year preceding the date of the information. On the plain words of the section, read so far, he (his Lordship) would have thought there was no difficulty

in recovering other unpaid contributions. But the matter did not stop there, for subsection (6) provided that nothing in the section was to prevent the recovery of "any sums" due to the unemployment fund by means of civil proceedings. Mr. Justice Rowlatt's judgment had prevented the Minister of Labour from recovering sums due to the unemployment fund. He (his Lordship) was quite unable to follow the distinctions made by the learned Judge.

Lord Justice Sargant said that there were two crucial questions in the case: (1) what was the meaning of the phrase "the unpaid contributions," and (2) what was the construction of subsection (6). On both those questions he (his Lordship) agreed with the judgments which had been delivered, that the appeal should be allowed.

[Solicitors—The Solicitor to the Ministry of Labour; Messrs. Withers, Bensons, and Co., for Messrs. Metcalfe, Copeman, and Pettefar, Wisbech.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1927. May 5.

NORWICH UNION v. HENSTEAD UNION.*

Poor Law—Derivative settlement—Father of pauper living but having no settlement—Mother not "widowed"—Reversion to birth settlement—Divided Parishes and Poor Law Amendment Act, 1876 (39 and 40 Vict., c. 61), s. 35.

A pauper whose father is living, but is an alien with no settlement in this country, cannot take a derivative settlement from his or her mother under s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, because the mother is not "widowed." In these circumstances—which appear to be a *casus omissus*—the pauper, in the absence of a settlement acquired by residence, retains the settlement of birth.

This was a case stated under section 11 of Baines' Act (12 and 13 Vict., c. 45) before an appeal to Norfolk Quarter Sessions.

On November 5, 1926, the respondents obtained an order under the hands and seals of two justices of the peace for the county of Norfolk whereby it was adjudged that the parish of Norwich, in the county borough of Norwich, was the place of the last legal settlement of one Alice Louise Dezert, aged about 30 years (a pauper lunatic confined in the asylum for the said county of Norfolk, and chargeable to the common fund of the Henstead Poor Law Union in the said county), and whereby the appellants were ordered to pay certain sums of money in respect of the expenses of maintenance of the said pauper lunatic. The appellants having duly given notice of appeal to Quarter Sessions this case was stated.

Alice Louise Dezert was the lawful child of Edmond Eugene Dezert and Suzannah Dezert, formerly Ashley, who were married at Norwich on December 17, 1892. The said Alice Louise Dezert was born in the parish of Great Yarmouth on June 19, 1896, and after that date resided in various parishes in England with her father until about 1901, when she accompanied him to France and did not return until 1920. From 1920 till 1925 she resided in various parishes in England, and on December 20, 1925, she was removed from her mother's house in the parish of Framingham Pigot, in the respondents' union, to the Norfolk County Asylum, wherein she was thereafter maintained as a pauper lunatic chargeable to the respondents until November 5, 1926, when the before-mentioned order of justices was made.

The said Edmond Eugene Dezert was a native and subject of France. He resided in various parishes in England from the time of his marriage in 1892 until the year 1901, when he returned to France, where he had ever since resided. At no time did he acquire a legal settlement in this country.

The said Suzannah Dezert resided with the said Edmond Eugene Dezert from the date of the said marriage in 1892 until 1920, when she left him in France and returned to England, where she had ever since resided. The said Suzannah Dezert was born in or about May, 1859, in the parish of Norwich, and she resided in such parish for a term of three years and upwards prior to her marriage in such manner and under such circumstances as to acquire a settlement by residence therein by virtue of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

The appellants contended that the pauper lunatic must be deemed to be settled in the parish of Great Yarmouth by reason of her birth therein.

The respondents contended that the said Alice Louise Dezert must be deemed to have derived the same settlement as her mother—viz., in the parish of Norwich.

Mr. Herbert Davey appeared for the appellants; Mr. Hugh Goitein (Mr. A. S. Leighton with him) for the respondents.

The Lord Chief Justice.—This is a special case stated before going to Quarter Sessions under the provisions of Baines' Act. It is only necessary, I think, to summarize the facts of the case. The short point is that a pauper lunatic whose father was a native and subject of France and at no time acquired a legal settlement in England became chargeable as a pauper lunatic in a certain place. An application was then made for an order of justices, and that order provided that the charge for her fell upon Norwich on the ground that she was settled as a pauper in Norwich. The argument of the appellants was that she could not be settled in Norwich because that meant a derivative settlement from her mother, and that she must be deemed to be settled in the parish of Great Yarmouth, inasmuch as she was born in that parish.

The question turns upon the true construction of section 35 of the Divided Parishes and Poor Law Amendment Act of 1876. That section provides as follows: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of 16, which child shall take the settlement of its father or of its widowed mother as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." There have undoubtedly been cases in which a portion of section 35 has had to be construed by the Courts, and some difference of opinion, to which it is not perhaps desirable to apply epithets, has made itself manifest. But we are expressly told that upon this particular point there is no authority, and the matter comes before this Court as *res integra*. In the case of *West Ham Union v. Holbeach Union* (21 *The*

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Times L.R., 713, at p. 715 ; [1905] A.C., 450, at p. 453) Lord Macnaghten, speaking of the first clause of section 35, said : "By the first clause of section 35 all derivative settlements are abolished with two exceptions—one in the case of a wife, which has no application to the present question ; the other in the case of a legitimate child under the age of 16," and that, if I may say so with great respect, seems to be a perfectly clear analysis of a sufficiently clear provision in the statute. "No person shall be deemed to have derived a settlement from any other person . . . except"—the section begins with a universal negative proposition ; it then proceeds to particular and limited exceptions, and, so far as a child is concerned, the exception is expressly limited to the case of a child under the age of 16, "which child shall take the settlement of its father or of its widowed mother. . . ." The section, it may be, assumed that in the case of any child, with regard to whom a question of derivative settlement might arise, there would be either a father from whom a settlement might be derived, or, alternatively, a widowed mother from whom a settlement might be derived ; in other words, it regarded, it may be, those two cases as being, taken together, exhaustive, and so the words were added, "as the case may be." The Legislature does not appear to have contemplated a third case in which, while the father still lives, and, therefore, the mother is not a widow, the child cannot derive a settlement from the father, inasmuch as the father, being a native and subject of France as in this case, never acquired a settlement. If that be the true construction, the particular case revealed by the facts in this appeal is a *casus omissus*, and as no case comes within the exception except the cases which are expressly mentioned, it would follow that the enacting words apply. Whether the true view be that this is a *casus omissus*, or whether it be that the Legislature must be taken to have considered this case and not included it within the exception, in either event, as it seems to me upon the clear construction of this part of this section, this case is not included within the exception.

It follows, therefore, that with regard to this pauper lunatic there is no possibility of a derivative settlement, and so the question what is her settlement depends upon other considerations, and she is remitted for that purpose to the place of her birth. In 1849, in the case of *Reg. v. Inhabitants of All Saints, Derby* (14 Q.B., 207, at p. 216), Mr. Justice Coleridge said : "It is an established principle that every English subject has a settlement by birth, *prima facie* ; that is, till an acquired settlement is shown."

In the course of the argument, various matters have been stirred, which, in my opinion, do not really arise. We are not concerned here with the true interpretation, whatever it may be, of the third part of this section. We are dealing, and we are dealing for the first time, with the true interpretation of the first part of this section upon the particular facts of this case. Regarding the matter in that way, I think that this appeal succeeds.

Mr. Justice Avory.—I am of the same opinion, and I incline to the view that the present case is a *casus omissus* from this statute ; in other words, that section 35, in the first branch of it, contemplates that every child under the age of 16 will either have a father who has a settlement, or, if the father is dead, that it will have a widowed mother who has a settlement. In the present case, this pauper when she was under 16, and in fact since that time, has neither had a father with a settlement of his own, nor has she had a widowed mother with a settlement of her own ; the result is that she is a person who is, by the statute, not to be deemed to have derived a settlement from any other person, and, secondly, is relegated to the place of her birth, which is her settlement. I agree, therefore, that the judgment should be entered for the appellants here.

Mr. Justice Shearman.—I agree.

[Solicitors—Messrs. Vizard, Oldham and Co., for Messrs. Mills and Reeve, Norwich ; Messrs. Godden, Holme, and Ward, for Mr. W. E. Ripley, Norwich.]

K.B. Div.
(Lord Hewart, C.J., Shearman and MacKinnon, JJ.)
1927. May 10.

EVERTON v. WALKER.*

By-law — Reasonableness — *Ultra vires* — Restraint of trade—Severn Navigation Acts, 1842 to 1920.

By the Severn Navigation Act, 1920, s. 9, extending s. 16 of the Severn Navigation Act, 1914, the Severn Commissioners were empowered to make by-laws "for prescribing the place or places at public wharves and quays at which passengers and goods may be embarked or disembarked. . . ."

None of their enabling Acts empowered the Commissioners to impose tolls on persons embarking or disembarking.

To prevent the dangerous racing of rival steamers starting from private landing-stages at Worcester, the Commissioners made a by-law : "No person shall anchor or moor any passenger vessel near to or against any portion of Worcester Quay for the purpose of enabling any passenger to be taken on board or disembarked from such passenger vessel . . . if and so long as the Corporation of the City of Worcester maintain . . . a pier . . . or piers . . . connected with the quay and available for giving access from the quay to a passenger vessel . . . and allow any persons desirous of travelling by a passenger vessel to enter upon and pass along the said piers . . . who have previously paid to the Corporation or their authorized agent, such sum, not exceeding twopence, as the Corporation may be entitled to charge in respect of every such person, which sum shall allow the person paying the same to pass along the said piers . . . to the quay when disembarking from the said passenger vessel on the same day as that on which the said sum was paid."

Held (Shearman, J., dissenting), that this by-law was not *ultra vires*, unreasonable, or in restraint of trade. It did not impose a tax or toll upon the public but restricted the duration of the by-law for the protection of the public to the period during which the charge made (assuming that the Corporation were entitled to make any charge at all) did not exceed twopence.

The justification for the charge, if its legality

* Reported by J. W. Hall, Esq., Barrister-at-Law.

were challenged, was not to be found in the by-law, but must be derived *aliunde*.

Per Lord Hewart, C.J. : Though the reasonableness of a by-law is a question of law, the Court should pay great regard to the findings of local justices upon a by-law made by a body of persons with knowledge of local conditions.

This was a case stated by justices for the City of Worcester.

Informations were preferred by Charles Isaac Carey Walker, the respondent, under by-law number 25 of the by-laws made on July 3, 1922, by the Severn Commissioners in exercise of the powers vested in them by the Severn Navigation Acts, 1914 and 1920, against James William Henry Everton, the appellant, for that he :—

(*a*) On September 25, 1926, in the City of Worcester, unlawfully allowed a passenger or passengers to embark upon a passenger vessel, the Belle, from the Worcester Quay at a place on the quay other than the landing stage maintained by the Corporation of Worcester above the Worcester Bridge, contrary to the said by-law 25 ; (*b*) on September 27, 1926, committed a like offence.

The informations were heard on November 2, 1926, when the appellant was fined £1, or 14 days' imprisonment in default, on each charge.

Upon the hearing of the said informations the following facts were proved or admitted :—

That the Severn Commissioners were a public body to whom Parliament had by the Severn Navigation Acts, 1842 to 1920, entrusted the improvement and maintenance of the navigation of the river Severn from Stourport to Gloucester. The river Severn was in the summer much used for pleasure traffic on steamers, launches, rowing boats, &c.

That the quays at the City of Worcester were vested in the Corporation of Worcester, but were open to use by the public.

That there were five steamers certified by the Board of Trade running trips on the river and starting from the Worcester quays ; that the usual trip extended from Worcester through Camp Lock, about four miles above Worcester, and thence to Holt about four miles further up the river. That one of these steamers, the Belle, belonged to and was worked by the appellant.

That it was not desirable for two or more steamers to start on the same trip at or about the same time as it led to racing, and was dangerous to people in small boats.

That a steamer proprietor could start from the Worcester Quay whenever he liked, so that two or three steamers might start at the same time.

That the times of starting of the five steamers varied considerably and on some days two or three steamers started at or about the same hour, while on other occasions there were intervals of 15 minutes or more between the times of starting from the Worcester Quay.

That about four miles above Worcester there was a lock on the river called Camp Lock and more than four miles above that lock there was another lock called the Holt Lock.

That steamers from Worcester made journeys up and down the river but the usual trip was from Worcester to Holt, where there were two riverside inns at which pleasure parties were entertained.

That steamers starting from the Worcester Quay at about the same time on the trip to Holt had raced so as to be the first to get through the Camp Lock (which they took about 10 minutes to pass through), so as to reach Holt before the other steamers.

That if steamers started in turn from the corporation landing stage there would be no racing to Camp Lock as the time occupied in taking the passengers on board the second steamer would give the other so much start that racing would be impossible, but that the provision of the landing stage would not prevent racing on the return journeys.

That the Severn Navigation Acts did not contain any specific statutory power to make a charge for entry upon the landing stage.

That there were eight sets of steps on the east side of the river Severn leading down from the Worcester Quay. At, against or near five of these sets of steps were rafts or landing stages owned and used by the owners of passenger vessels who embarked and disembarked their passengers on to their respective passenger vessels from such rafts or landing stages. That these rafts had been used by the respective passenger vessel owners for many years, and the passenger vessels owned by the respective owners were moored against the rafts or landing stages.

That the appellant had carried on his business by himself and his predecessors for upwards of 40 years, and other passenger vessel owners for many years, and had used the rafts belonging to them respectively, which were moored to the quay walls on the river Severn at the steps leading from the quay to embark and disembark passengers on to their respective vessels. There were five passenger vessels moored to the Worcester Quay, the largest vessel being licensed to carry 326 passengers.

That on occasions in one day crowds of passengers embarked and disembarked from the passenger vessels at the quay walls in the City of Worcester, embarking and disembarking from the different rafts or landing stages.

That the Corporation landing stage was on the river Severn and was constructed of wood and iron. To gain access to it passengers had to descend two flights of artificial steps over the river, the length of the landing stage being 120 feet.

That Worcester Quay had been used by the public to obtain access to and from the river Severn without payment of tolls or charges since the quay walls were erected. By the Severn Navigation Act, 1842 (section 253), the Severn Commissioners compounded with the City of Worcester Corporation in respect of all tolls and charges to which the Corporation were at that time entitled in respect of merchandise, articles and things whatsoever carried or conveyed into through or out of the City of Worcester on the river Severn. That the river Severn was a free river until the navigation locks were constructed. That the appellant alleged that he was not in charge of the Belle at the time when the passengers embarked on it on September 25 and 27, 1926.

That the by-laws made by the Severn Commissioners on July 3, 1922, were properly made in accordance with the requirements of their Acts of 1914 and 1920 and were duly confirmed by the Minister of Transport.

That by-law 25 was made after much consultation between the Severn Commissioners and the Corporation of Worcester and that such by-law was made (amongst other things) for the prevention of racing between steamers on the river and for the better regulation of the embarcation and disembarcation of passengers at Worcester Quay.

That the landing stage provided by the Corporation of Worcester pursuant to the said by-law was properly constructed and suitable to the extent of its

accommodation for the purposes named in the by-law and was capable of accommodating one steamer loading and another unloading passengers at the same time and at all material times was available for use on payment of the sum of one penny for each person.

That the Corporation proposed to issue a weekly list of the days and hours at which steamers would leave the landing stage showing the order of starting each week, so that each steamer would in turn be the first to start.

That a representative of the Corporation of Worcester in giving evidence for the respondent undertook that if the use of the landing stage should be so great as to necessitate further facilities of the same character the Corporation were ready and willing to erect a second landing stage.

That the appellant, in his evidence, did not deny that he had stated to a committee of the Corporation that he would not use the landing stage whether there was a charge or not.

That on September 25, 1926, passengers were embarked on the appellant's steamer Belle—which was a steamer certified by the Board of Trade—at Worcester Quay at a place other than the Corporation landing stage, and that the appellant was present while passengers were embarking.

That on September 27, 1926, passengers were embarked on the appellant's steamer Belle at Worcester Quay at a place other than the corporation landing stage, and that tickets for such steamer were issued to the passengers by the appellant's wife.

That the appellant admitted that on September 25 and 27, 1926, the steamer Belle was navigated by men in his employment and that he received the monies paid by the passengers thereon.

On the part of the appellant it was contended that by-law 25 was void on the following grounds :— (1) That it was *ultra vires* ; (2) that it was unreasonable ; (3) that it was in restraint of trade ; and he supported his contention on the following grounds :—

(*a*) That neither the Severn Commissioners nor the Corporation of the City of Worcester were by any of the Severn Navigation Acts empowered to make or create a charge or toll by any by-law for the user of landing stages constructed on the river Severn over which persons might pass to embark or disembark on or from passenger vessels on such river and that the Worcester quays were free to the public.

(*b*) That by-law 25 worked injustice and imposed a charge or toll upon all persons seeking to embark or disembark on or from passenger vessels arriving at or departing from Worcester Quay.

(*c*) That the by-law was too wide, there being no qualification or limitation.

(*d*) That the capacity of the Corporation landing stage was limited and not suitable or sufficient for allowing the number of persons embarking and/or disembarking on or from passenger vessels arriving at or departing from Worcester Quay and that congestion would be caused if all passenger vessels were compelled to embark or disembark passengers at such landing stage.

(*e*) That the entry to the Corporation landing stage was in a dangerous position, railway lines being laid within a few feet of the entrance and that crowds of people on occasions used the passenger vessels for conveyance up and down the river Severn.

(*f*) That by-law 25 was in restraint of trade, as it compelled the passenger vessel owners to embark or disembark passengers from one particular landing stage, *i.e.* (the Corporation landing stage) and restrained passenger vessel owners from allowing their old landing stages (*i.e.*, their places of business) to be used to embark and disembark passengers using passenger vessels owned by them—thus interfering with established businesses which had been carried on for many years at particular place or places at the respective landing stages.

(*g*) That passenger vessel owners contracted to carry a number of persons at an inclusive price and if the toll were imposed in respect of the embarking or disembarking of passengers at the Corporation landing stage it would diminish the profits of the passenger vessel owners which at present were not large.

The appellant further contended that upon the facts it was not proved that he was in charge of the passenger vessel Belle or personally allowed any passenger to embark on such vessel, and he was therefore not guilty of the offences alleged to have been committed and that the loading up of vessels at the Corporation landing stage would take unnecessary time and cause delay to passengers and congestion of traffic.

On the part of the respondent it was contended that the said by-law was a reasonable one and that it was not *ultra vires* nor was it in restraint of trade and in support thereof the following grounds were put forward :—

(1) That the by-law was made by a public authority, the Severn Commissioners, and confirmed by a Government department, and was deemed necessary to prevent dangerous racing on the river and therefore should be supported in accordance with the principles laid down in *Kruse v. Johnson* (14 *The Times* L.R., 416 ; [1898] 2 Q.B., 91) and *Clayton v. Peirse* ([1904] 1 K.B., 424).

(2) That the by-law was not unreasonable as it did not prohibit the trade of running passenger steamers on the river but merely regulated the embarkation and disembarkation of the passengers.

(3) That the by-law was not *ultra vires* of the Severn Commissioners as it was authorized by the Severn Navigation Act, 1914, section 16, and the Severn Navigation Act, 1920, section 9.

(4) That the by-law would have been valid even if it had imposed a charge for use of the landing stage (*Nash v. Manning*, 58 J.P., 718), but that as a matter of fact the by-law did not impose any charge, merely providing for payment of such sum as the Corporation were entitled to charge.

(5) That the appellant was not entitled to raise the question of the power to impose a charge, or the amount of the charge imposed, as he was not shown to be aggrieved by the charge, since it was not proved that any person had ever objected to pay it.

(6) That if the question of making a charge were open to the appellant the making thereof was justified by the fact that the Corporation had provided a landing stage which was a further facility added to Worcester Quay enabling passengers to embark on, or disembark from a passenger vessel and, if the by-law had not been made, the Corporation could have charged to a person using this facility any sum they pleased ; but that as soon as the by-law was made requiring the use of this facility, it ceased to be *juris privati* only, and the Corporation could not make an arbitrary charge but only a reasonable and moderate charge. *Allnutt v. Inglis* (12 East, 527).

(7) That the charge of one penny per person was a reasonable and moderate charge.

The justices' attention was also called to the following cases :—*Arlidge v. Islington Borough Council* (25 *The Times* L.R., 470 ; [1909] 2 K.B., 127) ; *Rex v. Faversham* (8 Term Rep., 352) ;

Gray v. Sylvester (14 *The Times* L.R., 10) ; *Strike v. Collins* (2 *The Times* L.R., 421) ; *Collins v. Wells Corporation* (1 *The Times* L.R., 328) ; *Scott v. Glasgow Corporation* (15 *The Times* L.R., 498 ; [1899] A.C., 470) ; *Da Prato v. Partick Corporation* (96 L.T., 398), and *Sutton Harbour Improvement Company v. Foster* (No. 2) (36 *The Times* L.R., 590).

The justices were of opinion that the said by-law was a reasonable one and that it was not *ultra vires*, or in restraint of trade, and that it was properly made and confirmed and that the appellant had committed breaches of it on September 25, 1926, and September 27, 1926, and was liable to the penalties provided for by the said by-laws.

The Severn Navigation Act, 1842 (5 Vict., c. xxiv.), by section 186 empowered the Commissioners to take certain tolls (not including tolls for passengers embarking or disembarking on the river banks) and, by section 210, to make by-laws for limited purposes. By section 253 the Worcester Corporation compounded for tolls due to them under old rights.

By the Severn Navigation Act, 1914 (4 and 5 Geo. V., c. xlii.), section 16, power was given to the Commissioners to make by-laws, *inter alia*,

"For the good rule government and regulation of the traffic on and the navigation of the river and of persons using the river and the prevention of misconduct and of offences against good order thereon. . . .

"For regulating the anchoring and mooring of vessels in the river and for preventing vessels anchoring mooring or remaining stationary for an unreasonable time in the river or against the banks thereof or at any wharf quay pier jetty or landing place. . . .

"For regulating the payment and receipt of tolls fees and charges payable to the Commissioners."

The Severn Navigation Act, 1920 (10 and 11 Geo. V., c. xxiv.), provided an amended schedule of navigation and lock tolls, but did not provide for tolls on embarking or disembarking. By section 9 the power of the Commissioners to make by-laws was further amended by the addition (*inter alia*) of the following paragraph :—

"For prescribing the place or places at public wharves and quays at which passengers and goods may be embarked or disembarked loaded or unloaded on the river on to or from vessels plying on the river. . . . Provided that the Commissioners shall not under this section make any by-law prescribing any place or places at a public wharf or quay belonging to the mayor aldermen and citizens of the city of Worcester . . . without the previous consent in writing of [that] corporation. . . ."

By-law 25 provided : "No person shall anchor or moor any passenger vessel near to or against any portion of Worcester Quay for the purpose of enabling any passenger to be taken on board or disembarked from such passenger vessel or shall permit or allow any passenger to embark upon any passenger vessel from the quay or to disembark from any passenger vessel on to the quay if and so long as the Corporation of the City of Worcester maintain either above or below Worcester Bridge a pier or landing stage or piers or landing stages connected with the quay and available for giving access from the quay to a passenger vessel moored against the said piers or landing stages and allow any persons desirous of travelling by a passenger vessel to enter upon and pass along the said piers or landing stages from the quay to the passenger vessel moored against the said piers or landing stages who have previously paid to the Corporation or their authorized agent such sum, not exceeding twopence, as the Corporation may be entitled to charge in respect of every such person, which sum shall allow the person paying the same to pass along the said piers or landing stages to the quay when disembarking from the said passenger vessel on the same day as that on which the said sum was paid."

Mr. Joy, K.C., and Mr. Engelbach appeared for the appellant ; Mr. Montgomery, K.C., and Mr. Simes for the respondent.

Mr. Joy contended that the Severn Commissioners had no power to make a charge for embarcation or disembarcation, and that the part of the by-law which purported to subject users to a charge was bad. The Corporation had no power, statutory or other, to make a landing stage, and the expenditure of public money upon it was *ultra vires*. The reference to public wharves and quays in section 9 of the Act of 1920 could not refer to existing landing stages. If a statute was intended to take away existing rights it must do so in express terms. The Act empowered the Commissioners to prescribe "the place or places at public wharves, &c." This by-law purported to prescribe times, days, and hours.

Mr. Justice Shearman referred to *Parker v. Clegg* (2 L.G.R., 608).

Mr. Joy referred to *Kruse v. Johnson* (14 *The Times* L.R., 416 ; [1898] 2 Q.B., 91) and *Scott v. Pilliner* (20 *The Times* L.R., 662 ; [1904] 2 K.B., 855) on the question of reasonableness. Further, the by-law was uncertain ; apparently persons who embarked at Holt or elsewhere could not disembark at Worcester at all. There was no responsibility or duty laid on the Corporation to ensure that the landing stage should be available for a steamer at the time prescribed for it. What was the meaning of "available ?" Suppose the appellant wished to sail at 3 p.m. and found the Corporation landing stage booked for 3, 3.30, 4, 4.30, &c. Was it available ?

Mr. Justice Shearman.—Mr. Montgomery, I think I am the only person who desires to hear you, but the reasonableness of the by-law is a question of law for this Court. I can see no authority for the Corporation charging any fee themselves or for the by-law giving them power to do so. If it is *ultra vires* as imposing a tax on the public, of course anyone is entitled to evade it.

Mr. Montgomery.—If no power exists the question can be raised any day by any person saying "I am going on the pier without paying," and in other ways. But here there is a public body with power to specify the place of embarcation, and they say that the proper quay is the Corporation quay. The by-law only sanctioned such sum as the Corporation might be entitled to charge. That was outside the by-law.

Mr. Justice Shearman.—I regret very much that I am in disagreement with the other members of the Court. In my judgment this appeal should be allowed. In my view the objection which was taken in the Court below to this by-law on the ground that it was invalid as being unreasonable and in restraint of trade, which objection was overruled by the Court below, was right, and therefore I think this appeal should be allowed.

I do not wish to read the whole of this long case, but I think these facts appear from the findings. Finding No. 2 is that the quays at Worcester, that means Worcester Quay, the whole of it, are vested in the Corporation of Worcester but are open to use by the public. Finding No. 16 is : "Worcester Quay has been used by the public to obtain access to and from the River Severn without payment of tolls or charges since the quay walls were erected." That means that this part of the River Severn, from

the sea up to some eight miles, I think it is, above Worcester was a free navigable river. It appears from the statutes which are incorporated in this case that it was a free navigable river where people could travel up and down and land without charge from time immemorial; that right was interfered with by the statutes which begin in the year 1842 and go on to the year 1920. Those statutes authorize the imposition of such fees as were imposed by those Acts, but no others. I, of course, accept without demur the findings that there has been considerable pleasure traffic upon the river; that that pleasure traffic has become dangerous to the general public using the river in small boats; that it was not desirable for two or more steamers to start on the same trip at or about the same time as it led to racing, and was dangerous to people in small boats. No doubt it was something of the sort that led to the passing of the Act of 1920, section 9 of which gives additional powers to make by-laws, and, among others, those powers are: "For prescribing the place or places at public wharves and quays at which passengers and goods may be embarked or disembarked loaded or unloaded on the river on to or from vessels plying on the river." The words relevant to this case are "passengers may be embarked or disembarked." Of course, all by-laws must have reference in the interests of the public to the safe and reasonable navigation of the river. In pursuance of that object by-law 25, the only one in question, was passed in the year 1922. I need not read the whole of it. When that by-law was passed the Worcester Corporation had not a landing stage or stages at all, and it contemplated that, so soon as they built an available landing stage, thereupon this by-law should come into force, and it says not only that a passenger vessel for the purpose of embarking or disembarking passengers is not to be moored at any place other than at this stage which had not as yet been built, but it could only embark or disembark passengers "who have previously paid to the Corporation or their authorized agent such sum not exceeding 2d. as the Corporation may be entitled to charge in respect of every such person," and the words go on to say that a sum not exceeding 2d. should include embarcation and disembarcation on the same day. It is argued by Mr. Montgomery that that meant "such sum if any" and left the question open whether any charge was leviable at all; in other words, that it contemplated that there might be a charge or there might not be a charge and it contemplated that some day before very long some passenger would indulge in a law-suit to decide whether any fee was chargeable or not. I am unable to think that that is the meaning of it at all. It seems to me that the only reasonable meaning to give to this by-law, which is all in one sentence and not possibly severable, is: "We are not going to allow the Corporation to charge anything excessive but only such sum as they may be reasonably entitled to charge," and no doubt it is intended that the charge should recoup them for the expense of making a landing stage. The whole object of the by-law, in my view, is not to stop a legal nuisance for the purpose of the safety of navigation and of preventing racing, by allowing steamer owners to take up passengers only at certain definite times at certain definite places, but it is contemplated that a reasonable fee should be charged to people embarking and disembarking. In my view that by-law meant to encourage the Worcester Corporation to impose a fee for embarking and disembarking, and assumes that if the fee came within the reasonable limit of 2d. this could lawfully be charged. It is imposing a tax on everybody who goes on a pleasure steamer, and, to my mind, that is the clearest interference with a legitimate trade. The trade of taking a passenger for a pleasure cruise on a navigable river is a long understood and well understood trade. To say that you shall only take people on board who pay some owner for the privilege of getting on board at a landing stage which he has spent money in building, to my mind goes beyond the possible purview of what can be done on a river which is free for the navigation of the public. I think that is the short answer. I think it is clear on the findings that while the Corporation of Worcester had originally claims or rights to fees from merchants, they bargained them away, and the findings of the case about the river being free and navigable show they have not, and never have had, any right to charge for embarkation and disembarkation. On those grounds I think this by-law is bad.

I have only a few other remarks to make. I do not attach any importance to the finding in this case first of all that the appellant said that nothing would induce him ever to go to the Corporation pier. I do not think that ought to have found its way into the case. It has no bearing on the matter, and it seems as if a litigant lost his temper. There is another finding in the case that the advocate for the Corporation, when the point was being argued that this stage of the Corporation was not large enough, pledged himself that the Corporation would make it bigger if required. That again is one of those excited remarks made by advocates which sometimes occur in other Courts than a magistrate's Court and have no bearing whatever as to the decision of the case. Some of these findings I should not think of questioning, namely: "That it was not desirable for two or more steamers to start on the same trip at or about the same time as it led to racing, and was dangerous to people in small boats," and "That a steamer proprietor could start from the Worcester Quay whenever he liked, so that two or three steamers might start at the same time." This rather points to a suggestion that while a time-table might be fair and reasonable there is nothing in the world to prevent these Commissioners from making a by-law as to steamers not starting from any part of Worcester Quay, whether from a private stage or elsewhere, except at such time as is directed by the Worcester Corporation, and that the by-law does not give an exclusive monopoly to the Worcester Corporation to charge a fee to every passenger using their landing stage. The same object could easily have been effected as to all these private landing stages if there were a by-law framed preventing the steamers from starting within such times of one another or otherwise than at such fixed times as the Commissioners should publish, as I understand they desire to do. In other words, without framing a bad by-law they could very easily frame a good by-law without creating this monopoly and making a charge which is a tax upon the industry; they could have passed other regulations which could easily be passed and which would have the same beneficial effect.

For the reasons I have given I think the appeal should be allowed.

Mr. Justice MacKinnon.—I regret that I cannot come to the same conclusion. The question is whether this by-law is unreasonable or *ultra vires* or in restraint of trade. The magistrates find that it is not. The Severn Commissioners under the Act of 1920 are given power to make by-laws: "For prescribing the place or places at public wharves and

quays at which passengers and goods may be embarked or disembarked loaded or unloaded on the river on to or from vessels plying on the river." For certain reasons of policy it was thought desirable that the various passenger steamers plying on the river should start from one uniform spot so that they would not all start at once, and they should start in succession so as to prevent racing. The by-law which is impugned in its operative part provides that every passenger steamer shall resort for the landing and embarking of passengers to one quay only. They have selected the quay or landing place of the Corporation of Worcester, and if the by-law stopped there it would not be open to very much of the criticism that has been urged against it. It is said that it goes further and is bad because it imposes a tax on the public. Now if the Commissioners by any by-law did purport to impose a toll or tax upon passengers I should quite agree that the by-law would be bad because under their special Acts they are not given any powers to impose a tax or toll upon passengers. But in truth, as I read this by-law, the position is this. They have directed that these steamers shall resort only to one place, namely, the Corporation landing stage. They then go on in the interests of the public to say, having some knowledge that the Corporation either does or proposes to make some charge, that this by-law shall only be in operation provided that the charge made by the Corporation, if any is made, does not exceed the sum of 2d. That does not seem to me in the least to be a by-law imposing a tax on the public. It has added to the by-law a provision for the protection of the public with regard to the possible action of a third party over whom the Commissioners have no power, and as to whose rights the Commissioners have no authority to say anything. I think the shortest answer to the question, Is it or is it not true that this by-law imposes any taxation on the public? is this: Suppose any member of the public was minded to dispute his liability to pay this taxation and that had to be determined by any tribunal, no human being opposing his claim would seek to say: "Oh, but you are liable by virtue of this by-law"; his liability would have to be established by some legal right of the Corporation to impose the charge. It does not seem to me that this by-law imposes any charge whatever; the only thing it does is to make a provision which shall limit and restrict the possibility of some other person making a charge, and for that reason it does not seem to me there is anything wrong in this by-law. The reasons given in the case with some elaboration show that its purpose, to restrict the resort of these steamers to one spot, is reasonable. The by-law, I think, is certainly not *ultra vires* because it is in direct pursuance of this Act to prescribe a place or places, and so forth. I do not think it is in restraint of trade.

For these reasons I think this appeal should be dismissed.

The Lord Chief Justice.—It is with profound respect and sincere regret that I differ in this case from the judgment of my brother Shearman. The prosecution here was under certain by-laws made by the Severn Commissioners, and the real question to which this special case gives rise is a question whether the particular by-law referred to, which is by-law 25 of the last series of by-laws, was a reasonable by-law or was *ultra vires* or in restraint of trade. In approaching that question I think the true canon is laid down in words, often cited, but never too often, in the judgment of Lord Russell of Killowen in *Kruse v. Johnson* (14 *The Times* L.R., 416; [1898] 2 Q.B., 91, at p. 99): "When," said Lord Russell, "the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness." Applying those observations to the present case, I cannot help observing that we are really being asked to consider the reasonableness of a by-law made on the spot by a representative and aggregate body for the better and safer navigation by passengers of a particular part of the river Severn, and it seems to me that it is material—I speak for myself—that one unfortunately knows too little of the course, the dimensions and the other individual features of the river Severn in that part of it, the particular position of the locks which are to be navigated by passenger vessels going to and from Worcester, the habits, and especially the festive habits, of the population and the particular methods of local competitive traders. All these matters and many others were well within the knowledge, on the one hand, of the delegates who constituted the Severn Commission, and, on the other hand, of the elective persons who constituted the Corporation of the City of Worcester. Nor do I think that it is immaterial that the justices in this case, Worcester justices sitting in Worcester, have come to the conclusion, after hearing all the relevant facts and, at least, all the relevant arguments, that this by-law was a reasonable one and was not *ultra vires* or in restraint of trade. It is, of course, true that the question here is not a question of fact, but is a question of law. But nevertheless the questions of fact are highly material to the question of law when the question of law is whether in a given situation, and for the purpose of dealing with a particular evil, a particular remedy is, or is not, a reasonable remedy, and it seems to me that the observations of Mr. Justice Channell, as he then was, in the case of *White v. Morley* (15 *The Times* L.R., 360; [1899] 2 Q.B., 34) are apt to the present controversy. In that case Mr. Justice Channell said this, at page 39, referring to the case of *Burnett v. Berry* (12 *The Times* L.R., 362; [1896] 1 Q.B., 641): "Since that case was decided, the case of *Kruse v. Johnson* (*supra*) has been heard, and has thrown a good deal of light on the previous decisions as to the reasonableness of by-laws. I think that the principle of that decision is that, where a thing is of such a character as that it can be a nuisance, it is to rest with the local authority to say whether it shall be considered to be a nuisance in the particular locality for which they have power to make by-laws. The Court can say whether it is reasonably possible for the prohibited act or thing to be a nuisance; but they cannot say whether it should or should not be forbidden in the

particular locality." That case is, therefore, an additional authority for holding that this by-law is not unreasonable. And in like manner in the case of *Friend v. Brehout* (30 *The Times* L.R., 587 ; 79 J.P., 25), a case decided in the year 1915, Mr. Justice Bray in giving judgment, referring to a certain point, said : "The next point taken is that the by-law is unreasonable because it is too wide and it ought to have dealt with only a portion of the area. That must be a question of fact for the magistrates, and they have decided it. They had evidence on both sides, and it is impossible to say that they were not justified in holding the by-law to be not unreasonable." And in the same case Mr. Justice Avory, with reference to the same point, said : "I see no ground for saying the by-law is unreasonable, but I express no opinion on that ; it is not a matter with which this Court ought to deal. It was a question of fact for the justices and there was evidence on which they could find as they did." Mr. Justice Atkin, as he then was, concurred.

I am not saying that this question which this Court has now to decide is a question of fact. I am far from saying that, but I do think, having regard to the nature of the subject-matter, that this Court ought not to disregard the findings of the local justices dealing with this local problem and the local method proposed for solving it by persons locally elected and locally responsible.

With regard to the making of this by-law it seems to me that by the operation of section 16 of the Severn Navigation Act, 1914, and section 9 of the Severn Navigation Act, 1920, the Severn Commissioners clearly had power to make a by-law falling within this category. I say nothing for the moment of its special provisions. By the earlier section to which I have referred the Commissioners were empowered to make such by-laws as they thought fit, among other things for regulating the anchoring and mooring of vessels in the river, and by section 9 of the later Act they were empowered to make by-laws for "prescribing the place or places at public wharves and quays at which passengers and goods may be embarked or disembarked loaded or unloaded on the river on to or from vessels plying on the river."

But it is said that this by-law, although no doubt it falls within the class of topic with which the Commissioners might properly deal, is nevertheless by reason of its special provisions unreasonable, *ultra vires*, and in restraint of trade. I take the last phrase first : "in restraint of trade." Upon analysis that phrase proves to mean no more than this, that it compels some alteration, I think a comparatively slight alteration, in the mode in which a particular trade was heretofore carried on. The argument that the by-law is *ultra vires* is the same argument, spelt differently, as the argument that it is unreasonable, and in the last resort it depends upon this proposition, that the by-law is unreasonable inasmuch as it imposes, or purports to impose, a charge in the nature, it is said, of a tax upon the public—that part of the public, in other words, which embarks upon or disembarks from passenger vessels using this part of the River Severn. I pause to say that it is perfectly obvious to my mind that that is not the point upon which this case was fought in the Court below. There is nothing novel in that ; one is quite used to it, just as much used to it as to the circumstance that the real points in the appellant's favour are always, or nearly always, points which do not appear in the case. But here it is expressly stated in the case that the appellant in his evidence did not deny that he had stated to the committee of the corporation that he would not use the landing stage whether there was a charge or not, and I think that the relevancy of the insertion of that paragraph, which may have been inartistically done, is that it is intended to show that the real point was not the point which might be thought to be the useful point when the case came before the Divisional Court. In like manner, I see that it is found that a representative of the Corporation of Worcester, in giving evidence for the respondent, undertook that if the use of the landing stage should be so great as to necessitate further facilities of the same character the Corporation were ready and willing to erect a second landing stage. Before I come to the conclusion that that is mere irrelevancy or the offer of a bribe to the tribunal, or otherwise objectionable, I look to the contentions then raised on behalf of the appellant and I find this : "That the capacity of the Corporation landing stage is limited and not suitable or sufficient for allowing the number of persons embarking and/or disembarking on or from passenger vessels arriving at or departing from Worcester Quay, and that congestion would be caused if all passenger vessels are compelled to embark or disembark passengers at such landing stage." The inference I draw is that this evidence is a portion of the answer made to the argument adduced before the justices that this by-law was unreasonable, and I think that, the argument being made, it evidently was a relevant answer.

But is it true to say that this by-law imposes a toll or charge upon the public ? The operative part of the by-law is the first part, which provides that : "No person shall anchor or moor any passenger vessel near to or against any portion of Worcester Quay for the purpose of enabling any passenger to be taken on board or disembarked from such passenger vessel, or shall permit or allow any passenger to embark upon any passenger vessel from the quay or to disembark from any passenger vessel on to the quay, if and so long as the Corporation of the City of Worcester maintain, either above or below Worcester Bridge, a pier or landing stage, or piers or landing stages, connected with the quay and available for giving access from the quay to a passenger vessel moored against the said piers or landing stages, and" —now come the words of which complaint is made— "allow any persons desirous of travelling by a passenger vessel to enter upon and pass along the said piers or landing stages from the quay to the passenger vessel moored against the said piers or landing stages, who have previously paid to the Corporation or their authorized agent such sum not exceeding 2d. as the Corporation may be entitled to charge in respect of every such person, which sum shall allow the person paying the same to pass along the said piers or landing stages to the quay when disembarking from the said passenger vessel on the same day as that on which the said sum was paid." The by-law begins with a prohibition : no person shall anchor ; no person shall permit ; no person shall allow. Then there follows a passage showing the period during which the prohibition is to operate, and it is to operate "if"—because the pier had not yet come into existence—"if and so long as the Corporation maintain and allow," so and so ; it is a defining and limiting provision as to time, and it is when one comes to the second limb of that limitation as to time that these words about charge occur : "allow any persons . . . who have previously paid to the Corporation or their authorized agent such sum not exceeding 2d. as the Corporation may be entitled to charge in respect of every such person." If the Corporation have not the right to do that it seems to me the by-law never comes into exercise at all. It

is made upon the assumption that the Corporation have that power *aliunde*. This by-law does not purport to give the power, but it makes it a condition of the duration of the period during which the prohibition created by the by-law is to last that the Corporation are to give these facilities. The nature of the condition is in itself a restrictive condition. If the Corporation raise the fee above 2d., then the prohibition in the beginning of the by-law does not apply. The by-law, I think, assumes that the Corporation have the power to impose that charge; it does not itself purport to impose that charge; and it was not at all upon that point that the case was fought in the Court below.

It seems to me that the justices were justified in coming to the conclusion to which they came, that this by-law was a reasonable one; that it was not *ultra vires*; and that it was not in restraint of trade. In these circumstances and for these reasons, regretting as I do that the Court is not unanimous in this matter, I think that this appeal fails and ought to be dismissed.

[Solicitors—Messrs. Timbrell, Deighton, and Nichols, for Messrs. Dobbs and Gill Smith, Worcester; Messrs. Sharpe, Pritchard, and Co., for the Town Clerk, Worcester.]

K.B. Div.
(Lord Hewart, C.J., Shearman and MacKinnon, JJ.)
1927. May 12.

RANSON v. BURGESS.*

Lotteries—Printer of tickets—Sale of complete set—Lottery to be conducted by purchaser—Printer not further interested—No lottery in existence at date of sale—Publication of proposal or scheme—Lotteries Act, 1823 (4 Geo. IV., c. 60), s. 41.

The appellant, a printer, sent to the respondent some specimen tickets for "Weekly Naps and Football Doubles" together with a printed document inviting him to purchase complete sets of tickets for various Divisions of the Football League. For example, for 10s. he would supply 231 tickets each containing the same "winning nap" on a horse race, but a different combination of two of the 22 teams in the First Division (231 being the total of possible combinations). The purpose was that the respondent should sell each of these tickets at 6d. each and should give a prize to the person whose ticket bore the names of the two teams which scored most goals on a given date. Out of the proceeds the respondent was to provide the prize or prizes, the balance being retained by him as profit. The appellant took no further share in the lottery or the proceeds beyond the original 10s. for the tickets.

Held, that the appellant was rightly convicted of publishing a proposal or scheme for the sale of tickets or chances in a lottery.

This was a case stated by an Alderman of the City of London.

On December 31, 1926, the appellant appeared at the Guildhall Justice Room, in the City of London, to answer an information laid by the respondent, a detective inspector of the City of London police, which charged that the appellant on October 26, 1926, in the said City of London, unlawfully published a certain proposal or scheme for the sale of tickets or chances in a lottery not authorized by any Act of Parliament, entitled "Weekly Nap with free Football Doubles," contrary to section 41 of the Lotteries Act, 1823.

The Alderman convicted the appellant and ordered him to pay a fine of £25 and a further sum of £10 10s. for costs, or in default, to be imprisoned for three calendar months.

Upon the hearing of the said information the following facts were proved:—

(*a*) That on October 26, 1926, the respondent, in response to a letter written by him in the name of Fred Martin, received from the appellant an envelope which contained, among other documents, the following:—

(i.) A white envelope containing two printed letters.

(ii.) Some specimen tickets and envelopes.

The material part of one of the said letters (which was exhibited to the case) was as follows:—

F. RANSON.

RAY SMITH,
Printer and Publisher,
65, Farringdon-street,
London, E.C.4.

Dear Sir,—I have now completed new arrangements for special information from Newmarket, Epsom, and other racing centres, for my "Special Weekly Naps." This information will prove itself very reliable and is worth following. . . .

To purchasers of the weekly Naps you will give a free competition with money prizes, and no charge is made for the competition.

I have pleasure in enclosing samples of tickets and envelopes. The printing is of the highest class, and the tickets cannot be tampered with.

Sets of these tickets can be obtained as follows:—

WEEKLY NAP WITH FREE FOOTBALL DOUBLES.

First Division only—231 tickets and envelopes printed as desired. Price £0 10s. 0d.

(Prices followed for other larger series up to 5,778 tickets for £5 10s. 0d., and also for "Free Football Trebles.")

All the above tickets are named, not numbered.

REMEMBER others may copy my ideas, but no other firm can be in a position to issue my reliable weekly Naps.

Tickets and weekly Naps are ready 21 days in advance.

All orders post free. Terms—Cash with order.

Yours faithfully,
RAY SMITH.

The tickets enclosed had on the back a numbered list of football teams. The front was in this form:—

WEEKLY NAPS.
Sopron and Nous Verrons.
Free Football Double.
Add Scores Together.
Saturday, August 28, 1926.
Your teams this week are Nos.
4 & 14
on this list.

This voucher must be produced within seven days if claiming a prize.

In the event of a tie, prize divided.

(*b*) That on November 8 following the respondent sent to the appellant a postal order for 10s. and

* Reported by J. W. HALL, Esq., Barrister-at-Law.

returned therewith one specimen ticket and envelope, and in reply received on November 9 a bundle of 231 tickets and envelopes for which payment had been made by the said postal order.

(*c*) That there were 22 Football Teams in the First Division, and therefore a complete set of tickets in respect of the same to secure that each combination of two should be different was 231. That the "Winning Nap" was constant on each of these tickets, whilst the combination of football teams was different.

(*d*) That the appellant contemplated that these tickets were to be sold by the respondent, each in its envelope, the purchaser having no choice of the football teams upon the ticket he bought, and that a prize should be paid to the holder of that ticket which bore the names of the two football teams scoring most goals, and a consolation prize should also be given by the respondent.

(*e*) That after the sale to the respondent by the appellant of the said tickets and envelopes the appellant took no further interest in the matter; that was, the appellant did not take or intend to take any money for the sale of separate tickets at 6d. each, nor did he hold himself liable for providing the prize.

It was contended on behalf of the appellant:—

(1) That all that he had done was to sell in the ordinary commercial sense certain pieces of printed paper which might or might not be afterwards employed in the conduct of a lottery.

(2) That the mere publication of tickets to Inspector Burgess in this manner did not amount to a proposal or scheme for the sale of tickets or chances in a lottery within the meaning of section 41 of the Lotteries Act, 1823, 4 Geo. IV., c. 60, any more than the sale of tickets to the inspector was a sale of tickets or chances in a lottery.

(3) That in order to bring the appellant within the prohibition in the said section 41 it was necessary to show that he was taking some part in the actual conduct of a lottery then in being.

Reference was made to the Ready Money Football Betting Act, 1920, and it was contended that if the Legislature had intended to prohibit at the source the printing of tickets and other material which might be used in the conduct of a lottery some enactment relating to lotteries similar to that relating to ready money football betting would be in force.

The case of *Dew v. Director of Public Prosecutions* (37 *The Times* L.R., 22) was cited and it was contended that in all reported cases except the said case cited the publication alleged was a publication by way of public announcement or advertisement of a lottery actually being conducted.

It was contended on behalf of the respondent that the facts proved established the offence charged, and that the matter that was published by the appellant to the respondent amounted to a proposal or scheme for the sale of the said tickets, and that each purchaser of such a ticket would obtain, in addition to the "Weekly Nap" the chance that his ticket might contain the names of the two football teams scoring most goals and thereby he would become entitled to the prize offered.

The Alderman was of opinion that the appellant had published to the respondent a proposal or scheme for the sale of tickets or chances in a lottery not authorized by any Act of Parliament. The scheme published by the appellant to the respondent was that these tickets were to be sold by the respondent, each in its envelope, the purchaser having no choice of the football teams upon the ticket he bought, and that a prize should be paid to the holder of that ticket which bore the name of the two football teams scoring most goals, and a consolation prize should also be given by the respondent. He therefore convicted the appellant upon the said information and ordered him to pay a fine of £25 and a further sum of £10 10s. for costs, or in default to be imprisoned for three calendar months.

The question upon which the opinion of the Court was desired was whether, upon the above statement of facts, the Alderman came to a correct determination and decision in point of law.

Mr. Roland Oliver, K.C., and Mr. McClure appeared for the appellant; Mr. Percival Clarke, for the respondent, was not called upon.

The Lord Chief Justice.—This is a case stated by an alderman sitting at the Guildhall Justice Room. The question arises upon an information laid by the respondent, who is a detective inspector of the City of London police, charging that the appellant on October 26, 1926, "unlawfully published a certain proposal or scheme for the sale of tickets or chances in a lottery not authorized by any Act of Parliament, entitled 'Weekly Nap with free Football Doubles,' contrary to section 41 of the Lotteries Act, 1823."

The magistrate convicted the appellant and has stated this case.

The question is whether, upon the material before the Court, the Alderman came to a correct determination and decision in point of law. What happened upon October 26, 1926, the day named for the offence, was that the respondent, in answer to a certain letter written by him in the name of Martin, received from the appellant a certain envelope, and that envelope contained certain documents, namely, another white envelope which, in its turn, contained two printed letters, and secondly, the main envelope contained certain specimen tickets and envelopes; that is all that was received on October 26. Certain other and supplementary things were received on November 9.

Now it is not denied that those documents which were sent on October 26, 1926, being really samples of the bulk sent on November 8, 1926, were documents deliberately designed as what has been described as the paraphernalia or apparatus of a lottery. The scheme of the lottery is made quite obvious by those documents. It was that the purchaser, for example in the case of First Division football, of 231 tickets, for which he paid 10s., might re-sell them individually at 6d. apiece. The total number of combinations in relation to 22 football teams competing in the manner represented being 231, the purchaser of one of those 231 tickets must get the particular statement of the winning result which would entitle him to a prize. Mr. Roland Oliver, with his usual frankness, has admitted that if the matter had been carried out to its conclusion, that is to say, if the moment had been reached when the sale of these tickets had actually begun, it could not be denied that they were tickets in a lottery and that there was a sale of tickets in a lottery; but, he says, as there was not yet an actual lottery in existence, and as what was in contemplation was not a definite and specific matter, this prosecution was misconceived, although it may be that there was good reason for commencing some other kind of prosecution against this printer. That is the submission which was made to the magistrate and it is succinctly expressed in this case. It was contended that in all the reported cases, except one, the publication alleged was publication by way of public announcement or advertisement of a lottery actually being conducted. In my opinion, that argument, which has been laid fully before us in the present case, proceeds upon too narrow a view of section 41

of the Lotteries Act of 1823. If I may read a portion of that section, it provides as follows: "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries, authorized by any foreign potentate or State, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorized by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorized as aforesaid," that person is liable to certain penalties.

It seems to me clear that that section covers a considerable variety of things, some of which are *in futuro*. For example, the very words employed show that the lottery referred to may be in the future—"to be drawn," "any lottery to be drawn in any foreign country"; and having said that, the section goes on: "or in any lottery or lotteries, except such as are or shall be authorized"; and what it dealt with is not only the sale of a ticket or a chance, or a share of a ticket or a share of a chance, but what it also dealt with is, (1) a publication of a scheme, and (2) a publication of a proposal, and the words "proposal" and "scheme" seem to me most naturally to indicate that there may be a certain ingredient of futurity, and I cannot see any ground whatever for saying that because the sale of tickets had not been actually begun, this was not the publication of a proposal or scheme for the sale of tickets in a lottery to be begun. I do not think that it is in the least necessary that the actual lottery should have advanced so far that the sale of tickets had already begun; it is enough that there was the publication either of a scheme or of a proposal for the sale of tickets in a lottery to be begun, and it is conceded that here the lottery must have begun the very moment when the ticket was first sold.

The case of *Dew v. Director of Public Prosecutions* (37 *The Times* L.R., 22; 85 J.P., 81) seems to me to be in point. There a person had sent to a printer, for the purpose of being printed, a draft circular containing a proposal for the sale of tickets in a lottery, and that circular was printed, and it was held that the person publishing the proposal, the printer, was liable to be convicted, even though no copy of the circular ever reached any person to whom it was afterwards addressed. Lord Reading, giving the judgment of the Court, said at page 81 of the J.P. Report: "Those statements are to my mind sufficient to support the conviction. They show that the circulars containing a proposal and scheme for the sale of tickets in a lottery were printed by a company. To that company the envelopes were sent by the appellant. The circulars were ordered by the appellant, and were printed and prepared for posting. The payment for the printing of the circulars and for their preparation for posting was made by the appellant by means of cheques signed by another person. A large number of circulars were printed and stamped ready for posting and were posted, but all were prevented from reaching the addressees, and there is no evidence that any circular was ever delivered to or reached any addressee"; and a little later the judgment proceeds: "When the draft circular was received by the printers for reproduction, and it was reproduced, some printer must have read at least one circular, but it has been argued that that is not publishing a proposal. The fallacy in that argument is that publishing a proposal means nothing more than making known a proposal to someone other than the person who originates it. As soon as it is established that the proposal was made known to another person, the proposal has been published. It is clear that this proposal was made known to the printer and therefore there was publication to the printer."

Now I cannot help thinking that that doctrine applies also the other way round. A man who goes to the printer to have the scheme printed, publishes the scheme to the printer: why is it any the less true that a printer, who has, let us say, in stock a great number of ready-made schemes for lotteries, publishes one of those schemes as soon as he communicates that scheme to any other individual? I think there are various ways in which this offence may be put. In one view of the facts, the printer and the recipient of his printing might be said to be working together in a lottery; in another view it might be said the printer is publishing a proposal for the sale of tickets in a lottery; and in another view it might be said the printer is proposing a scheme for the sale of tickets in a lottery, and it seems to me to be quite immaterial that the lottery referred to is a lottery thereafter to be brought into actual public operation by a sale of tickets which has not yet begun.

In my opinion the Alderman came to the right conclusion in this case, and I think that this appeal fails.

MR. JUSTICE SHEARMAN.—I am of the same opinion. When one looks at the plain words of the statute, I think the acts charged come clearly within it. This man published a proposal for the sale of lottery tickets and he also, in the circular which he sent, made quite clear what the scheme of the proposed lottery was. I think it comes most clearly within both these words, "proposal" and "scheme" in the Act, and, therefore, the conviction was right.

MR. JUSTICE MACKINNON.—I agree.

[Solicitors—Messrs. Bateman and Co.; the City Solicitor.]

K.B. Div.
(Lord Hewart, C.J., Shearman and MacKinnon, JJ.)
1927. May 12.

LONDON COUNTY COUNCIL v. WILTSHIRE COUNTY COUNCIL.*

Children — Youthful offender — Reformatory school—Residence—Liability for maintenance —Children Act, 1908 (8 Ed. VII., c. 67), s. 74 (1) (3) (7).

A youth resided at various places in London until the end of June, 1926. He was then taken to stay with his grandparents in Wiltshire for three months while his mother went abroad to her husband. He had then no home to which he could return in London. On July 18, 1926, he committed an offence in Wiltshire and was ordered to be sent to a reformatory school, London being specified in the order as his place of residence, the London County Council being thereby made liable for his maintenance.

Held, that there was no evidence of an actual residence in London at the date of the offence, and therefore, though he was in Wiltshire only

* Reported by J. W. HALL, Esq., Barrister-at-Law.

on a temporary visit, he was presumed to reside there under s. 74 (3) of the Children Act, 1908, and the liability for his maintenance fell on the Wiltshire County Council.

This was a case stated by justices for Wiltshire.

At a court of summary jurisdiction sitting at Marlborough in the county of Wilts on August 27, 1926, one Morrie Morrison, a youthful offender, was convicted of having committed an offence at Froxfield in the county of Wilts on July 18, 1926, and was ordered to be detained in a certified reformatory school for the period of five years pursuant to the provisions of the Children Act, 1908, and his place of residence in the said order was specified to be London, within the area for which the London County Council were the local authority under the said Act, whereby the London County Council became liable for the maintenance of the said youthful offender in the said school.

Being aggrieved by the decision of the said Court as to the place of residence of the said youthful offender, the appellants, the London County Council, on November 9, 1926, applied under section 74 (7) of the Children Act, 1908, to a Petty Sessional Court, acting in and for the place for which the Court which made the order acted, and complained that the youthful offender was resident in the area of the respondents, the Wilts County Council, at the time of the commission of the offence for which he was ordered to be sent to the said reformatory school.

Upon the hearing of this application the respondents were heard, and on January 31, 1927, the justices refused to make an order transferring the liability to maintain the said youthful offender from the appellants to the respondents.

The following facts were proved or admitted :—

(*a*) Morrie Morrison was born on March 24, 1912. He was the illegitimate son of Hazel Fairbank Vernon (otherwise known as Chapman or Downey).

(*b*) On July 18, 1926, Morrie Morrison was living and sleeping with his grandparents, Mr. and Mrs. Chapman, at Froxfield, in the county of Wilts. He had been brought there by his mother (Mrs. Downey) at the end of June, 1926, because she was going abroad for three months. About 14 days later and before July 18, 1926, Mrs. Downey sailed for Rio de Janeiro to join her husband, who was already there.

(*c*) Before he was taken to Froxfield, Morrie Morrison was working at the Naval and Military Club, Piccadilly, London, as a lift-boy for one month, living in, but had left this situation on coming to Froxfield.

(*d*) Before that he had been living at 20, Regent's Park-terrace, Camden Town, London, of which house Mr. Downey held a lease, and in which he and his wife resided. Morrie Morrison lived there for three weeks with Mrs. Downey and slept there, Mr. Downey being away.

(*e*) Before that he had lived and slept for four years at 37, Westbourne-terrace, London, as a boarder with a Mrs. Curston, his mother paying his keep. Mrs. Curston was not a relative.

(*f*) He had visited Froxfield twice before on short holidays.

(*g*) He had seen Mr. Downey only three times in all, and he had never stayed in the house while Mr. Downey was there.

(*h*) When Mrs. Downey took him to Froxfield, she asked Mrs. Chapman to look after him for three months while she and her husband went abroad, and Mrs. Chapman agreed to do this in return for a weekly payment, but she would not have agreed to take him for longer than three months.

(*i*) On July 18, 1926, the only place with relatives or friends to which Mrs. Chapman could have sent him was to Mrs. Downey's brother, who lived at Reading. His mother was abroad and he had no home then.

(*j*) Mr. Downey was a motor manufacturer and had a business in London with several branches. This business was still being carried on.

(*k*) In July, 1926, before going to Rio de Janeiro, Mr. Downey had surrendered the lease of 20, Regent's Park-terrace, and had stored his furniture.

(*l*) The original order of August 27, 1926, was put in evidence by consent of the parties.

On the part of the appellants it was contended that :—

(*a*) Morrie Morrison ceased to reside in London when he left his employment at the Naval and Military Club and went to Froxfield.

(*b*) He in fact resided at Froxfield between the end of June, 1926, and the time when he committed the offence in respect of which he was ordered to be sent to a reformatory school or alternatively he must be presumed to have resided in Froxfield pursuant to section 74 (3) of the Children Act, 1908, that being the place where the offence in question was committed.

On the part of the respondents it was contended that :—

(*a*) The onus of proof was on the London County Council that the youthful offender was resident in the area of another local authority, and they had not discharged that onus.

(*b*) The evidence given on behalf of both the appellants and the respondents proved that the youthful offender's visit to Wiltshire was of a very temporary character, and that his stay at Froxfield did not constitute a residence in the area of the respondent council within the meaning of the Children Act, 1908.

The justices' attention was directed to the following decisions :—*London County Council v. Birmingham Corporation* (40 *The Times* L.R., 76 ; [1924] 1 K.B., 248), *Stoke-on-Trent Corporation v. Cheshire County Council* ([1915] 3 K.B., 699), *Berkshire County Council v. Reading Corporation* (37 *The Times* L.R., 642 ; [1921] 2 K.B., 787), *Leicester Corporation v. Stoke-on-Trent Corporation* (83 J.P., 45).

The justices, being of opinion that on July 18, 1926, the youthful offender was on a temporary visit to his grandmother at Froxfield, found as a fact that on that date his residence was in London, and they dismissed the application.

The question upon which the opinion of the Court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Mr. A. F. Engelbach appeared for the appellants ; Mr. A. M. Trustram Eve for the respondents.

The Lord Chief Justice.—This is a case stated by justices, and the question arises in the following way. A youthful offender named Morrison was convicted on August 27, 1926, of having committed an offence at Froxfield, in the county of Wilts, on July 18, 1926. He was ordered to be detained in a certified reformatory school for a period of five years, pursuant to the provisions of the Children Act, 1908. In that order his place of residence was specified as being London, within the area for which the London County Council are the local authority under the Act. The

effect of the order, therefore, was to make the London County Council liable for the maintenance of Morrison in the school to which he was sent. The London County Council, who are the present appellants, objected to that decision, under the provisions of section 74, subsection (7), of the Children Act, 1908, and complained that the youthful offender was, within the meaning of that Act, resident at the material time in the area of the respondents, the Wiltshire County Council.

The justices, having heard that complaint, refused to make an order transferring the liability from the appellants to the respondents, and accordingly the appellants applied for a case to be stated, and the question raised by this case is whether the justices, in the conclusion to which they came, came to a correct determination and decision in point of law.

The provisions of this Act are, one would think, sufficiently clear. The part of the Act in which the section occurs is a part dealing with expenses of certified schools. Section 74, subsection (1), provides as follows: "Where a youthful offender is ordered to be sent to a certified reformatory school, it shall be the duty of the council of the county or county borough in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified reformatory school suitable to the case, having regard to the requirements of this part of this Act." Subsection (2) provides: "Where a child is ordered to be sent to a certified industrial school, it shall be the duty of the local education authority of the district in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified industrial school suitable to the case, having regard to the requirements of this part of this Act." Then follows, in subsection (3), a definition of "residence" for the purposes of these provisions: "For the purposes of the foregoing provisions of this section a youthful offender or child shall be presumed to reside in the place where the offence was committed, or the circumstances which rendered him liable to be sent to a certified school occurred, unless it is proved that he resided in some other place." In other words, *prima facie,* the place where the offence was committed is, for the purposes of this Act (though there are no doubt various Acts of Parliament of which the same thing could not be said) the place of residence of the child. If that *prima facie* presumption is to be rebutted, it can be rebutted only by proof that at the material time he did in fact reside in some other place. Then follow certain ancillary provisions, as, for example, that "Where the court by which the detention order is made is a court of assize or a court of quarter sessions, the court shall remit to a court of summary jurisdiction for the place where the youthful offender or child was committed for trial the determination of his place of residence"; and then by subsection (7) it is provided that "Where a local authority, that is to say, as respects reformatory schools the council of a county or county borough, and as respects industrial schools a local education authority, are aggrieved by the decision of a court as to the place of residence of a youthful offender or child, they may within three months after the making of the detention order apply to a petty sessional court acting in and for the place for which the court which made the order or determined the place of residence acted, and that court, on proof to its satisfaction that the youthful offender or child was resident in the area of another local authority, and after giving such other local authority an opportunity of being heard, may transfer the liability to maintain the youthful offender or child in a certified school to that other local authority." In other words, it is not then too late to put forward the proof referred to in section 74, subsection (3). *Prima facie,* the place where the offence was committed is the place of residence. It may be proved in the first place that the child resided in some other place, or it may be wrongly believed upon evidence that he resided in some other place, but in the one case as in the other if a local authority is aggrieved it has its remedy by way of complaint, and then the question for the Court is, as it is in subsection (3): Is it satisfied that the youthful offender or child was resident in the area of some other particular local authority?

It has been suggested faintly that because the words "for the purposes of the foregoing provisions of this section" appear in subsection (3), the word "resided" in subsection (3) means something quite different from what it means in subsection (7). In my opinion that is a desperate argument. "The foregoing provisions of this section" are provisions relating to liability in respect to residence, and that also is the subject-matter of complaint.

Here the question which the justices had to decide was where, for the purposes of this Act, it was true to say that this youthful offender resided at the material time. If there was no evidence to show that in fact at the material time he resided in some other place, then the provisions of the statute are conclusive that the place where he committed the offence must be taken for the purposes of this Act to be his place of residence. Now, how is that Act to be construed? Nothing is less useful than seeking to explain a term in one Act of Parliament by reference to the decisions about a like term occurring in other Acts of Parliament *alio intuitu.* So far as this Act of Parliament is concerned, I should like to refer to the brief and clear judgment (if I may, without presumption, say so) of Mr. Justice Avory in the case of *Stoke-on-Trent Corporation v. Cheshire County Council* ([1915] 3 K.B., 699, at p. 706). "In my opinion," said Mr. Justice Avory, "it is a question of law. Mr. Montgomery was right in saying that the word 'residence' is capable of various constructions according to the statute in which it appears. I am satisfied that in the Children Act, 1908, it means the place where the person actually resides, as distinguished from the place where he may be said constructively to reside. In my judgment the justices were wrong in law in that respect, for it is clear that they have held that the statute is satisfied by the youthful offender having a constructive residence with his father. I think that they were also wrong in law in holding that there was evidence that the boy was residing with his father. There was no evidence of residence, either actual or constructive, with his father."

In the present case it was never said or suggested that Froxfield in Wiltshire was the place where for the purposes of this Act this boy permanently lived, ate and slept. It was conceded that his residence there with his grandmother was purely temporary. The only ground on which Froxfield was said to be his residence was that Froxfield was where the offence had been committed and that it was not and could not be shown that he had at the material time any other place of residence; and in those circumstances the contention of the London County Council was that for the purposes of this Act Froxfield must be treated as his residence, inasmuch as Froxfield was the place where the crime was committed. That being so, the question before the justices who have stated this case was: Was it true to say that at the

material time this child really had a residence in London, where it was contended the place of his residence was ?

Now I say frankly that during a part of the argument of this case my mind was inclined to the view which the justices took ; but I am perfectly satisfied, after the able argument of Mr. Engelbach, that that view was wrong. The facts of the case, so far as the chronology is concerned, may be very briefly stated. This child, an illegitimate child, was born in March, 1912. From May, 1922, to May, 1926, he undoubtedly lived in Westbourne-terrace as a boarder with a Mrs. Curston. From May 7 to May 31, 1926, he was staying with his mother in Camden Town, in her husband's house, in the absence of the husband, and from June 1 to June 30, 1926, he was in service at the Naval and Military Club in London and living in it. On July 1 he went to stay with his grandmother at Froxfield, and while he was there, on July 18, he committed the offence at Froxfield. In the meantime his mother and her husband had gone to Rio, the house in London was given up, the lease was surrendered, and though the child had for some time been living in London it was, I think, in fact quite untrue to say that London then was his place of residence. The justices have found as a fact in this case that when Mrs. Downey—that is his mother—took Morrison to Froxfield, she asked Mrs. Chapman to look after him for three months while she and her husband went abroad, and Mrs. Chapman agreed so to do in return for a weekly payment, but she would not have agreed to have him for longer than three months. More than that, the case also finds that on July 18, 1926, the only relative or friend to whom Mrs. Chapman could have sent the boy was a brother of Mrs. Downey's who lived in Reading. The child's mother was abroad and he had no home then. In other words, he was homeless, and as he was homeless it was not possible for the respondents to prove that he was residing in London. It is suggested that if the question had been one of poor law settlement, other considerations might have applied, as, for example, whether his residence in London was interrupted for the purposes of the Poor Law by the temporary visit to the grandmother in Wiltshire. The nature of that question illustrates by contrast the nature of the question which arises under this statute, and I am satisfied that the only proper conclusion, for the purposes of this statute, upon these materials, was that the effort to prove that this boy at the material time in fact resided in London failed, and that therefore the question of his residence was determined by the opening words of section 74, subsection (3) ; in other words, he must be presumed to reside in the place where the offence was committed.

In those circumstances it seems to me that these justices came to an erroneous conclusion, and that this appeal ought to be allowed, and that the case should go back to the justices with the opinion of this Court upon this point.

Mr. Justice Shearman.—I am of the same opinion, and I base my judgment on the short ground that there was no evidence on which the justices could reasonably find that on July 18, 1926, Morrison's residence was in London.

I need not read again the sections of the statute which my Lord has read. It is clear that if the offence is committed in one jurisdiction that is deemed to be the place of residence until the onus has been shifted by the persons who oppose that presumed residence by showing in fact that there is a residence somewhere else. Ever since the case of *Stoke-on-Trent Corporation v. Cheshire County Council* ([1915] 3 K.B., 699) it has been well settled, and remains the settled law, that for the purpose of this statute "residence" means actual residence. The argument has been used that that can never mean constructive residence. When you look at that case, and other cases, it is however clearly laid down that a short temporary residence or holiday visit does not create a residence, and therefore it may be that a constructive residence may exist in one sense of the word when somebody has left the place where he sleeps and eats—his real home—for a few days' temporary visit elsewhere, as in the case of a person who is living with his parents and who runs away for a few days : it could not be said that because he had slept somewhere else the night before the offence that he was resident there, and indeed facts of that nature were given in evidence in the *Stoke-on-Trent* case (*supra*), to which I have referred.

The facts found by the magistrates in this case are shortly these. This boy, who was illegitimate, had lived, as far as they could trace him back, at a boarding house at the expense of his mother for some years ; he had then been for a week or two in the house where his mother was living with her then husband, while the husband was away, and he had been for a month living in as a servant of a club. The magistrates then go on to find that he had been definitely taken away by his mother from that job and sent to the country for a temporary visit down in Wiltshire. The magistrates, looking at the whole evidence, when they found that the mother and her husband had left the country, stored their furniture, and sold their house, held in plain English words that at the time when he was sent into the country to his grandmother the boy had no home. It seems to me idle to contend that, having no place in London to go back to, and no residence or address, he had got at that time, on July 18, a residence in London, when the magistrates found that his employment and his home in London had both been got rid of definitely and finally, and that he had no home in London.

On those facts, therefore, it seems to me that the magistrates were wrong. It may well be that they could have found that this boy never acquired a new residence by living at Froxfield, but as the statute says that he must be deemed to be living there until it is proved that he had a residence somewhere else, as soon as it is proved that he had no residence anywhere else, the statutory residence comes into effect.

In my view, therefore, the case must go back to the magistrates with the intimation of our opinion that they were wrong.

Mr. Justice MacKinnon.—I agree. The material date here is July 18, 1926. If the question had arisen, apparently, a short time previously, there was ample evidence that a short time previously the boy was resident in London. It is no doubt rather difficult as an intellectual feat to clear out of one's mind the facts as they were a month before, but I agree that the facts show that there was no evidence that on July 18 he resided in London.

[Solicitors—Mr. T. Bullivant ; Messrs. Sharpe, Pritchard and Co., for Mr. W. L. Bown, Trowbridge.]

House of Lords.
(Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Carson, and Lord Blanesburgh.)
1927.
May 27.

HARNETT v. FISHER.*

Lunacy — Certification—Negligence—Detention under reception order—Statute of Limitations —Limitation Act, 1623 (21 Jac. I., c. 16), ss. 3, 7—Lunacy Act, 1890 (53 and 54 Vict., c. 5), s. 331—Public Authorities Protection Act, 1893 (56 and 57 Vict., c. 61), s. 1.

The plaintiff was in 1912 certified as a lunatic by the defendant, a medical man, under s. 4 (2) of the Lunacy Act, 1890, and a reception order was then made, under which the plaintiff was detained and was taken to a licensed house. He was kept under detention until October, 1921. In an action brought in May, 1922, for negligence in giving the certificate the defendant denied negligence and pleaded the Limitation Act, 1623, s. 3, which bars actions on the case six years after the cause of action. The jury found that when the certificate was given the plaintiff was not of unsound mind and that the defendant did not use reasonable care, and they awarded the plaintiff damages.

Held, that the action was barred by s. 3 of the Act of 1623 and the plaintiff could not rely on the protection given by s. 7 of that Act to a person who when the cause of action accrued was *non compos mentis,* inasmuch as the jury had found that at that time he was not of unsound mind.

Per Lord Blanesburgh : The only statute of limitations applicable was the Public Authorities Protection Act, 1893, and the action was barred by the six months' limitation imposed by s. 1 of that Act, which had the effect of reducing to six months, from the date of the plaintiff's release, the limitation of twelve months imposed by s. 331 of the Lunacy Act, 1890, since the apparent total repeal of s. 331 of the Act of 1890 by the Act of 1893 was in reality only partial.

Decision of the Court of Appeal (42 *The Times* L.R., 745 ; [1927] 1 K.B., 402) affirmed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 745 ; [1927] 1 K.B., 402) dismissing an appeal by the plaintiff from the verdict and judgment entered for the defendant (the respondent) at the trial of the action before Mr. Justice Horridge and a special jury (42 *The Times* L.R., 486).

The action was brought by the appellant, Mr. William Smart Harnett, farmer and fruitgrower, of Springfield, Newington, near Sittingbourne, Kent, for damages against the respondent, Dr. Holdrich Fisher, of High-street, Sittingbourne, a duly qualified medical man, for negligence in signing a medical certificate under the Lunacy Act, 1890, to the effect that the appellant was a lunatic and a proper person to be taken charge of and detained under care and treatment.

The certificate was signed on November 10, 1912, and the writ in the action was issued on May 31, 1922.

The appellant alleged that by reason of the respondent's negligence the appellant was detained as a lunatic for nearly nine years from November 10, 1912, until October 15, 1921.

The respondent pleaded (*inter alia*) that he acted in good faith and with reasonable care, that he would rely on section 330 of the Lunacy Act, 1890, and, further, that the action was barred by the Statute of Limitations (21 Jac. I., c. 16).

The general facts of the case are fully stated in the report of the case of *Harnett v. Bond* (41 *The Times* L.R., 509 ; [1925] A.C., 669).

At the conclusion of the trial Mr. Justice Horridge put certain questions to the jury which, with the answers thereto, were as follow :—

" (1) Was Mr. Harnett of unsound mind on November 10, 1912, when he was certified by Dr. Fisher ?—No.

" (2) Did Dr. Fisher act with reasonable care in certifying him ?—No.

" (3) Damages ?—£500."

After argument the Judge gave judgment for the respondent, ordering that verdict and judgment should be entered for him on the ground that, the jury having found that on November 10, 1912, the appellant was a sane man, the appellant's right of action was barred by the Statute of Limitations. That judgment was affirmed by the Court of Appeal (the Master of the Rolls, Lord Justice Warrington, and Lord Justice Scrutton), subject to a variation on the question of costs.

The appellant appeared in person ; Mr. Alexander Neilson, K.C., and Mr. T. Carthew appeared for the respondent.

The appellant, in opening the appeal, contended that the plea that the action was barred by the Statute of Limitations failed on several grounds. First, the question of *non compos mentis,* being a question of status, was a question of law rather than of fact. Although he was in fact sane, he was legally a lunatic, and as he was under all the disabilities of a lunatic so he was entitled to all the privileges. Secondly, he pleaded estoppel. The respondent had certified that he (the appellant) was insane, and could not now be heard to say that he was sane. Thirdly, the appellant pleaded restraint. Although he had always been desirous of bringing the action, he could not do so without assistance while he was under detention. During that period time did not run against him because he was prevented, by circumstances over which he had no control, from bringing the action. Nor was there any person who was likely to assist him in taking proceedings. His brother would not, as it was on his petition that he was detained as a lunatic ; nor would his wife, who was appointed receiver of his property, as she wanted to get him certified ; nor would Dr. Adam, at whose house he was detained, for he refused to forward a letter which he had written to his solicitor.

The appellant, continuing, said that his first point was that, though in 1912 he was sane in fact, he had the legal status of *non compos mentis* and suffered all the disabilities arising from that status. He was therefore entitled to the privileges of that status and fell within the exception in the Statute of Limitations. In support of this contention he reviewed the facts relating to his detention as a lunatic down to 1916, the earliest period at which this action could have been begun, and showed that he was prevented, first, by Dr. Adam, in whose charge he was, and, afterwards, by the Master in Lunacy from communicating with his solicitor and taking legal proceedings. There

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

was no reason for that course. He was reported as well conducted and in good health, and he had ample means. His income was about £1,500 a year. Also, he was never allowed to know the grounds on which he was certified and there had been no re-certification as the statute required. On that ground also he was entitled to his discharge. In the previous case of *Harnett v. Bond* (*supra*) Dr. Bond had pleaded the Statute of Limitations, but the Attorney-General, on behalf of the Crown, refused to take advantage of that plea as he did not think it was right to do so.

He (the appellant) was *de facto* in precisely the same position as if he had really been a lunatic. This was illustrated by the decision of the House in *Harnett v. Bond* (*supra*), which raised a question as to the order for leave of absence under which he left Dr. Adam's house on December 12, 1912. That order empowered Dr. Adam to take him back before the expiration of his leave if his mental condition required it. That, it was contended, meant if his mental condition in fact required it, but Lord Cave took a different view and held that the medical officer in whom the power to retake was vested was the judge of his mental condition.

His next point was estoppel. The respondent could not be heard to say that the appellant was not a lunatic, because both in his certificate and in his evidence he maintained the contrary, and the respondent repeated that contention in his case in this House (*Bloomenthal v. Ford*, 13 *The Times* L.R., 240; [1897] A.C., 156; *North Eastern Railway Company v. Wanless*, L.R., 7 H.L., 12). He, a Kentish farmer, was placed in an embarrassing position by the action of the respondent, and he could not use his faculties in the same way as he might otherwise have done.

His third point was restraint. Time did not run against him while he was under detention (*Stedman v. Hart*, Kay, 607, at p. 611). He was impeded in his action by circumstances over which he had no control. Section 82 of the Lunacy Act, 1890, showed that the Legislature did not contemplate that a person detained as a lunatic could bring an action during detention. Time would not run against him until he knew the facts; but he never saw the respondent's certificate until 1921, when he was free (see *Molloy v. Mutual Reserve Life Insurance Company*, 22 *The Times* L.R., 525). It might be argued that he might have taken proceedings when he was out on leave in 1912, but such proceedings would have been stayed, because the action would have had to have been brought by a next friend and he had no one whom he could ask to be his next friend. Also, if he had issued a writ he could not have put in a statement of claim, for he had never seen the certificate; and, lastly, he would have been taken back to the asylum. It was contrary to the intention of the Legislature that he should be deprived of his legal rights and should have no help at all. There was ample justification for giving judgment in his favour on grounds both of law and of justice. The House would be slow to apply the statute to defeat an honest claim (*Boatwright v. Boatwright*, L.R., 17 Eq., 71, at p. 74). If he had made out a *prima facie* case for saying that the Statute of Limitations did not apply, he proposed to deal with two other contentions raised by the respondent: (1) that he (the respondent) owed no duty to the appellant to exercise reasonable care; and (2) that the detention was due to the independent order of the justices and not to the certificate. On both those points the Courts below had decided in his (the appellant's) favour.

Mr. Neilson, in opening for the respondent, after expressing his appreciation of the moderation and restraint with which the appellant had conducted his case, said that the question turned ultimately on the construction of the Limitation Act of 1623.

Lord Blanesburgh suggested that that Act had nothing to do with the matter. Section 331 of the Lunacy Act, 1890, prescribed a special period of limitation in the case of an action brought under section 330, and that period was one year after release. On that hypothesis the appellant's action was not out of time, as it was brought seven months after he regained his liberty. It was true that section 331 was repealed by the Public Authorities Protection Act, 1893, but there was a question as to the extent of that repeal (Halsbury's Laws of England, vol. XIX., ¶ 365). Assuming that the repeal operated, the Public Authorities Protection Act, 1893, prescribed a special limitation of six months, and on that hypothesis the appellant was out of time; but it had been held that that Act required to be pleaded and that the respondent had not done.

Mr. Neilson then formally applied for leave to amend his pleadings by pleading the Public Authorities Protection Act, 1893, and was provisionally allowed to continue his argument on the footing that leave had been granted. He said that the act complained of was clearly an act done in pursuance or execution or intended execution of an Act of Parliament within the meaning of the Public Authorities Protection Act, 1893, and on any view of that Act the appellant was out of time.

The certificate only came into existence for the purpose of the reception order, and was something done in the execution of the statute. The cases of *Kent County Council v. Folkestone Corporation* (21 *The Times* L.R., 269; [1905] 1 K.B., 620) and *T. Tilling, Limited v. Dick, Kerr and Co., Limited* (21 *The Times* L.R., 281; [1905] 1 K.B., 562), were distinguishable because the act there complained of was not done in pursuance of a public or statutory duty. Alternatively, this action was a pure action for negligence. There was no distinction between this kind of action and any other action for breach of duty, and there was nowhere anything to suggest that the statute of James had been repealed. It was true that the expression "want of reasonable care" was the language of section 330 of the Lunacy Act, 1890, but that was the common way of describing negligence.

Lastly, it was not the giving of the certificate which caused the detention, but the order of the justice. That was the view of Lord Reading in *Everett v. Griffiths* (37 *The Times* L.R., 481; [1921] 1 A.C., 631), which ultimately reached this House. That view was founded upon *Thompson v. Schmidt* (8 *The Times* L.R., 120), and it was accepted by Lord Justice Scrutton. It was true that when *Everett v. Griffiths* (*supra*) was before this House Lord Finlay expressed his disapproval of that view, but the decisions of the Courts below were affirmed on other grounds, and Lord Finlay's observations were *obiter* only. In his (Mr. Neilson's) submission it was the act of the justice which brought about the appellant's detention. On those grounds the judgment of the Court of Appeal should be sustained.

The appellant, in reply, said that at the trial he claimed no damages for detention; he simply claimed for wrongful certification.

The House took time for consideration.

Viscount Sumner.—My Lords: The respondent, a country doctor in Kent, was asked by another doctor, an old friend of his, to examine his patient,

the present appellant, with a view to certifying his opinion of his mental state, and the respondent consented to do so. From a window he watched the appellant for a short time in the street and took note of his demeanour, and subsequently he made an attempt to get into conversation with him. In the result he signed a certificate in the form required by the Lunacy Act, 1890, in which he pronounced the appellant to be of unsound mind. The appellant's brother, who presented the necessary petition for a reception order, took this certificate and that of the other doctor before-mentioned to a justice of the peace, who thereupon made the order and the appellant was placed in confinement as a person of unsound mind not so found by inquisition. All this happened on November 10, 1912.

Although on some subsequent occasions the appellant regained his liberty to a limited extent, he remained under detention till October 15, 1921, when he made his escape and remained at large till a sufficient period had elapsed to prevent his being again detained without further certification and a further order. From that time he has been at liberty. On his application the Master in Lunacy on December 12, 1921, discharged the receivership order over his property and income, which had been made on July 17, 1913, and on May 31, 1922, he began the present action against the respondent.

The statement of claim alleged negligence as a medical man in connexion with the examination and the certificate, and claimed damages resulting therefrom in respect of the entire period of almost nine years' detention. Negligence was alleged under two separate heads: (1) an inadequate examination, made without due care, and after perfunctory and momentary observations of the plaintiff's demeanour; and (2) certification without due consideration and on insufficient grounds and an incorrect recital, in the certificate, of the facts, which he purported to have observed himself. This latter allegation really meant that the facts stated in the certificate were not true, not that it did not correctly set out what the respondent alleged that he had in fact observed. No point appears to have been made at the trial that the respondent had been careless in the wording of the certificate, as distinguished from carelessness in ascertaining the grounds for it.

The original defence, in addition to traverses, relied specifically on sections 330 and 331 of the Lunacy Act, 1890. A formal amendment three years later pleaded 21 Jac. I., c. 16. An informal notice of reply was subsequently given by the plaintiff alleging (*a*) that during the period of his detention he was, within the contemplation of that Act, *non compos mentis* or was to be treated as such in law and in fact under the circumstances alleged in the statement of claim, and (*b*) that the defendant, whose certificate had caused his prolonged detention, ought not to be heard to allege that the claim was barred by lapse of time or that the plaintiff was *compos mentis* on November 10, 1912.

On these pleadings the cause went to trial before Mr. Justice Horridge and a special jury in Middlesex, and in answer to the learned Judge's questions the jury found as follows:—Was the plaintiff of unsound mind on November 10, 1912?—No. Did the defendant act with reasonable care?—No. Damages £500. No question was put as to the good faith referred to in section 330 of the Lunacy Act, 1890. Thereupon judgment was entered for the defendant on the ground that the action was statute-barred under the Act of 1623, but the verdict has not been challenged. The Court of Appeal unanimously affirmed this judgment. Hence this appeal.

My Lords, the respondent has not for present purposes disputed that a cause of action would arise at common law as for breach of duty towards the appellant, if the respondent was actually wanting in reasonable care in his examination and in forming his conclusion as to the appellant's state of mind. I need therefore express no opinion on this question.

The ground of the decision of both Courts below may be tersely put thus. The jury found conclusively that on the day of the examination the appellant was of sound mind, and he is not shown ever to have been otherwise. If, then, the appellant never has been *non compos mentis* he could not bring himself within the disability section (section 7) of the statute of James, and the period of six years ran from November 10, 1912. He cannot be allowed to blow hot and cold and to say for the purposes of getting the verdict and damages that he was sane all along, and yet, for the purpose of meeting the plea of the statute, that he must nevertheless be deemed to have been insane so as to prevent time from running.

My Lords, the appellant, who appeared at your Lordships' Bar in person, not only conducted himself with great propriety and moderation, but laid his legal argument before your Lordships in a way which was equally of assistance to your Lordships and to his own case. He said briefly that under the Lunacy Act, 1890, and for its purposes, he was made a lunatic and treated in person and property accordingly, and that for any purpose of bringing the present action he was in fact to all intents as much disabled as if he had been *non compos mentis*. As a practical matter it would have been impossible for him to have begun his action till after he had made his escape. On a "liberal" construction, the statute should be read as bringing this state of things within the disability section.

To this I am afraid I must say, as was said by both Courts below, that the Act does not say so, and cannot be made to say so, without wresting it from its language in a way that is not permitted to us. The object of the Act is to protect defendants against belated claims—not merely those defendants who have a good defence and to that extent need no protection, but those also who have not or who, owing to lapse of time, can no longer count on making out a sufficient answer (*Perry v. Jackson,* 4 Term Rep., 516, at p. 519; *A'Court v. Cross,* 3 Bing., 329, at p. 332; *Tolson v. Kaye,* 3 B. and B., 217, at p. 222). The present action is an action on the case, and, being within the Act, is *prima facie* statute-barred, unless the appellant can bring himself within the only words in the disability section which touch him, namely, *non compos mentis*. What those plain words mean is further shown, if that be necessary, by the words used to express the opposite state, viz., "of sound memory." They describe an actual mental condition, which the jury's word "sane" negatives, and not a treatment imposed or a disability suffered, because the plaintiff has been wrongly supposed to be in that mental state, by whosesoever fault, even that of the defendant himself, this may have been brought about. On one occasion, about a month after the reception order was made, the appellant was allowed to leave the asylum provisionally and was actually at large for some two days, and after his return there he was in frequent communication with his solicitor and occasionally saw him personally. I think, however, that one may accept the statement that even the issue of a writ against the respondent was beyond

his power, much as it would have been if, though sane, he had been bedridden and in poverty, but in the latter case no one could doubt that his disability was not one of those named in the section. Neither will it do, if he was called insane when he was really sane. The question is not, as the appellant put it, of the status of a lunatic, imposed on him after the making of the reception order, but of his mental condition of sanity or insanity, and this has been finally disposed of in his favour by the verdict. I am not concerned to justify what the Legislature has enacted or to regret that it has gone no further to assist persons in the appellant's position. I therefore agree entirely with the conclusion of the Court of Appeal.

After the appellant had concluded his argument a question was raised by one of your Lordships, which, though it had not been raised before either here or below, is of much importance. It was whether the right statutory limitation had been relied on. The Lunacy Act of 1890 provided in section 331 that any action, brought by any person who had been detained as a lunatic, against any person for anything done under the Act, must be brought within 12 months after the detained person's release. If this is the Act which applies, the action was brought in time. This section, however, is included in the schedule of repeals attached to the Public Authorities Protection Act, 1893. A question has been raised, but not I think decided, as to the extent to which this repeal goes, and it is said that, although the terms of the Act of 1893 seem at first sight to provide for an absolute repeal, the true reading of it is that section 331 is kept alive for the purpose of claims against persons who are within section 331 but are not among those protected by the Act of 1893. In that case, assuming that these later limitation sections would preclude the application of the general Act, either section 331 remains in force and this action was begun within time, or, if the defendant is within the ambit of the Act of 1893, the limitation which it contains, dating as it does from the time when the cause of action accrued, would not be available to protect the respondent, because that Act had not been pleaded.

I think it was the opinion of all your Lordships that leave to amend by pleading the Act of 1893 ought to be granted to the respondent in the circumstances, the only question to be settled now being that of the terms, if any, to be imposed, if it were necessary to hold that the defendant was within the protection of the Act of 1893, in so far as he was sued for any act done in pursuance of the Lunacy Act, 1890, or in respect of any neglect in the execution of that Act or of any public duty; but the question would further arise, How far, if at all, is he thus sued in these proceedings?

I am strongly of opinion that no terms should be imposed as a condition of the grant of this leave. By section 1 (*b*) of the Public Authorities Protection Act, 1893, a successful defendant is entitled as of right to costs of the action as between solicitor and client. It seems to me that the defendant is not more in fault in overlooking the Act of 1893 than his opponent. They were in equal ignorance, and not they alone. Nobody thought of this point at all. In the case of limitation sections, passed for the protection of defendants, it ought not to be presumed that a second provision constitutes an implied repeal of the first *pro tanto*, unless their respective terms are inconsistent with one another, and a limitation to 12 months from the alleged lunatic's restoration to liberty is not inconsistent with a term of six years from his first detention. As to the Act of 1893, the question is, whether the defendant was acting under it at all. If, though I should not concede it without hearing argument on the point, the language and purpose of the Act of 1893 or that of 1890 require that the periods of limitation there given are to be substituted for and are exclusive of those given in the statute of James, I think that the plaintiff, instead of arguing the statute of James from Court to Court, ought to have contended at the outset that it did not apply, and that the defendant's choice lay between an Act which did not help him and an Act which he had not pleaded. Other terms as to leave to amend might then have been timely and fair. I think it is enough, if, so far as leave to amend is concerned, the result remains the same as if the Act of 1893 had not been brought into the discussion. After all, the defendant has not had the chance of getting solicitor and client costs at the trial.

It appears to me, however, that no amendment is needed, because it really is the statute of James that applies to this case. What is the action to which the Act of 1893 applies? It is one brought for doing or neglecting to do an act under any statute of the kind described, in this case the Lunacy Act, 1890. As far as the present action is concerned the only such act is signing the certificate in the prescribed form. When, however, we look at the statement of claim and still more at the substance of the case as proved at the trial and since alleged on two appeals, the gist of the action is not the signing of the prescribed form of certificate but the lack of care in examining into the appellant's mental state and in forming an adverse opinion about it. The negligence, for which the action was brought, could only arise in this connexion. The claim was not for breach of a statutory but of a common law duty. Negligence as a medical practitioner acting in the course of his private practice is what is charged against the respondent.

Any principle on which this cause of action could be sustained would be equally applicable if the defendant had signed nothing but had given his opinion to the magistrate orally. The rest is either a separate cause of action under the Lunacy Act, 1890, for which no damage could be recovered since the detention order was the order of the justice and not of the doctor, or is a mere item in the damages claimed for the negligence. It may be that in view of section 317 (2) of the Lunacy Act, 1890, the proceedings to be taken in case of mis-statements made in medical certificates under the Act are criminal proceedings only. In my opinion the present cause of action being on the case for an alleged common law breach of duty, the statute of James was the statute applicable. I think that, whether the pleadings are amended on the terms I suggest or not at all, this appeal ought to be dismissed with costs.

Lord Atkinson.—My Lords: This is an appeal from an order of the Court of Appeal, England, dismissing an appeal by the present appellant against the verdict found for the present respondent, and the judgment entered up thereon dated April 27, 1926. The appellant is a farmer, and fruit and hop grower, residing at Baroona, 19, Vale-road, Balham. The respondent is a duly qualified medical man who has for many years practised at Sittingbourne in the county of Kent. The appellant in his case sets forth his grievance and his alleged cause of action against the respondent in the following terms:—

"3. The writ in the action was issued on May 31,

1922, claiming damages against the respondent for negligence in certifying the appellant to be a lunatic and a proper person to be taken charge of and detained under care and treatment.

" 4. By his statement of claim delivered on July 12, 1922, the appellant alleged :—

" (*a*) That on November 10, 1912, his brother Arthur Harnett presented a petition to one R. G. E. Locke, a justice of the peace for the county of Kent, for an order for the reception of the appellant as a person of unsound mind into the licensed house of one Dr. G. H. Adam, at West Malling, Kent.

" (*b*) That the said petition was accompanied by a medical certificate made by the respondent in his capacity as a medical practitioner in which he alleged that he had personally examined the appellant and come to the conclusion that he was a lunatic and a proper person to be taken charge of and detained under care and treatment.

" (*c*) That by the said certificate the respondent had formed such conclusions on the facts and grounds therein set forth.

" (*d*) That the facts and grounds alleged in the said certificate were inaccurate in the respects set forth in paragraph 4 of the statement of claim.

" (*e*) That the said petition was also accompanied by a medical certificate made by Dr. F. W. H. Penfold, since deceased.

" (*f*) That on the same day, November 10, 1912, the said R. G. E. Locke made an order upon the said petition accompanied by the said certificates authorizing the said Dr. G. H. Adam to receive the appellant as a patient into his said licensed house.

" (*g*) That the same day, November 10, 1912, the appellant was received under the said order at Dr. Adam's said licensed house and thereunder there detained from November 10, 1912, until February 22, 1913, and thereafter detained under the said order at divers asylums and places registered or licensed for the reception of lunatics (more particularly specified in paragraph 8 of the statement of claim) until October 15, 1921, when he escaped."

The appellant is entirely in error in supposing or thinking that he was after February 22, 1913, detained in any asylum under the authority of the order of November 10, 1912. His subsequent detention was, by the House of Lords, held to have taken place under proceedings with which neither Dr. Adam nor the respondent were connected, and for which neither of them is responsible.

The appellant proceeds to aver—

" (*h*) That the respondent in making his said medical certificate was negligent and acted without reasonable care in the respects set forth in paragraph 9 of the statement of claim."

In paragraph 9 of the statement of claim the tort for which the appellant sues the respondent is described as follows :—

" 9. The defendant in making the said medical certificate acted without reasonable care in the respects following. There was no real examination of the plaintiff by the defendant for the purposes of the said certificate at all ; the examination alleged by the defendant in the said certificate was momentary, perfunctory, and a sham. The grounds upon which the defendant made his said certificate were entirely insufficient and the defendant gave the said certificate without proper consideration as to the sufficiency of the said grounds. Further the defendant gave the said certificate upon grounds which so far as they relate to facts indicating insanity observed by the defendant at the time of the alleged examination amount to nothing at all."

On October 13, 1922, the respondent delivered his defence. He admitted paragraphs 1, 2, 3, and 6 of the statement of claim, alleged that the facts stated in paragraph 4 were inaccurately set forth, and made no admission as to the allegations contained in paragraphs 7 and 8. As to paragraph 9 of the statement of claim he denies the allegation of fact therein contained and avers that in all the matters therein referred to he acted with good faith and with reasonable care and in pursuance of the Lunacy Act, 1890. He further states that he will at the trial of the action rely on section 330, subsection 1, and section 331 of the said statute. The respondent admits that the appellant was detained as a lunatic, but denies that the detention was at the places or for the periods referred to in paragraph 10 of the statement of claim, and further denies that such detention was due to any negligence on his part.

On December 16, 1925, the respondent, pursuant to an order of that date, amended his defence by adding the following paragraph :—

" The plaintiff's alleged right and/or rights of action did not accrue, if at all, within six years before the commencement of this action, and was and/or were barred by the Limitation Act of 1623, 21 Jac. 1, c. 16."

On March 3, 1926, the appellant's solicitor, Mr. Harry Coulson, wrote to the respondent's solicitors, Messrs. Le Brasseur and Oakley, a letter, informing them that as there had not been time to file a reply to the new defence it was the appellant's intention to apply to the Judge at the trial for leave to contend by way of reply to the amended defence—

" (*a*) That at the time of the accrual of the plaintiff's cause of action herein and until October 15, 1921, he was, within the contemplation of the statute 21 Jac. 1, c. 16, *non compos mentis* or to be treated as such in law and in fact, having regard to the matters pleaded in the statement of claim—and

" (*b*) That for the purpose of his said plea of the said Statute of Limitations, the defendant, by reason of the matters pleaded in the statement of claim, cannot be heard to say that the plaintiff was *compos mentis* on November 10, 1912, when the said certificate was given by the defendant, the said reception order was made by the said Locke and/or the plaintiff was received into the said licensed house of the said Dr. G. H. Adam, and/or between the said 10th November, 1912, and the 15th October, 1921."

In the 9th paragraph of the appellant's case it is stated that at the trial the appellant through his counsel agreed to confine his claim for damages for negligence to the period from November 10, 1912, to the time the plaintiff was received and detained by Dr. G. H. Adam at West Malling. The action was tried before Mr. Justice Horridge and a special jury for several days in the month of April, 1926. The learned Judge left the three following questions to the jury :—

" (1) Was the plaintiff of unsound mind on the 10th November, 1912 ? to which they answered, No.

" (2) Did the defendant act with reasonable care ? to which the jury also answered, No.

" (3) What damages, if any ? and they answered £500."

The respondent does not seek to have that verdict set aside.

Thereupon the learned Judge directed a verdict and judgment to be entered for the respondent on the ground that the Limitation Act, 1623, 21 Jac. I., c. 16, was a good defence at law.

The Court of Appeal unanimously held that the appellant's action in this case fell within the third

section of the statute of Jac. I., which definitely provides that such an action is barred after the lapse of six years from the accrual of the cause of action. The cause of action in this case admittedly accrued on November 10, 1912. And the action in respect of it was not instituted till May 31, 1922, nearly ten years afterwards.

It is unnecessary to set forth the words of the statute.

The appellant contends, however, that notwithstanding that the jury have found that he was, on November 10, 1912, of sane mind, and have awarded him £500 damages in respect of the detention he has suffered owing to the negligence of the defendant in giving a certificate to the effect that he was insane, he was in fact *non compos mentis* during the whole time from November 10, 1912, till October 15, 1921, when he regained his liberty ; and that therefore the time limit of six years only ran against him from the latter date. The Court of Appeal without calling on counsel for the respondent dismissed the appeal. They varied the judgment of Mr. Justice Horridge on the question of the costs of those issues on which the appellant had succeeded. On this no point arises in the present appeal, and in all other respects they affirmed Mr. Justice Horridge's decision. Their Lordships concur with the Court of Appeal. They think their decision was perfectly sound and right on the question raised before them. During the progress of the hearing in this House, however, attention was called by one of its members to the question of the possible application of the provisions of the Public Authorities Protection Act, 1893, to certain provisions of the Lunacy Act, 1890, affecting in some respects its administration. This is a matter of such importance that I think it should be dealt with. The former of these statutes is entitled : "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

The first section enacted :—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provision shall have effect : (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . ." The final clause of this section enacted : "This section shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority."

By section 2 it was enacted : "There shall be repealed as to the United Kingdom so much of any public general Act as enacts that in any proceeding to which this Act applies—(*a*) the proceeding is to be commenced in any particular place, or (*b*) the proceeding is to be commenced within any particular time . . . and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned. . . ." The Act of 21 James I., c. 16, is not mentioned in this schedule. The Lunacy Act of 1890 is mentioned in it, but section 331 of that Act alone is repealed and the repealed section only provided that any action brought by any person who had been detained as a lunatic against any person for anything done under the Act should be commenced within 12 months next after the release of the party bringing the action. This section would not apply to the appellant even if not repealed, as he was not released from Dr. Adam's licensed house where he was detained, but from which he escaped.

The aim and proper construction of this Act of 1893 have been many times considered and ruled upon by this House and many other legal tribunals both in England and in Scotland. One point has been definitely established, that the statute does not necessarily apply to all the acts of public companies, corporations, or *quasi* legislative bodies which are *intra vires*. In the case of *Bradford Corporation v. Myers* (32 *The Times* L.R., 113 ; [1916] 1 A.C., 242) the construction of the statute was most carefully considered, and a great number of cases reviewed. There the corporation, a municipal body, were authorized by Act of Parliament to carry on the undertaking of a gas company, bound to supply gas to the inhabitants of their district, and empowered to sell coke produced in the manufacture of the gas. The defendants contracted to sell and deliver to the plaintiff a ton of coke. By the negligence of the corporation's agent the coke was shot through the shop window of the purchaser. More than six months after this accident the purchaser commenced an action against the corporation for negligence.

The Court of Appeal held that the corporation were not entitled to the protection they claimed. They then appealed to this House.

Lord Buckmaster, then Lord Chancellor, in delivering judgment, after expressing rather scanty approval of the ground of decision in the case of *Sharpington v. Fulham Guardians* (20 *The Times* L.R., 643 ; [1904] 2 Ch., 449), which excluded an action for breach of contract from the protection of this statute, in a clear, pithy and pregnant passage of his judgment, described the nature and character of the acts which the statute was designed to protect, and said : "While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duy, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply. This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products ; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied ; nor had any member of the public the right to require the local authority to contract with him. The act complained of arose because one of the servants of the appellants, acting in the course of an errand on which they had power to send him, but on which they were not bound

in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens caused damage by his personal negligence. In my opinion an action for such negligence is not within the class of action contemplated by the statute."

To the same effect is the case of *Clarke v. St. Helens Borough Council* (85 L.J., K.B., 17).

An effort was made to distinguish this case from the case of *Bradford Corporation v. Myers* (*supra*), which I do not think was very successful.

I now turn to the provisions of the Lunacy Act of 1890, for the purpose of considering the nature, scope and aim of those of its provisions dealing with the proceeding of which the appellant was the subject.

It may well be that a medical man who treats a patient, or purports to express an opinion on that patient's bodily or mental state of health, is bound to do the work he has undertaken to do with reasonable care and skill. In this case it was alleged by the appellant and found by the jury that the respondent was guilty of negligence in giving a certain certificate, dated November 10, 1912, pursuant to the provisions of section 4 of the Lunacy Act, 1890, upon which, coupled with a similar certificate of the same date given by Dr. Penfold, since deceased, both accompanying a petition presented to Richard Good Edward Locke, the justice of the peace for the county of Kent specially appointed as the judicial authority under section 6, subsection 1, of the Lunacy Act, 1890, the latter gentleman made an order authorizing Dr. G. H. Adam to receive the appellant as a patient in his licensed house at West Malling. This order contains a declaration by the said R. G. E. Locke to the effect that he had personally seen the appellant before making the order.

Negligence is a breach of duty, but the question is to whom this duty to use reasonable skill and care is owed. This action is founded on the assumption that it was owed to the appellant. The additional question is whether the alleged act of the defendant in abstaining from exercising due and reasonable skill and care in granting his certificate was an act done in pursuance or execution or intended execution of an Act of Parliament, or of any public duty or authority. These words must, I think, bear the meaning attributed to them by Lord Buckmaster in *Bradford Corporation v. Myers* (*supra*, at p. 247). The language of the Act does not cover all the acts which a local authority has power to perform. It is because the act is one which is an act either in the direct execution of a statute or in discharge of a public duty or in the exercise of a public authority that it is covered.

By section 4 of the Lunacy Act of 1890 it is enacted that in a case such as this, "a person, not being a pauper or a lunatic so found by inquisition, shall not be received and detained as a lunatic in an institution for lunatics or as a single patient unless under a reception order made by the judicial authority hereinafter mentioned." The order is to be obtained upon a private application by petition accompanied by a statement of particulars and by two medical certificates on separate sheets of paper. The statement of particulars accompanying the petition is in this case very full and convincing.

"Upon the presentation of the petition" (section 6) "the judicial authority shall consider the allegations in the petition and statement of particulars, and the evidence of lunacy appearing by the medical certificates, and whether it is necessary for him personally to see and examine the alleged lunatic, and if he is satisfied that an order may properly be made forthwith he may make the same accordingly, or if not so satisfied, he shall appoint as early a time as practicable, not being more than seven days after the presentation of the petition for the consideration thereof, and he may make such further or other inquiries of or concerning the alleged lunatic as he may think fit."

The statement of particulars accompanying the petition may be, and in this case is, very important, referring, for instance, to the lunacy of relatives, but one finds that by section 317 of the statute the petitioner, and the makers of a reception order, or of a medical or other certificate, or of any statement in respect of bodily or mental condition, are all placed in the same boat, and are all made guilty of a misdemeanour, if in any of the above-mentioned documents they make a wilful misstatement of any material fact.

It is difficult to see on what principle a petitioner who is guilty of negligence in framing his statement of particulars, but not guilty of misstatement of any material fact, should not be liable to be sued for that negligence as the doctor may be who negligently frames his certificate on examining the alleged lunatic. If the latter comes within the statute of 1893 the former would seem necessarily to be within it also, as he is within the 317th section of the statute of 1890.

Section 28 of the Act of 1890 is headed "Requirements of Reception Orders and Medical Certificates."

It enacts that a medical certificate shall be made and signed by a medical practitioner. It is to state the facts upon which the certifying medical practitioner has formed his opinion that the alleged lunatic is a lunatic, distinguishing facts observed by himself from facts communicated by others. It provides that a reception order is not to be made upon a certificate founded only on facts communicated by others. By section 28 (4) it is provided that every medical certificate made under and for the purposes of the Act shall be evidence of the facts therein appearing, and of the judgment therein stated to have been formed by the certifying medical practitioners on such facts, as if the matters therein appearing had been verified on oath. This reveals the true nature and function of the medical certificates. They are pieces of evidence just as the statements of the petitioner are pieces of evidence, and are supplied to the judicial authority to help it to decide on the matter of the petition. Many precautions are taken to make this evidence as reliable as possible. The succeeding sections set out these precautions.

Section 29 requires that the person or persons giving the certificate should have personally examined the alleged lunatic. Where two medical certificates are required each medical practitioner must examine him separately. Section 31 provides that one of the medical certificates accompanying a petition shall, where practicable, be under the hand of the usual medical attendant of the alleged lunatic. If that cannot be done the reason is to be stated in writing to the judicial authority to whom the petition is presented, and is to be deemed part of the petition.

Section 32 (1) provides: "No person shall be received or detained as a lunatic in any institution for lunatics or as a single patient where any certificate accompanying the reception order has been signed by any of the following persons:—

"(*a*) The manager of the institution or the person who is to have charge of the single patient.

"(*b*) Any person interested in the payments on account of the patient.

"(c) Any regular medical attendant in the institution. . . ."

It is by section 33 further provided that "a medical practitioner who is a commissioner or a visitor shall not sign any certificate for the reception of a patient into a hospital or licensed house unless he is directed to visit the patient by a judicial authority under this Act, or by the Lord Chancellor, or a Secretary of State, or a committee appointed by a Judge in lunacy." Thus everything that could well be done has been done to detach the medical practitioner who signs one of these certificates from the staff of the institution in which the lunatic is to be confined. He cannot have any interest in the payments made on account of any patient confined. In one sense the general public in a community have an interest in the ability, skill, qualification and effectiveness of the medical men residing and practising in that community. The aid of one or more of these can, in any case if need be, be obtained by private contract, but in the matter of the reception of an alleged lunatic in an asylum or licensed house, the giver of a certificate owes no duty to the general public or to any public institution or authority *whatever*. He is not an employee of the State or of any municipal body carrying on certain services for such bodies. He is simply engaged as a medical man to give an opinion as to a patient's state of health, as he would be to diagnose the state of health of any patient who in his daily practice called upon him to prescribe for him.

I therefore am clearly of opinion that the Public Authorities Protection Act of 1893 does not apply to the appellant's action, and that his remedy is barred by the Act of 21 James I., and that the appeal should be dismissed.

LORD CARSON.—My Lords: I agree with the reasons given and the conclusions arrived at by the noble and learned Viscount on the Woolsack. At the same time I have to admit that it seems to be a strange result that the fact that the appellant proved to the satisfaction of the jury that he never was *non compos* should enable the respondent to escape from the damages awarded against him for his negligence, but I can see no answer to the plea of the statute of limitations on which the respondent relies.

LORD BLANESBURGH (read by LORD CARSON).—My Lords: The appellant was well entitled to Mr. Neilson's tribute of respect for the moderation and ability with which he presented his case at your Lordships' Bar. By verdicts of two juries, he, in Lord Buckmaster's words in *Harnett v. Bond* (41 *The Times* L.R., 509; [1925] A.C., 669), "while a sane man has been imprisoned in a private lunatic asylum and it follows that he has suffered a grievous wrong for which no money payment can provide an adequate compensation." His moderation and ability displayed in this case only served to disclose as in a flash the extent of that wrong. But great as it has been, it can furnish no justification for an order upon the respondent to make the money payment which the jury here have awarded against him, if in truth the appellant's claim against the respondent is out of time and the objection that it is has been properly taken.

And, my Lords, if the statute of James applies to this case at all, it must, I think, be agreed that the action is out of time. The argument of the appellant upon the construction of that Act, sensible and forcible though it was, left, I thought, almost untouched the reasoning and conclusions both of Mr. Justice Horridge and of the Court of Appeal.

But the appellant's argument raised, in my mind at all events, the gravest doubt whether a limitation statute to which such a construction was applicable could really have been left by the Legislature to govern the particular claim made by him in this suit. If it be the function of an appropriate limitation period to hold the scales evenly between plaintiff and defendant, the statute of James seemed to be singularly unsuited to a claim like the present—equally so, indeed, whether its true construction was that for which the appellant contended or that put forward by the respondent. On either view the statute must, if applicable, bring in not a few similar cases dire results in its train. If, for example, the appellant's contention were to be upheld that in such a case as this the duration of a plaintiff's *de facto* insanity imputed to him as a result of the defendant's certificate is, like a period of genuine insanity, to be excised from the limitation period, it would, indeed, be oppressive on a medical defendant acting, as the respondent here acted, in perfect good faith, that not within a short period after the disability ceased, but in a suit commenced six years later, he might be called upon to justify his actions, possibly almost, if not entirely, forgotten. If, on the other hand, during the same *de facto* disability, with consequences to a plaintiff as devastating and paralysing in their incidents and restraints as if he were in fact insane, time, as the respondent contends, was continuously running in favour of the defendant, it would only be necessary that the period of restraint should be sufficiently prolonged and the wrong done to the plaintiff in that respect sufficiently grievous for him to be deprived by the statute of all remedy, however unjustifiable or even malicious the defendant's acts might have been.

But the improbability that the Legislature had left a claim of this kind to be governed in the matter of limitation by a statute so clumsily inappropriate was shown also by considerations still more pertinent. The provisions of section 82 of the Lunacy Act of 1890 itself are even more significant in the same direction. By that section it is provided that the Secretary to the Commissioners shall, upon the discharge of a person who considers himself to have been unjustly confined as a lunatic, furnish to him upon his request, free of expense, a copy of the reception order and certificate or certificates upon which he was confined, and, if the order was made upon petition, also of the petition and statement of particulars upon which the reception order was made. That is to say, it is only upon his discharge that the person considering himself to have been unjustly confined is to be supplied with a copy of the certificate upon which his claim to redress in such an action as this depends. Could it have been supposed by the Legislature when enacting that section that the claim of the person so unjustly confined might by that time have become statute-barred? I did not think so, and thus was I led to inquire for myself whether some other period of limitation than appellant's position which the statute of James, had not been specially devised by the Legislature for a claim like this, a limitation period which would be consistent with the implications of section 82 and would be free from the injustice to those in the appellant's position which the statute of James, had it been left applicable, might bring in its train.

And, my Lords, I have, on examination, reached the conclusion that there is such a limitation period in fact specially prescribed by statute, and, relatively unimportant as in the present instance the result

may be to the appellant, the principle involved may be of such wide-reaching consequence in other cases that I make no apology for directing your Lordships' attention to the matter with some particularity.

My Lords, this action was, I think, correctly described by Mr. Justice Horridge in his considered judgment after the trial, as one by the plaintiff against the defendant, a medical man, for having without reasonable care on November 10, 1912, given a certificate under section 4 (2) of the Lunacy Act, 1890, that the plaintiff was a lunatic and a proper person to be taken charge of and detained under care and treatment. The claim really is one based upon the well-known case of *Hall v. Semple* (3 F. and F., 337) for damages due to the breach of the duty which, as there laid down, the defendant owed to the plaintiff under the Lunacy Act of 1890 not to give a certificate without exercise on his part of reasonable care. The statement of claim here, it is true, does not define the cause of action so precisely. The Lunacy Act, 1890, is not in terms there referred to and the suit may thus appear to be framed independently of that Act. But the allegations of the claim were not so regarded by the defendant, who, in paragraph 4 of his defence, alleges that in respect of the matters complained of "he acted in good faith with reasonable care and in pursuance of the Lunacy Act, 1890, and that in particular he will rely upon section 330, subsection 1, and section 331 thereof at the trial."

The issue so raised was accepted. Upon it the whole trial proceeded. The plaintiff did not challenge the defendant's good faith. The defendant did challenge the plaintiff's sanity. The questions put to the jury accordingly were two: 1. Was the plaintiff of unsound mind on November 10, 1912? 2. Did the defendant act with reasonable care? To each question the jury answered, "No," and in answer to a third question they assessed the damages at £500.

My Lords, upon these findings two points were made before Mr. Justice Horridge by the defendant. The first was that *Hall v. Semple* (*supra*) was not good law and that the defendant owed no duty under the statute to exercise reasonable care—no duty upon the defendant apart from the statute, I may observe, was ever suggested. The second was that the cause of the plaintiff's detention as a lunatic was the independent order of the justice and not the certificate of the defendant. Both points were decided by the learned Judge against the respondent. Neither of them is raised by him now. The point under *Hall v. Semple* (*supra*) remains where it was left by this House in *Everett v. Griffiths* (37 *The Times* L.R., 481; [1921] 1 A.C., 631). There the correctness of that decision was assumed but not decided. Now its correctness is no longer challenged. The jury's verdict accordingly stands and the plaintiff's right to judgment under it is acknowledged, subject only to the question of limitation. That is the one issue before your Lordships, and upon that issue the questions that remain are, what statute of limitations applies, and has that statute been pleaded?

My Lords, in his original defence, the respondent pleaded only one limitation, section 331 of the Lunacy Act, 1890. The scope of that section is for present purposes important. It can perhaps best be appreciated if reference be had first to section 330 (1) which, as above stated, is also pleaded. That subsection provides that a person who, after the passing of the Act, *inter alia*, signs a certificate purporting to be a certificate under the Act "shall not be liable to any civil . . . proceedings . . . on any . . . ground if such person has acted in good faith and with reasonable care." It is, *inter alia*, with reference to such a certificate and such proceedings that section 331 provides that "any action brought by any person who has been detained as a lunatic against any person for anything done under this Act shall be commenced within twelve months next after the release of the party bringing the action," a provision, it will be noted, in entire consonance with section 82, to which reference has already been made.

Here I pause to mention that the corresponding section 105 of the Lunacy Act, 1845, then in force, was treated by Mr. Justice Crompton in *Hall v. Semple* (*supra*, at p. 358) as the appropriate limitation statute in a case like this. "It is provided," he says, "that no action shall be brought against any person for anything done in pursuance of the Act, unless the same shall be commenced within twelve months [next after the release of the party bringing the action]; and if this action had not been commenced within that period I should have thought that part of the section applied."

Section 331 of the present Act was accordingly well pleaded. But the section was repealed in 1893; a fact which apparently was overlooked when the defence was delivered. Presumably the repeal was subsequently discovered by the defendant's advisers, and under an order dated December 16, 1925, the defence was amended by adding a paragraph to the effect that the plaintiff's alleged rights of action were barred by the statute of James, the Limitation Act, 1623. In other respects, however, the defence remained unamended; section 331 of the Lunacy Act, 1890, is still pleaded in paragraph 4.

Now, my Lords, if I have correctly appreciated and faithfully recorded the true limits and scope of this suit as fought and decided, I cannot myself doubt that if section 331 of the Lunacy Act, 1890, had remained unrepealed, that section and it alone prescribed the only period of limitation to which this action was subject. Is then that position which goes back at all events to 1845 entirely lost now, although section 82 of the Act still remains in force. In my judgment, no. The section, although repealed, still speaks, albeit in modified terms. The repeal is effected by the Public Authorities Protection Act, 1893, an enactment whose purpose is to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory or other public duties, and difficult as it has been in many cases to ascertain the true effect of that enactment, no difficulty, I think, arises in this instance. It is only necessary to compare the provisions of section 331, which is expressly repealed, with the following provision of the Act of 1893 to see that that section still lives in an amended form. The words are these:—

"Where after the commencement of this Act any action . . . is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament . . . or in respect of any alleged neglect or default in the execution of any such Act . . .

"(*a*) The action . . . shall not lie or be instituted unless it is commenced . . . in case of a continuance of injury or damage within six months next after the ceasing thereof . . ."

I cannot doubt, my Lords, that in that amended form section 331 of the Act of 1890 repealed expressly by the statute still operates, applicable as before to the respondent's certificate, but shortening the period after what in the Act of 1890 in the case of a plaintiff who has been detained as a lunatic is termed his "release" to a term which without doubt or possible

question makes it a complete bar to the present suit. For, my Lords, while, if section 331 had been the section applicable, there might have been some question whether the detention for which the respondent was responsible came to an end within 12 months before the institution of the action—I myself, in agreement with my noble and learned friend Lord Atkinson, think it had come to an end long before—there can be no doubt at all that it came to an end more than six months before its institution. The appellant escaped finally from confinement on October 15, 1921, and this action was not commenced until May 31, 1922. In my judgment, therefore, the Public Authorities Protection Act, 1893, is the Statute of Limitations, and the only Statute of Limitations which applies to this action. If pleaded it would have been a complete answer. But it is not pleaded. Accordingly, unless leave is now given to the respondent to amend his defence by rectifying that omission, he has, in my judgment, no answer to this appeal.

But Mr. Neilson applied for leave to amend his defence in that respect should amendment be necessary. I entirely agree that in the circumstances leave to amend should be granted, and on terms which are not onerous. My Lords, these terms, if they rested with me, would be that as the price of the amendment the respondent should lose his costs of the appeal. I know that the objection was not taken by the appellant himself, but, if my view of the matter be right, the respondent, on his unamended defence, is in mercy, and the appellant has not had that opportunity of reconsidering his position, which he would have had if the true statute had been timeously put forward. If he had by a proper defence been made to realize that his action was out of time not because although he had suffered all the penalties of lunacy he was still to be regarded as sane, but because it was commenced too late after his escape, he might never have persisted in it at all. I cannot myself doubt that the appellant has at all events prosecuted this appeal mainly if not wholly by reason of the intolerable position, as he regarded it, in which the statute of James as interpreted below appeared to place him. To deprive the respondent of the costs of the appeal only would therefore appear to be not ungenerous to him.

My Lords, as will be seen, the appellant gains little by this finding in his favour. But other plaintiffs in his position may gain much. The view I have presented to your Lordships may be wrong. But if it is, a very serious state of things is thereby disclosed. For it results that section 331, prescribing a period of limitation at least as old as the Act of 1845 and sensible and fair in its operation has been repealed by a general Act with no corresponding provision substituted, and with the result that plaintiffs in the position of the appellant are now, for the first time as I think, relegated to the statute of James which is, as I hope I have shown, entirely inappropriate to their case. If this appeal fulfils no other useful purpose, it will at least have served to draw the attention of those engaged in the amendment of the Lunacy Laws to a matter which is not unworthy of their consideration.

VISCOUNT SUMNER.—My Lords, I desire to say that my noble and learned friend Lord Wrenbury concurs in the judgment which I have already read and in the motion about to be proposed.

[Solicitors—Mr. Harry Coulson; Messrs. Le Brasseur and Oakley.]

House of Lords.
(Viscount Dunedin, Lord Atkinson, Lord Wrenbury, Lord Phillimore, and Lord Carson.)

1927. May 23.

WOOLWICH CORPORATION v. ROBERTS.*

Local Government—Wages paid by borough council—Auditor's finding that wages were excessive—Surcharge—Discretion of council—Whether absolute—Requirement of reasonableness—Metropolis Management Act, 1855 (18 and 19 Vict., c. 120), s. 62.

In 1920 the Fulham conference of representatives of metropolitan borough councils recommended a scheme for a scale of wages to be adopted by such councils, and the appellants, the Woolwich Borough Council, adopted the scheme for employees other than those whose wages were regulated by trade union rates. The scheme established a minimum rate for the lowest grade of employees, and it did not provide for any sliding scale if any difference should arise in the cost of living. The Joint Industrial Council recommended another scheme which did provide a sliding scale according as the cost of living went up or down. The appellants then adopted the Industrial Council's scale, subject to this, that if it fell below the Fulham scale they adopted the latter. In 1924 the payments were greater than if the Industrial Council's scale had been strictly adhered to, and the district auditor surcharged upon the appellants those parts of the wage payments which were more than 12½ per cent. in excess of the Industrial Council's scale, the 12½ per cent. being allowed by him in respect of the appellant council's discretion in the matter. The appellant council obtained a rule *nisi* to quash the surcharge on the ground that under s. 62 of the Metropolis Management Act, 1855, they had a right to pay such wages as they might think fit.

Held, that the discretion conferred by the Act must be a reasonable discretion, and the district auditor was entitled to hold the wages payments to be so excessive as to make it his duty to interfere, and the rule *nisi* must be discharged.

Roberts v. Hopwood (41 *The Times* L.R., 436; [1925] A.C., 578) followed.

Decision of the Court of Appeal (90 J.P., 197) affirmed.

This was an appeal from an order of the Court of Appeal (90 J.P., 197) affirming an order of the Divisional Court, which discharged an order *nisi*, obtained by the appellants, for a writ of *certiorari* directing the removal into the King's Bench Division, for the purpose of being quashed, of certain disallowances and surcharges made by the respondent as district auditor on November 5, 1925.

The disallowances amounted to £8,000 and covered the wage charges included in the accounts of the appellant council for the year ending March 31, 1924,

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

and the surcharges related to the same matters. The items disallowed were those parts of the wage payments made by the council in the year 1923-24, which were more than 12½ per cent. in excess of the standard rates as recommended by the awards issued by the Joint Industrial (or Whitley) Council for the Administrative County of London and applicable to manual workers employed by local authorities. No disallowance was made in respect of the wages paid to the manual workers in technical grades as the appropriate trade union awards were followed in settling the amounts of these payments.

The amount paid in excess of the Joint Industrial Council awards came to £18,473 during the year. That was reduced to £8,000 (i.) by deducting the 12½ per cent. margin allowed for the council's discretion in the matter; (ii.) by disregarding all payments which were less than 3s. a week in excess of that margin; and (iii.) by giving the council the benefit of the doubt in any question arising in connexion with the grading of the workmen.

In 1919 the Fulham Borough Council convened a conference to which all the Metropolitan borough councils were invited to send representatives. The conference met in January, 1920, when representatives from 22 of the Metropolitan boroughs were present. At that meeting the conference, after full inquiry, agreed upon a scheme of grading and wages which they recommended for adoption by all Metropolitan borough councils.

In May, 1920, the appellant council adopted a scale of minimum rates of wages for such of their employees as were not engaged in any trade to which a trade union rate of wages applied. These minimum rates were arrived at by adopting the scheme recommended by the Fulham Conference, which was based upon a minimum wage of £3 10s. 6d. per week for the lowest grade of employees (called grade "A" employees). During the whole of the year in respect of which the disallowances and surcharges were made, this minimum rate was paid to grade "A" employees.

The respondent contended that the wage payments of the council in the year in question were so excessive as to make it his duty to interfere and that the wages disallowed were illegal and *ultra vires*.

The appellant council contended that the discretion vested in them by section 62 of the Metropolis Management Act, 1855, was not limited to the payment of such wages as the district auditor might consider necessary or reasonable and that, in the circumstances, the wages in fact paid by the council were lawfully paid in the honest and *bona fide* exercise of that discretion.

The Divisional Court (the Lord Chief Justice, Mr. Justice Shearman, and Mr. Justice Roche) were of opinion that this case was concluded by *Roberts v. Hopwood* (the Poplar case) (41 *The Times* L.R., 436; [1925] A.C., 578) and *Roberts v. Cunningham* (the Bethnal Green case) (42 *The Times* L.R., 162) and discharged the rule *nisi*. That decision was affirmed by the Court of Appeal (Lord Justice Bankes, Lord Justice Atkin, and Lord Justice Sargant).

Mr. Norman Birkett, K.C., and Mr. Arthur H. Davis appeared for the appellants. The respondent, who appeared in person, was not called upon to argue.

Viscount Dunedin.—My Lords, This is an appeal against a judgment of the Court of Appeal affirming a judgment of the Divisional Court which discharged an order for a *certiorari* which had been obtained against a surcharge which had been made by the district auditor against the Mayor and Councillors of Woolwich and certain individual parties who were members of the council in respect of overcharges in their accounts of the year ending March 31, 1924. The case has to do with payments made to employees other than those employees whose wages were regulated by trade union rates.

Now the payments made to employees by these borough councils are made according to various grades, but the real question that arises in this case is as to the payment made to the lowest grade. In 1919 there was a conference of various borough councils, known as the Fulham Conference, and that Fulham Conference recommended a scale of payments also drawn up according to grades, but it had what I may call two peculiarities. In the first place it established an absolute minimum for the lowest grade of £3 10s. 6d., and, in the second place, it did not provide for any sliding scale if there should ensue a difference in the cost of living. It only purported to deal with the year 1920, and, therefore, what may appear, especially in the last matter, a lacuna, might really, if things had remained unchanged, not be found out to be a lacuna, because it might have met again and dealt with the question of the differences in cost of living if such differences had occurred in fact. That scheme was adopted by the Woolwich Council on May 12, 1920. The history of the payment of the lowest grade in the employment of the Woolwich Council was this: What may be called the pre-war payment was £1 10s.; in 1915 it was raised to £1 12s.; and then, as living got dearer and dearer, it was raised again and again till, on the eve of May 12, 1920, it was £3 3s. 6d. Of course, the result of adopting the Fulham scale was that it was raised to £3 10s. 6d. But on June 8, 1920, there was another body which met, known as the Industrial Council, and they suggested a general scale for the payment of this class of persons by boroughs. Their scale was rather differently arranged from the Fulham scale, because in particular it provided for a sliding scale according as the cost of living went up and down. On July 14, 1920, the Woolwich Council "adopted," as they called it—because undoubtedly I think it is something very like a misnomer—the Industrial Council's scale. Their idea of adoption was to say this: "When the Industrial Council's scale provides better terms than the Fulham scale we take it, but if, owing to its sliding scale, it goes below the minimum of the Fulham scale then we do not take it, but we stay by the Fulham scale." The result of that in history was this: Immediately after that the cost of living began to rise and, in accordance with their view, they took the Industrial Council's scale, with the result that in February, 1921, the minimum wage had risen to £4 8s. 6d. Then times changed and the cost of living began to fall, and in February, 1922, the Industrial Council's scale of rates had fallen to exactly what the minimum Fulham scale would give, and though it went on falling, of course, under their resolution, there the payments stuck; and, when we come to the year with which the auditor has dealt, the actual payment made by the borough council of Woolwich was 11s. 4d. greater than that payment which would have been made if the Industrial Council scale had been exactly followed. What the district auditor has done is this: He has not for one moment surcharged that whole amount; he has only surcharged 3s. 11d. of it, and 7s. 5d. of it he has left alone. The way he arrived at it was that he began from the scale as it had been calculated according to the Industrial Council and then he allowed a 12½ per cent. increase, but the result, of course, has been that there is a surcharge to the amount of 3s. 11d. and that surcharge *in toto* arrives at the very substantial sum of £8,000.

As your Lordships are well aware, the law on this matter was finally disposed of in your Lordships' House by the case of *Roberts v. Hopwood* (41 *The Times* L.R., 436 ; [1925] A.C., 578), generally known as the Poplar case. By section 62 of the Metropolis Management Act, 1855, a metropolitan borough council, as the successors of the Board of Works, shall employ such servants as may be necessary and may allow to such servants such wages as the council may think fit. It was argued in that case—and it received the sanction of the opinion of Lord Justice Atkin, although I think he was the only Judge of the five Judges who had to do with it who came to that opinion—that that was an absolute right and that, whatever they fixed, it could not be touched. But the judgment of this House was not that. The judgment of this House was that although there was a discretion it must be a reasonable discretion, and, if it was found that the wages actually paid were not reasonable in the whole circumstances of the case, then it was the duty of the district auditor to surcharge.

Now the argument of the Woolwich Council in this case is this : The Industrial Council's scale had a sentence in it in these words : "Existing privileges to continue. Nothing contained in the wages scheme shall operate to reduce the present wages of any employee in a borough where better conditions prevail" ; and they say the result of that is : "We introduced the Industrial Council's scale and with it, of course, that proviso. At the moment of so introducing the Industrial scale we had adopted the Fulham scale and, therefore, the result of that clause is to continue the Fulham scale wherever it is better than the Industrial scale ; and obviously it is better if it has a fixed minimum below which you never can get, whereas the Industrial Council's scale says you can get below any particular figure if the cost of living alters." The first remark I should like to make upon it is that I think really that is a thoroughly wrong way of looking at the whole question. Neither the Fulham scale nor the Industrial Council's scale has any real authority. They have no statutory authority, and they have no authority of any kind. They operate as a practical guide when you are going to say what is a reasonable payment, and I have no doubt whatsoever that, if in 1920 (as they did) the Woolwich Council paid what was recommended by the Fulham scale, it would have been held in 1920 that that was a reasonable payment. But that is a perfectly different thing from saying that you really can settle this question by the terms of these reservations in these two documents. What the auditor in this case has found is that, with the reduced cost of living staring them in the face, they went on paying wages far in excess of the amount for which the Industrial Council's scale would have shown a justification. In making the argument that they do—namely, that that saving clause kept on the Fulham scale, they seem to me to do two things that are wrong. In the first place they necessarily assume that the Fulham minimum was a minimum for all time. The Fulham Conference did not say so, and I do not suppose that if the Fulham Conference had been asked they would ever have replied that it was meant to be a minimum for all time. But beyond that, and quite beyond that—and this is quite enough—if, as a matter of fact, a payment is unreasonable it does not make it reasonable because you label it "Fulham payment."

Therefore, my Lords, upon the whole matter I come, without the slightest hesitation, to think that the district auditor here has really been very merciful to the borough council in what he has done, because he has made a very large allowance, and I move your Lordships that the appeal be dismissed.

LORD ATKINSON.—My Lords, I concur.

LORD WRENBURY.—My Lords, I concur. I think the case is entirely covered by the principles adopted by this House in the Poplar case, *Roberts v. Hopwood* (41 *The Times* L.R., 436 ; [1925] A.C., 578), and the only matter which has struck my mind is the extraordinarily moderate amount at which, it seems to me, the district auditor has surcharged Woolwich.

LORD PHILLIMORE.—My Lords, I concur. I would only add these two remarks : First, it may be reasonable to take the scale recommended by the Joint Industrial Council as a measure of wages, but to except the rate prevailing in a particular borough from that scale does not make the excepted rate reasonable. Secondly, it seems sometimes to be forgotten that the council of a borough is not the employer. It is only the steward of the ratepayers and inhabitants and must act as a faithful steward.

LORD CARSON.—My Lords, I concur.

[Solicitors—Sir Arthur Bryceson ; Messrs. Last, Riches and Fitton.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927.
May 23.

IN RE RYDER AND STEADMAN'S CONTRACT.*

Law of Property—New legislation—Transitional provisions—Undivided shares—Entirely subject to jointure rentcharge—Settled land—Statutory trusts—Law of Property Act, 1925 (15 Geo. V., c. 20), Schedule I., Part IV., par. 1 (2), (3)—Settled Land Act, 1925 (15 Geo. V., c. 18), s. 1 (1).

The expression "not being settled land" in the Law of Property Act, 1925, First Schedule, Part IV., paragraph 1, sub-paragraph (2), and the expression "settled land" in the next sub-paragraph, indicate whether the land is or is not settled immediately before the coming into force of that Act. Therefore where on December 31, 1925, three persons were tenants in common of Blackacre, subject to a jointure rentcharge, but with an indemnity in respect of the same, they were, on January 1, 1926, entitled to sell Blackacre as joint tenants holding upon the statutory trusts within the meaning of sub-paragraph (2).

Decision of Astbury, J. ([1927] 1 Ch., 509), reversed.

The facts of this appeal from Mr. Justice Astbury's decision upon a vendor and purchaser summons appear from the judgment, but may be summarized as follows :—

By a conveyance dated April 14, 1924, the Duke of Marlborough and the Marquess of Blandford appointed Blackacre, part of their family estates, to three persons (hereinafter called the vendors) as tenants in common in fee simple subject to a rentcharge

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

for a jointure payable to the Marchioness of Blandford, but with the benefit of a covenant by the Duke to pay the same, and an indemnity. On February 13, 1926, the vendors contracted to sell to a purchaser, subject to the jointure, but with the benefit of the indemnity. The purchaser contended that on January 1, 1926, owing to the existence of the charge for the jointure, Blackacre became settled land under the Settled Land Act, 1925, section 1 (1) (v), and was therefore "settled land" within the meaning of the Law of Property Act, 1925, First Schedule, Part IV., paragraph 1 (3), and that therefore the trustees of the Marlborough settlement were the persons to convey. The vendors contended that Blackacre was not settled land on January 1, 1926, as it was not settled land "immediately before the commencement of this Act," within the meaning of the opening words of Part IV., and that therefore they held as joint tenants upon the statutory trusts under the provisions of paragraph 1, sub-paragraph (2) of Part IV., and could make title as such. Mr. Justice Astbury took the view put forward by the purchaser.

The vendors appealed.

Mr. Farwell, K.C., and Mr. Walter Banks appeared for the appellants; Mr. Hubert Rose for the respondent.

The arguments and material sections of the Acts of 1925 appear in the judgments.

The following considered judgments were delivered.

The Master of the Rolls.—This is an appeal from a judgment of Mr. Justice Astbury given on February 17, 1927, upon a vendor and purchaser summons, taken out by the vendors, for a declaration that a requisition made on behalf of the purchaser had been sufficiently answered, and a good title shown. By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and his eldest son, under their powers, appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares, subject to the jointure charged upon certain freehold estates including Blackacre, but with an indemnity therefor. By a contract dated February 13, 1926, the three vendors agreed to sell Blackacre to the purchaser, subject to the jointure, but with the benefit of the indemnity, so that the price was not affected by the jointure.

The vendors contended that on January 1, 1926, the date when the Settled Land Act, 1925, and the Trustee Act, 1925, and the Law of Property Act, 1925, came into operation, Blackacre vested in them as joint tenants upon the statutory trusts for sale under Schedule I., Part IV., paragraph 1 (2), of the Law of Property Act, 1925, and that they were now the estate owners with power to convey, subject to the jointure, and to give a proper receipt for the purchase money. The arguments for and against this contention are set out in the judgment of Mr. Justice Astbury ([1927] 1 Ch., 509), where the facts are also fully stated. Mr. Justice Astbury decided against the vendor's contention, and they appeal. The question for this Court is what is the true construction to be placed upon certain clauses in Schedule I., Part IV., of the Law of Property Act, 1925. This is the first case in which the construction of that Act, and of its concomitant Acts, has come before this Court. The three Acts are interconnected not only by the subject-matter to which they relate, but also by the definition clauses contained in them.

It is obvious that the terms of these three Acts, embodied in a total of 400 sections, and 14 schedules, not to mention other relevant Acts which came into operation on the same day, must give rise to a number of problems in conveyancing and in the law under which property is held and dealt with. The Law of Property (Amendment) Act, 1926, which makes amendments in these three Acts, adds its testimony to this statement. These problems must now be determined by the rules of law applicable to the interpretation of statutes. They cannot be solved by reliance upon the opinions of able writers of text books yet living, or of those who have been closely and devotedly identified with the passage of this legislation through Parliament. Such persons may be expected to know what was the original intention of the Bill introduced into Parliament, and what was the purpose and design of later amendments; but words in the statute must be considered and construed as they stand, even if that construction may involve subsequent difficulties, or even hardship, in cases that are conceived as possible to arise. "A sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment." See *per* Lord Herschell in *Arrow Shipping Company v. Tyne Improvement Commissioners* (10 *The Times* L.R., 551; [1894] A.C., 508, at p. 516). It may, however, be observed that Mr. Justice Astbury says of the construction of the Act adopted by him: "There is no doubt that in this particular case the Acts have worked a very serious hardship on the vendors."

Turning now to the Law of Property Act, 1925, by section 39 the provisions set out in the First Schedule to the Act are to have effect "for the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended)." These provisions therefore are to mould what had been done under the law as it existed before 1922 into conformity with the new system. By section 39 (4) the appropriate provisions in the schedule are to apply for "subjecting land held in undivided shares to trusts for sale." This same heading is placed before the group of provisions in Part IV. of Schedule I. The question is which of these provisions applies to the present case. Before the commencement of the Law of Property Act, 1925, the land of the vendors was not settled land; but it was "immediately before the commencement of this Act held at law or in equity in undivided shares vested in possession." Does sub-paragraph (2) or sub-paragraph (3) of the subsequent sub-paragraphs in Part IV. apply?

In order to answer this question it seems right to bear in mind the purpose for which these transitional clauses are introduced as already stated, and to repeat the opening words of Part IV. of the schedule immediately before each sub-paragraph, whether (2) or (3). The result of this is that the land which is to be operated upon by the sub-paragraph is land which is regarded as it was immediately before the commencement of the Act, and that same land is the land affected by the operation of the later words. Can the time at which this same land is to be regarded be changed in the same sentence without clear words to that effect? I think not. "Before the commencement of this Act" is the dominant time at which the land is considered and affected by these transitional clauses. In this view the words "not being settled land" must also be attributed to the time immedi-

ately before the commencement of the Act. It may be that these words are unnecessary or tautologous, but it seems difficult to put a construction upon them which brings into the ambit of the clause land considered as it was before the commencement of the Act and, a few words later, considered as it is under the operation of the new Act, without any indication that the land is to be regarded at two different moments of time with inconsistent results. This is a part of the Act which is intended to deal with transition, and to formulate how land held as it was immediately before the commencement of the Act can be brought under the new system. It is such land upon which the transition is to work. A sufficient meaning can in my judgment be given to the words "not being settled land," if they are taken as indicating a caution, or *nota bene,* that sub-paragraph (2) in question does not deal with settled land. As to that, the next clause is the operative one. This construction is in accord with the ordinary canons of construction and leads to no hardship upon the vendors.

Two objections are raised to this construction. The first is that under the interpretation clause—section 205, subsection 1 (xxvi.), of the Law of Property Act, 1925—"settled land" is to have the meaning given to it by section 2 and section 1 (1) (v) of the Settled Land Act, 1925, so that land, subject to such a jointure as Blackacre is, is to be deemed "settled land." This definition applies, however, only unless the context otherwise requires, and the difficulty already pointed out of interpreting Schedule I., Part IV., paragraph 1, sub-paragraph (2), in the manner suggested appears to me to indicate that the context does "otherwise require." The second objection is that section 35 of the Law of Property Act, 1925, militates against the interpretation of the sub-paragraph that I have adopted. That section expresses the meaning of the "statutory trusts." The trustees are to sell and stand possessed of the net proceeds of sale after deductions named have been made "upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons . . . interested in the land." These persons are defined to include "an incumbrancer . . . whose incumbrance is not secured by a legal mortgage." It is said that the jointress in the present case is such a person, for her incumbrance is not secured by a legal mortgage. She, therefore, fulfils one limb of the definition. It is, however, a definition, and only a definition, which may enable an incumbrancer's rights to be considered; but, *per se,* it does not confer new rights, and the trustees for sale are to hold the net proceeds only subject to such powers as may be requisite for giving effect to rights. If the rights of the jointress are not imperilled, it is not requisite to give effect to her rights to withhold the purchase-money from the vendors.

The three vendors held the land subject to the rentcharge. The extent of their estate is not enlarged. They convey it subject to the rentcharge, which is protected by paragraph 1, sub-paragraph (8), of this same Part IV. of the schedule, and no such power as of withholding the purchase-money is requisite to give effect to the rights of the jointress after sale. Mr. Justice Astbury's judgment turned upon his feeling unable to accept the interpretation as to the meaning of "not being settled land" in sub-paragraph (2), which I have adopted, and he gives reasons for his view derived from some difficulties or problems that may arise if the interpretation contended for by the vendors is accepted. I am conscious that I have not referred to or dealt with all of them; but such difficulties and problems must be considered when they arise in a concrete form. It may be that even yet another amending Act may be required to get rid of difficulties arising as the sequel to the interpretation given to the more fundamental clauses of the Acts. I will only add that I have had an opportunity of considering Lord Justice Sargant's judgment, and I agree with the view that he has expressed upon the other points raised and dealt with by him. The appeal is allowed, and the order will be as stated by Lord Justice Sargant.

Lord Justice Sargant.—The present appeal involves the determination of important questions under the Law of Property Act, 1925, and relates particularly to the effect of the transitional provisions of section 39 of the Act as affecting land held in undivided shares. The three appellants are the vendors, and the respondent is the purchaser under a contract dated February 13, 1926, for the sale of certain freehold land which has throughout been referred to as Blackacre. The origin and nature of the estate and interest of the appellants in this land are sufficiently indicated in the following paragraphs, which are substantially taken from the report of this case in the Court below ([1927] 1 Ch., 509).

In April, 1924, under and by virtue of a resettlement of July 14, 1866, a marriage settlement of November 6, 1869 (appointing a jointure of £2,500 per annum to the wife for life and a term of 1,000 years to secure it), a marriage settlement of July 19, 1897, and a disentail of March 10, 1920, certain freehold estates, including Blackacre, stood limited (subject to a £2,500 jointure and term to secure payment of the same) to such uses as the Duke of Marlborough and the Marquess of Blandford should jointly appoint. By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and the Marquess of Blandford appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares subject to the jointure but with an indemnity therefor. In this state of things, the vendors by a contract dated February 13, 1926, agreed to sell Blackacre to the purchaser for £1,700 subject to the jointure but with the benefit of the indemnity therefor. Apart from the legislation which had come into operation on January 1, 1926, there would have been no difficulty in carrying out this contract, conveying the land to the purchaser, and giving a good receipt for the purchase-money. But some difficulties have been introduced by this legislation, and particularly by that part of it which relates to undivided shares in land. Section 34 of the Law of Property Act, 1925, prohibits in general the creation of an undivided share in land, and provides that where after the commencement of that Act land is expressed to be conveyed to any persons in undivided shares and these persons (as was the case here) are of full age and not more than four in number, the conveyance shall operate as if the land had been expressed to be conveyed to the grantees as joint tenants upon the statutory trusts thereinafter mentioned, being trusts for the sale by the grantees of the land held by them under the conveyance. Section 39 of the same Act, which is headed by the phrase "Transitional Provisions," enacts, so far as material, as follows: "For the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act as amended"—such last-mentioned law being identical, for the present purpose at least, with the law enacted by the Law of Property Act, 1925—"the provisions set out in the

First Schedule to this Act shall have effect . . . (4) for subjecting land held in undivided shares to trusts for sale. . . ."

Part IV. of the First Schedule to the Act is headed by the words "Provisions subjecting land held in undivided shares to a Trust for Sale," and provides, amongst other things, as follows: Paragraph 1. "Where immediately before the commencement of this Act land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect. . . . (2) If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares but subject or not to incumbrances affecting the entirety, it shall by virtue of this Act vest in them as joint tenants upon the statutory trusts." On the other hand, in the event of the entirety of the land being settled land provision is made by sub-paragraph (3) of paragraph 1 for its vesting in the trustees of the settlement if any, or, until there should be such trustees, in the Public Trustee, and in either event upon the statutory trusts, and further, in any case to which the previous provisions of Part IV. do not apply, it is provided by sub-paragraph (4) of paragraph 1 that the land shall vest in the Public Trustee upon the statutory trusts.

In this state of things the first question to be determined is who are the persons in whom Blackacre became vested under these transitional provisions? Did it vest under sub-paragraph (2) in the three vendors as joint tenants upon the statutory trusts? Or did it vest under sub-paragraph (3) or sub-paragraph (4)? At first sight the answer would seem to be quite simple and straightforward. The entirety of Blackacre was, immediately before the commencement of the Act, vested absolutely and beneficially in the three vendors; it was not then "settled land," and it was subject only to an incumbrance, namely, the jointure, affecting the entirety. And apparently, therefore, it complied with all the requisites of sub-paragraph (2) and would have been converted by the statute from being vested in the vendors as tenants in common to being vested in them as joint tenants upon the statutory trusts. This *prima facie* view was, however, controverted by the purchaser's advisers. They asserted that in the construction of Part IV. of the First Schedule the phrase "settled land" must, by virtue of section 205 of the Law of Property Act, 1925, have the same meaning as in the Settled Land Act, 1925; they pointed out that under section 2 and section 1 (1) (v) of the Settled Land Act, 1925, land subject to such a jointure as Blackacre was "settled land"; and they drew the conclusion, which has been accepted by the learned Judge, that the entirety of the land vested, under the provisions of sub-paragraph (3) of paragraph 1, Part IV. of the First Schedule, in the trustees of the settlement, or intermediately in the Public Trustee. In my judgment, however, this construction gives too rigid an effect to the definition of "settled land" in subsection (1) of section 205 of the Law of Property Act, 1925. Under that subsection the expression "settled land" and the other expressions in the subsection are given the meanings thereby assigned to them only "unless the context otherwise requires." Now the transitional provisions in Part IV. are for the very purpose of changing the legal position existing before the Act into a new legal position, to take effect under and subsequently to the Act. And, when in the course of so doing the Act defines the position existing before the Act, the definition must naturally, and indeed almost inevitably, refer to the law as it stood before the Act and can hardly, without some confusion of thought, be importing into that definition a state of law which is only to exist after the Act. In sub-paragraph (2) itself the land dealt with is defined as land the entirety of which "(not being settled land) is vested . . . in undivided shares." The last part of this definition obviously refers to the status of the land before the Act, and cannot refer to a status incapable of existing after the Act. It is therefore inconsistent with the context to apply to that part of the definition which consists of the words "not being settled land" a meaning derived from the new law introduced by the Act itself. The result would be a mongrel definition, involving a mixture of the old law and the new law, which is wholly unsatisfactory.

Perhaps there should be noticed here, if only for the purpose of rejection, a somewhat subtle argument for the purchaser, of the following nature. It is said that the words "(not being settled land)" in sub-paragraph (2) imply that the sub-paragraph includes not only land which is not settled land but some land which is settled land; that if the phrase "settled land" here has reference to the law existing before the Act there could not be any settled land falling within the definition in sub-paragraph (2), while if it has reference to the law as changed by the Act it might be satisfied by such a state of things as existed here with reference to Blackacre; and that therefore the language of the sub-paragraph is better satisfied by reading the expression "settled land" as referring to the new law. But this argument neglects the consideration that the sub-paragraph deals with both of two alternatives, namely, that of the land being free from incumbrances and that of the land being subject to incumbrances. Even under the new law the land, if free from incumbrances, would be no more settled land than under the old law; and therefore in the case of the first alternative the implication said to be involved in the use of the phrase "(not being settled land)" would be no better satisfied by reading the phrase "settled land" as referring to the new law rather than to the old. But in truth the subtleties considered in the last preceding paragraph are based upon a suggestion of implication which is too slight to prevail against the more obvious inferences to be drawn from the fact that sub-paragraph (2) is, as already pointed out, an enactment converting an existing legal position under the old law into a new legal position under the new law; and, if sub-paragraph (2) is closely compared with sub-paragraph (3), it seems reasonably clear that they constitute alternative provisions, and that while sub-paragraph (3) deals exclusively with the case of the entirety of the land being settled land, sub-paragraph (2) deals exclusively with the entirety of the land being unsettled land. In other words, the words in brackets "(not being settled land)" in sub-paragraph (2) are merely descriptive of the land being dealt with by that sub-paragraph, and the commencing words of the sub-paragraph are precisely correlative and alternative to the commencing words of sub-paragraph (3), and mean: "If the entirety of the land is not settled land and is vested," &c. This construction merely imputes some slight clumsiness of expression to the drafting of sub-paragraph (2) and in all other respects seems far more satisfactory than the construction suggested for the purchaser.

So far, then, the result is that on January 1, 1926, Blackacre became vested, subject to the jointure and to the term of years for securing it, but with the

benefit of the indemnity against it, in the vendors as joint tenants in fee simple upon the statutory trusts for sale; and the natural conclusion would seem to be that they could sell what they had got, namely, the fee simple of Blackacre, subject to and indemnified against this existing incumbrance, and carry out their contract. But here again the purchaser raises a difficulty which, as stated by her counsel, may be summarized as follows. It is contended that under section 35 of the Law of Property Act, 1925, the jointress here is a person whose incumbrance is not secured by a legal mortgage and would attach to the net proceeds of sale in the hands of the vendors as trustees for sale; that under section 28 of the same Act trustees for sale are to have the powers of sale of a tenant for life under the Settled Land Act, 1925, and that these powers when exercised are to operate to overreach any equitable interests made to attach to the net proceeds of sale; that tenants for life of the compound settlement said to exist in Blackacre could overreach the equitable interests of the jointress under section 38 and section 72 of the Settled Land Act, 1925, if they caused trustees to be appointed of the compound settlement and allowed the purchase-money to be paid to them; and accordingly that the vendors cannot sell and convey to the purchaser subject to the jointure, but are bound to sell and convey freed from the jointure and to allow the purchase-money to be paid to the trustees of the compound settlement when appointed. This argument is an elaborate and ingenious one; but, in my judgment, when carefully examined it breaks down at every stage. In the first place, section 35 of the Law of Property Act, 1925, is obviously aimed at giving corresponding rights in the net proceeds of sale to incumbrancers whose rights in the land are disturbed by the sale; it does not apply to a case such as this where the sale is made subject to the incumbrance. In such a case it is not "requisite" to give "effect to the rights of the person . . . interested in the land" by giving rights against the net purchase-money. For the rights of the incumbrancer in the land are left entirely unaffected by the sale. Next, section 28, subsection (1), of the Law of Property Act, 1925, does not apply; for, inasmuch as the equitable interest of the jointress will not attach to the net proceeds of sale, the exercise of the powers conferred by that subsection will not operate to overreach the equitable interest of the jointress. Again, it is at the least extremely doubtful whether the documents creating the jointure can be coupled with the statutory trust for sale under Part IV. of the First Schedule to the Law of Property Act, 1925, so as to form a compound settlement within section 1 of the Settled Land Act, 1925, especially in view of the provision introduced into that section by "a minor amendment" in the Schedule to the Law of Property (Amendment) Act, 1926, namely, "(7). This section does not apply to land held upon trust for sale." And lastly, even if Blackacre is held from and after January 1, 1926, under a compound settlement, yet section 1 of the Law of Property (Amendment) Act, 1926, expressly allows the conveyance of settled land subject to a prior interest when the land had previously to January 1, 1926, been conveyed to a purchaser subject to the prior interest, whether with exoneration from or indemnity against the prior interest or not.

In my view no importance is to be attached in connexion with this case to the inconvenience or inconsistency that may arise in the case of two married women entitled before January 1, 1926, to land in fee simple as tenants in common with in each case a restraint on anticipation. It may be that in a very unusual case of this kind difficulties may arise and the protection of one or other of the married women may be endangered. If so, this is the result, in one exceptional case, of the drastic legislation which converts tenancies in common into joint tenancies upon trust for sale. It cannot alter the general construction of the transitional provisions of the Act with regard to land held in undivided shares.

In conclusion I desire to add that the learned Judge attached undue weight to certain expressions in a text-book written by a well-known conveyancer. Such expressions are no authority as to the construction and effect of recent legislation; at the most they can only be adopted by counsel as embodying their argument or by the Court as representing its ultimate view. Nor is any importance to be attributed to the views of the writer because he may be recognized as the draftsman of the statute in question. On the contrary, that very fact may disable him from taking an unbiased view of the expressions used in the Act.

In my judgment the order appealed from should be discharged and it should be declared that the requisitions and objections of the purchaser have been sufficiently answered, and that the vendors have shown a good title to the property in accordance with the contract. The purchaser must pay the costs here and below.

LORD JUSTICE LAWRENCE.—I have had the advantage of reading the judgments which have just been delivered by my Lords. I agree with them, and have nothing to add.

[Solicitors—Messrs. Stow, Preston, and Lyttelton, for Messrs. Andrew Walsh and Bartram, Oxford; Messrs. Steadman, Van Praagh, and Gaylor.]

K.B. Div.
(Lord Hewart, C.J., Shearman and MacKinnon, JJ.)
1927.
May 13.

WOOD v. BURKE.*

Insurance (National)—Summary proceedings—Question of insurability — Reference to Minister — Adjournment — Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 22 (7)—National Health Insurance Act, 1924 (14 and 15 Geo. V., c. 38), s. 97 (4).

The requirements of s. 22 (7) of the Unemployment Insurance Act, 1920, and of s. 97 (4) of the National Health Insurance Act, 1924, are imperative. Therefore if in any summary proceedings under either Act the insurability of any person becomes material, and has not been decided by the Minister, the justices must forthwith refer the question to him and adjourn the hearing pending a final decision.

Informations were preferred by Sidney Wood (hereinafter called "the appellant") under section 96 (2) of the National Health Insurance Act, 1924, and section 22 (2) of the Unemployment Insurance Act, 1920, against Rachael Burke (hereinafter called

* Reported by J. W. HALL, Esq., Barrister-at-Law.

"the respondent") for that she, the respondent, did :—

(*a*) On January 9, 1926, within the County Borough of Walsall fail to pay a contribution in respect of the week commencing on December 28, 1925, which she was liable to pay under the National Health Insurance Act, 1924, in respect of an employed contributor, to wit, Elizabeth Bailey, contrary to section 96 (2) of the said Act and the regulations made thereunder ;

(*b*) On May 10, 1926, within the County Borough aforesaid fail to pay a contribution on May 10, 1926, which she was liable to pay under the National Health Insurance Act, 1924, in respect of an employed contributor, to wit, Elizabeth Bailey, contrary to section 96 (2) of the said Act, and the regulations made thereunder ;

(*c*) On May 10, 1926, within the County Borough aforesaid, did fail to pay a contribution in respect of the week commencing on May 10, 1926, which she was liable to pay under the Unemployment Insurance Acts, 1920 to 1925, in respect of an employed person, to wit, Elizabeth Bailey, contrary to the Unemployment Insurance Acts, 1920 to 1925, and the regulations made thereunder.

The informations were heard and dismissed on September 13, 1926.

Upon the hearing of the said informations the following facts were proved :—

(*a*) That the said Elizabeth Bailey (wife of William Bailey) had been employed as a lodging house deputy from August 1, 1925, for a period of 13 months and had received living accommodation, one room for herself, husband, and one child, and coal in return for her services, but received no wages or other money payment whatsoever ;

(*b*) That the said Elizabeth Bailey was employed part-time only and that her duties included the making of beds for three single men, cleaning five bed rooms and a kitchen, keeping a register, collecting money from lodgers and paying it over to the respondent ; in addition she attended to domestic and other household duties for her husband, child, and herself during the daytime and to her own private affairs ;

(*c*) That the said Elizabeth Bailey's husband with whom she was living, was in receipt of £1 per week from the Guardians which went to the joint support of himself and his wife and child ;

(*d*) That the said Elizabeth Bailey on or about April 5, 1926, handed to the respondent her unemployment card, and requested her to stamp it, that the card was not stamped for the weeks in respect of which the charges were preferred, and that Elizabeth Bailey was employed during the said weeks.

On the part of the appellant it was contended that there was a contract of service between the respondent and Elizabeth Bailey and that the employment of the said Elizabeth Bailey was within the meaning of Part I. (*a*) of the First Schedule to the National Health Insurance Act, 1924, and Part I. (*a*) of the First Schedule to the Unemployment Insurance Act, 1920, and as such was insurable.

On the part of the respondent it was contended :—

(1) That the said Elizabeth Bailey received no money or other wages payment whatsoever as required by Part I. (*a*) of the First Schedule to the National Health Insurance Act, 1924, and Part I. (*a*) of the First Schedule of the Unemployment Insurance Act, 1920.

(2) That the employment of the said Elizabeth Bailey with the respondent was of a subsidiary nature and not as her principal means of livelihood, she being supported by her husband, William Bailey, and that she was exempt from insurance under the National Health Insurance Act, 1924, and the Unemployment Insurance Act, 1920, and

(3) That the employment of Elizabeth Bailey as a lodging-house deputy was equivalent to that of a caretaker where no wages were paid or other money payments were made and as such was excepted by Part II. (*m*) of the First Schedule to the National Health Insurance Act, 1924, and Part VII. of the First Schedule to the National Health Insurance (Subsidiary Employments) Consolidated Order, 1924, and Part II. (*j*) of the First Schedule to the Unemployment Insurance Act, 1920, and Part VII. of the First Schedule to the Unemployment Insurance (Subsidiary Employments) Special Order, 1925.

It was contended that it therefore became necessary for the determination of the proceedings that the question whether the said Elizabeth Bailey was an employed person within the meaning of the said Acts should be decided, and on the part of the appellant application was made to the justices for the adjournment of the informations pending reference to the Minister of Health and the Minister of Labour under section 97 (4) of the National Health Insurance Act, 1924, and section 22 (7) of the Unemployment Insurance Act, 1920, respectively, for decisions by the said Ministers in accordance therewith, inasmuch as no decision of the said Ministers on the question aforesaid had theretofore been obtained. The said application was refused.

In the justices' opinion :

(1) The employment of the said Elizabeth Bailey was excepted by Part II. (*m*) of the First Schedule to the National Health Insurance Act, 1924, and Part VII. of the First Schedule to the National Health Insurance (Subsidiary Employments) Consolidated Order, 1924, and Part II. (*j*) of the First Schedule to the Unemployment Insurance Act, 1920, and Part VII. of the First Schedule to the Unemployment Insurance (Subsidiary Employments) Special Order, 1925 ; and

(2) They were not bound under section 97 (4) of the National Health Insurance Act, 1924, and section 22 (7) of the Unemployment Insurance Act, 1920, to adjourn the informations for reference to the respective Ministers for their decisions on the question of insurability.

The question upon which the opinion of the Court was desired was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

By the National Health Insurance Act, 1924, section 97 (4) : "In any summary proceedings under this Act whether for an offence or for the recovery of any sum as a civil debt the decision of the Minister on any question whether or not a person is or was an employed person or is or was the employer of an employed contributor within the meaning of this Act shall, unless an appeal against the decision is pending or the time for appealing against the decision has not expired, be conclusive for the purpose of those proceedings, and, if such a decision has not been obtained, and the decision of the question is necessary for the determination of the proceedings, the question shall be referred to the Minister for decision in accordance with the provisions of this Act, and, where any such appeal is pending, or the time for so appealing has not expired or any question has been so referred to the Minister, the Court dealing with the case shall adjourn the proceedings until

such time as a final decision on the question has been obtained."

Section 22 (7) of the Unemployment Insurance Act, 1920, is, so far as material, in identical terms.

Mr. Harold Murphy appeared for the appellant; the respondent was unrepresented.

Mr. MURPHY said that a very similar question had been before the Court in the unreported case of *Jones v. Martin*, on July 24, 1925. That case arose under the Unemployment Insurance Act, 1920, only, but the sections were identical. In *Jones v. Martin* there had been a decision of the Minister that the employee was insurable in September, but the justices held that they were entitled to inquire into the circumstances of his employment and to determine whether he was insurable in July. He submitted that the language of the sections was imperative.

The LORD CHIEF JUSTICE.—In my opinion this appeal ought to be allowed. In the Court below it had become necessary that the question whether Bailey was an insured person should be decided and accordingly an application was made to the justices to adjourn the case for the decision of the Ministers, inasmuch as no decision had been given. The justices rejected that application and held that they were not bound to adjourn the case for reference to the respective Ministers. In other words they undertook themselves the task which, under the statutes, is reserved to the Ministers, subject to an appeal to the High Court. It is not necessary to read the sections again. They are perfectly clear, and I think that the view which the justices formed was in the teeth of them, and that this appeal must be allowed.

Mr. Justice SHEARMAN.—I am of the same opinion. In view of the plain language of the statutes, the duty of the justices is clear: they must refer the question to the Minister, and having referred it must take the consequential step and adjourn the hearing.

Mr. Justice MACKINNON.—I agree.

[Solicitor—The Solicitor to the Ministry of Health.]

NOTE.—The following are the judgments delivered in the case of

JONES v. MARTIN

heard before Lord Hewart, C.J., Avory and Shearman, JJ., on July 24, 1925.

The LORD CHIEF JUSTICE.—This appeal ought, I think, to be allowed.

Here, not to repeat unnecessarily the facts of the case, there has been a decision of the Minister, dated September 29, 1924, whereby it was held that Mr. Morgan as a carter and haulier had an employment within the meaning of the Act. But the date of the alleged offence, the default in payment, and these proceedings, was earlier than that—namely, July 5, 1924. In these circumstances one of two consequences followed. Either it appeared upon the evidence that the man's employment at July 5 was the same as his employment in September, 1924, when the decision of the Minister was given, or it did not. In the first case there was a decision of the Minister upon the point. In the second case there was need of a decision of the Minister to decide a question necessary for the determination of the proceedings. The Justices here seem in effect to have said that the decision of the Minister of September, 1924, did not relate back to July, 1924, and therefore, they themselves undertook the burden of deciding whether Morgan's employment in July, 1924, came within the Act or not. But that question, no less than the question as at September, 1924, is a question, not for the justices, but for the Minister. I think, therefore, that this appeal ought to be allowed and the case should go back to the justices with the direction that, if the facts are not such as to show that the decision of September, 1924, is dealing with the very same employment as that which was being carried on by Morgan in July, 1924, there is need for another decision, and that decision must be the decision of the Minister and should be referred to him in accordance with the provisions of the Act.

Mr. Justice AVORY.—I agree, and have nothing to add.

Mr. Justice SHEARMAN.—I agree.

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore, and Lord Carson.)

1927. May 24.

SEYMOUR v. REED.*

Revenue—Income-tax—Profit or gain—Professional cricketer's benefit—Proceeds—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule E.

The House (Lord Atkinson dissenting) held that the proceeds of a professional cricketer's benefit match did not, in the circumstances, constitute an income, profit, or gain assessable to income-tax, since they were a personal gift and not a remuneration.

Decision of the Court of Appeal (42 *The Times* L.R., 514; [1927] 1 K.B., 90) reversed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 514; [1927] 1 K.B., 90) reversing by a majority an order of Mr. Justice Rowlatt (42 *The Times* L.R., 377; [1926] 1 K.B., 588) affirming a decision of the Commissioners for the General Purposes of the Income Tax Acts for Lower South Aylesford, Kent.

The appellant was a well-known cricketer in the employment of the Kent County Cricket Club, and the question for determination was whether he was assessable under Schedule E, rule 1, of the Income Tax Act, 1918, in respect of a sum of £939 odd, being the net proceeds derived from a benefit match played at Canterbury in 1920 under the direction of the club for the benefit of the appellant.

The club's regulations for the staff contained a provision as to benefits and tours. That provision (so far as material) was as follows:—

"(1) The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connexion with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiaire."

If a professional cricketer was granted a benefit, it was granted on the express understanding that he should allow the proceeds to be invested in the names of the trustees of the club during the pleasure of the committee. The income derived from the invested proceeds was paid to the beneficiaire. The invested sum was always handed over to the professional cricketer when his career as a cricketer was over, or when he found an investment, such as a share in a business or a farm, of which the trustees approved.

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

The net proceeds derived from the benefit match, together with certain other sums obtained by public subscriptions, were invested by the club in the purchase of certain investments at a total price of £1,492 odd. The dividends on those investments, from 1921 to 1923, less income-tax, were received by the club and paid over to the appellant. Certificates of deduction of income-tax from the dividends were furnished to the appellant by the secretary of the club and the appellant preferred claims for repayment of income-tax for the relevant years, on the footing that the dividends formed part of his income.

In 1923 the investments were realized and the proceeds, amounting, with the addition of certain other moneys, to £1,914 odd, were paid by the club to the appellant and applied by him, with the approval of the trustees of the club, to the purchase of a farm.

In 1923 the appellant was assessed, under Schedule E, in the sum of £939 odd for the year 1920-1921 in respect of the net proceeds derived from the benefit match.

On appeal, the General Commissioners discharged the assessment, and their decision was affirmed by Mr. Justice Rowlatt, on the ground that the money in question was a personal gift and not such remuneration as would constitute income for the purposes of income-tax.

The Court of Appeal by a majority (the Master of the Rolls and Lord Justice Warrington, Lord Justice Sargant dissenting) reversed the decisions of Mr. Justice Rowlatt and the General Commissioners.

Sir John Simon, K.C., and Mr. W. T. Monckton appeared for the appellant; and the Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. R. P. Hills for the respondent.

The Lord Chancellor.—My Lords: In this case James Seymour, a professional cricketer, appeals against a judgment of the Court of Appeal in England by which, differing from the Commissioners for the General Purposes of Income Tax and from Mr. Justice Rowlatt, they held the appellant liable for income-tax in respect of the net proceeds of a benefit cricket match.

In the year 1920 the appellant, who had been for many years in the employment of the Kent County Cricket Club at a salary and had played fine cricket, was allowed by the club to have a benefit match, the match selected being the Kent *v.* Hampshire match played in the Canterbury week. The club's regulations for the staff contained the following provisions:—

"*Benefits and Tours.*

"The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connexion with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiaire. The committee also reserve the like discretion in regard to granting permission to any player to go on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

The gate money received at the match in question, less some expenses, amounted to £939 16s. 11d., and this sum, together with other sums obtained by public subscription, was invested by the direction of the committee in certain securities, of which the income (less tax) for the years 1921, 1922, and 1923 was paid to the appellant. In the year 1923 the securities were realized and the proceeds, amounting (with the addition of certain other moneys) to £1,914 14s. 5d., were paid to the appellant with a view to their being applied, with the approval of the committee, to the purchase of a farm. Thereupon the respondent, the inspector of taxes, made an assessment upon the appellant under Schedule E of the Income Tax Act, 1918, in the sum of £939 16s., being the net gate money received from the benefit match for the tax year 1920-21, and the question for your Lordships to determine is whether this assessment was valid.

In considering this question, I will assume that the appellant was assessable (if at all) under Schedule E of the Act. It would appear that in the year 1920-21 any assessment upon him must have been made, not under Schedule E, but under Schedule D (*see Great Western Railway Company v. Bater*, 38 *The Times* L.R., 448; [1922] 2 A.C., 1); but the law was altered by the Finance Act, 1922, and it has not been disputed that the assessment in the year 1923, if allowable at all, was properly made under Schedule E.

The question, therefore, is whether the sum of £939 16s. fell within the description, contained in Rule 1 of Schedule E, of "salaries, fees, wages, perquisites, or profits whatsoever therefrom" (*i.e.*, from an office or employment of profit) "for the year of assessment," so as to be liable to income-tax under that schedule. These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as Mr. Justice Rowlatt put it: "Is it in the nature of a personal gift or is it remuneration?" If the latter, it is subject to the tax; if the former, it is not.

Applying this test, I do not doubt that in the present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the committee of the club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement; and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities. It is usually associated, as in this case, with a public subscription; and, just as those subscriptions, which are the spontaneous gift of members of the public, are plainly not income or taxable as such, so the gate moneys taken at the benefit match, which may be regarded as the contribution of the club to the subscription list, are (I think) in the same category. If the benefit had taken place after Seymour's retirement, no one would have sought to tax the proceeds as income; and the circumstance that it was given before but in contemplation of retirement does not alter its quality. The whole sum—gate money and subscriptions alike—is a testimonial and not a perquisite. In the end—that is to say, when all the facts have been considered—it is not remuneration for services, but a personal gift.

I am of opinion that this appeal should succeed, and that the order of Mr. Justice Rowlatt should be restored with costs here and below, and I move your Lordships accordingly.

Viscount Dunedin.—My Lords : I concur in all that my Lord has said. I have had the advantage of reading the opinion which is about to be delivered by my noble friend Lord Phillimore, and I concur entirely in his exposition and analysis of what are generally known as the Easter Offering cases. Personally I cannot help thinking that the whole trouble in this case has rather arisen from the fact that, although of course the controversy necessarily turned upon the particular words of Schedule E, yet at the same time it was a little forgotten to pay attention to the warning which I remember Lord Macnaghten gave us years ago when he said, "My Lords, I wish to remind you that income-tax is a tax upon income." When I think of this little nest egg —which, of course, paid income-tax as an investment and which, now that it has taken the form of a farm, will pay income-tax under Schedule A—being treated, the whole sum, as income, honestly, had it not been for the fact that honourable Judges whose opinion I respect have come to another conclusion, I would have thought the contention was quite preposterous. I therefore concur in the motion which has been made.

Lord Atkinson.—My Lords : I regret that I am unable to concur with the judgment which has just been delivered by my noble friend on the woolsack, the Lord Chancellor, and I further regret that I am unable to concur in the judgments of my other noble friends. In those circumstances I must, of course, assume that the conclusions at which I have arrived are erroneous, though I cannot feel convinced of it. I have this consolation, however, that if I err, I err in good company, namely, in that of the Master of the Rolls and of Lord Justice Warrington, as he was when he delivered judgment in this case in the Court of Appeal.

In my view, this latter judgment, especially, appears to be sound, logical, sustained by the facts proved and consistent with the authorities cited in support of it. What has given me most trouble in the case is this—the bald, meagre and sketchy way in which the facts of the case have been stated.

It is rightly stated in the case that the sole question for decision is whether the large sum of £939 16s. 11d. derived by Seymour, the professional cricketer, from the benefit match played on the cricketing field of the Kent County Cricket Club, accrued to him, or came to him from his employment as the professional cricketer of this club, or was a gift not earned by him by the discharge with special efficiency of his duties as professional cricketer to the club, but independently of the discharge of those duties, unconnected with them, nor in any way springing from them. Accordingly, one would, I think, suppose that in order to determine this question, the first thing to be fully ascertained would be what were the terms upon which Seymour was hired ; what were his duties, what were the functions which he discharged upon the occasion of a benefit match being held. Did he himself play in it ? Did he in any way select the competing teams, or aid in the management of the fête, as it may well be styled ?

The only statement contained in the case at all touching these matters is the following :—

"(*c*) A professional cricketer in the service of the Kent County Cricket Club is granted a benefit on the express understanding that he shall allow the proceeds of the benefit to be invested in the names of the trustees of the club during the pleasure of the committee. The income derived from the proceeds invested is paid to the beneficiary. The invested sum has, however, always eventually been handed over to the professional cricketer when his career as a cricketer is over, or when he finds an investment (such as a share in a business or farm) of which the trustees approve."

The following is an extract from the regulations for the staff of the Kent County Cricket Club bearing on the point, actually in force when the above-mentioned match was played. The regulation is headed "Benefits and Tours" and runs thus :—

"The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connexion with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiaire. The committee also reserve the like discretion in regard to granting permission to any player to go on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

This regulation may be fully adequate to protect the committee from any legal obligation towards their professional cricketer being imposed upon the club or the committee in respect of the matters named, but it is quite inadequate to prevent that cricketer from having a hope or an expectation, or a formed belief that he had a chance, if he discharged his duties well and to the satisfaction of his employers, of being given the prize of a benefit match. For all that appears, he owed no duties to the Kent club or to its committee save those which spring from his position of professional cricketer. If he got the reward of a benefit match by reason of the efficient discharge of those duties, it must, I think, in the absence of all evidence of the committee's being influenced by any other motive, object, or aim, be held that this reward accrued to him by reason of the office or employment he held within the meaning of Schedule E of the Act of 1842, or came to him from that employment within the meaning of Schedule E, rule 1, of the Income Tax Act of 1918.

I cannot find anything in the case suggesting that the club, or its committee, had any motive, object or aim in giving the benefit of this match to Seymour, their officer, other than to reward him for the efficient discharge of the duties of his post.

It is here that the bald, incomplete and unsatisfactory provisions of paragraph 2 (*c*) of the case stated cause embarrassment. Surely it would have been easy to have ascertained from Seymour or the committee what, if any, was the agreement made with, or assurance given to him as to the result of holding a benefit match, or whether it was the usual practice of the club to permit any professional cricketer they had in their service to obtain this benefit if he discharged the duties of his post well, though admittedly it was a matter entirely in their discretion, and they were not bound to do so. Suppose, for instance, that when Seymour was originally appointed, the committee or secretary of the club said to him, "The committee have absolute power to let you have the advantage of a benefit match or not just as they please. Their discretion is absolute and unfettered, but if you discharge the duties of your post to their entire satisfaction, they may possibly be inclined to let you have the benefit of such a match. They make no promise whatever to do so." It certainly would appear to me that if that remark or any equivalent

remark had been made at the time suggested, it ought to be held that Seymour might naturally and reasonably anticipate that he would have a fair chance of obtaining the benefit of a match conferred upon him by his employers, if he discharged the duties of his post to their entire satisfaction. A grave injustice might be done to an employee or to his employer by the omission to elicit what took place when the employee was first engaged.

What were the precise conditions of his employment? Lord Justice Warrington deals with these points of view in a lengthy passage of his judgment. I quote it in full by reason of its importance, and because I thoroughly concur with it.

"Now did this money come to the respondent by virtue of his office? Looking at the regulations, I am satisfied that from that alone one must come to the conclusion that it did come to him by virtue of his office. It is something which obviously was contemplated as a possibility amongst the terms under which he was serving the Kent County Cricket Club, but more than that, it seems to me that this came to him not merely by virtue of his office, because it was something which he might expect to get from his office, but it came to him from his employers, when one comes to think of what really happened. If this match had been held without the exercise by the club of their discretion in this man's favour by making it a benefit match, the gate money would have been the property of the club and would have gone into their coffers. It is quite true that the gate money which would have been taken at the match if it had not been a benefit match may have been less in amount, but that seems to be quite immaterial. They were under no obligation to give the benefit. They were under no obligation to give him any portion of the gate money that day, and it seems to me that by making the match a benefit match it was their act which gave him the right to receive this gate money. That seems to me to be one extremely and perhaps the most important factor of all, and it is that fact which distinguishes the gate money from the subscriptions which were gathered outside. As regards those subscriptions, the club never had any interest in them at all. They were, as it seems to me, quite properly treated by the Crown as falling on the other side of the line, and as donations purely personal given by outsiders to the man for whose benefit they were given.

"That seems to me to be the crucial point in this case, that this was money given to him by the will of his employers and in a manner contemplated by the actual terms of his employment as shown by the regulations."

The fact that the giving of permission by the committee of the club to the holding of benefit matches is purely voluntary and discretionary is entirely immaterial (*Herbert v. McQuade,* 18 *The Times* L.R., 728; [1902] 2 K.B., 631.) The Master of the Rolls (Sir Richard Henn Collins, as he then was), at page 649 of the case, quoted a passage from the judgment of Lord Curriehill in a Scotch case to the following effect:—

"It is," said the learned Judge, "with some reluctance that I have formed the opinion that the Commissioners are wrong and that the appellant is liable for income-tax on the £100 mentioned in the case. It is true that it is a voluntary contribution by the parishioners, one which they are under no obligation to make and which they may withdraw at any time, but still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes."

Sir Richard Henn Collins, in commenting on this judgment, laid down a test in these words—"The test is, whether from the standpoint of the person who receives it (*i.e.,* the payment) it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income-tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

This case of *Herbert v. McQuade* (*supra*) has been often approved of and followed. It may well be that there is nothing to prevent the Kent County Cricket Club from giving a handsome gift to their professional cricketer though they knew he was the worst cricketer that ever held a bat or bowled a ball, but these regulations do not appear to me to contemplate such a case. A benefit match permitted in such a man's interest would naturally secure very little money either in the shape of subscriptions or of gate money. A professional cricketer such as Seymour must have had some special merit to secure such a splendid prize as he obtained in this case. The money of both subscribers and of persons who passed the gate was rather lavishly given. It is difficult to imagine what special merit he could have had other than skill and efficiency in the game which he was employed by his employers to play and to teach. It is much to be regretted that Seymour was not examined, not only as to the terms of his employment, but also as to how he regarded this sum of £939 odd, and upon what ground he demanded a return of the income-tax paid yearly by his trustees. The decision in *Herbert v. McQuade* (*supra*) establishes that the test is whether from the standpoint of the person who receives the money it accrues to him in virtue of his office or employment.

Lord Hanworth, M.R., deals with this point in the following passage of his judgment in the present case. He said:—

"But after recounting the facts as I have done and giving consideration to the substance of the matter and bearing in mind the regulations which I have read, it appears to me that this sum of £939 cannot be considered to be an extraneous addition to Seymour's wages or a fortuitous donation, but that it was an addition arranged by and through his employers at a time when they considered that a benefit match should be allowed to him and was an addition contemplated as a possibility in the course of his employment in the very terms which regulated the employment of their staff, including respondent. For these reasons it appears to me that this sum of £939 falls within the principle which has been laid down in *Herbert v. McQuade* (*supra*) and the other cases, and is taxable just as any other sums are taxable which are received in the course of employment and are profits arising therefrom."

It is not disputed that the effect of these regulations is, according to a well-known principle of law, to create in Seymour an absolute ownership in the fund vested in the appointed trustees.

The mode in which the trustees discharged their trust affords an indication of how they and their beneficiary must have regarded the fund resulting from the benefit match.

At page 3 of the stated case it is set forth that the

net proceeds of the match, with certain other sums obtained by public subscriptions, were, by the Kent County Cricket Club, invested in the purchase of the stocks named, that dividends from these investments were received by the county club, less the income-tax which was deducted, and were paid to Seymour by cheques drawn by the county club in his favour on October 21, 1921, October 21, 1922, and October 21, 1923, for the respective amounts of £55 8s. 6d., £64 5s. 8d., and £67 12s. 2d. At page 4 of the case stated it is set forth that certificates of the deductions of income-tax were furnished to Seymour by the Kent County Cricket Club, and that he, Seymour, claimed for repayment of the income-tax deducted. *Herbert v. McQuade* (*supra*) and the cases which followed it decided that it was the standpoint of the receiver of the money that determines the liability to income-tax. It was essential then that it should be ascertained in what light Seymour regarded these dividends. He was not apparently asked a single question upon the subject.

The judgment of Lord Loreburn in *Blakiston v. Cooper* (25 *The Times* L.R., 164 ; [1909] A.C., 104) has been frequently referred to. The head-note fairly states what was the pith of the decision. It is there set forth that voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income-tax as profits accruing to him by reason of his office under Schedule E, r. 1, of the Income Tax Act, 1842. There was, I think, a disposition during the argument to treat Lord Loreburn's judgment as having laid down a test as to when Easter offerings of this kind would be properly assessable to income-tax and when not. I doubt very much if Lord Loreburn intended to lay down any test of the kind. I doubt very much if the alleged test would have been workable, for he said, "Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

In the present case no evidence was given to show that Seymour was possessed of anything beyond his skill in cricketing or the discharge of his professional duties to give him a claim to a benefit match, but that skill he was hired to exercise and display in the performance of the duties of his post ; the money he thus secured accrued to him by reason of that—not, so far as appears, by reason of anything else.

The judgment of Lord Robertson in *Blakiston v. Cooper* (*supra*) is well worth a careful perusal on this point. He said, "When the broader facts of the case are remembered, I confess that it savours of paradox to say that this money did not accrue to the appellant by reason of his office of vicar of East Grinstead. The cause of collecting the money was to supplement the legal income of the vicar, and, while this is the ordinary history of Easter offerings, in the present instance the thing is set out in black and white in the bishop's letter and the subsequent notices."

I think that, when no reason is shown for the gift to an official such as Seymour of the large and substantial prize given to him through the medium of a benefit match, it must in reason be assumed that it was given to him for the efficient and satisfactory discharge of the duties he was employed to discharge, and, if so, that the reward which accrued to him came to him from his employment. I am therefore of opinion that the judgment of the Court of Appeal was right and should be affirmed and that this appeal should be dismissed with costs.

Lord Phillimore.—My Lords : The result of the assessment having been made upon the appellant as a person holding an office or employment under Schedule E and not upon him in respect of his professional earnings under Schedule D has been to bring under your Lordships' notice two quite different classes of authorities : those which deal with a public officer receiving some emolument not from his employers (if indeed he has any) but from persons with whom he has official relations, and those which deal with an employee receiving from his employers some benefit other than and additional to his contractual salary.

The conditions of these two classes of case seem to me so different that very little assistance can be derived in one case from the decisions applicable to the other.

The reported cases dealing with a public officer which have been brought to your Lordships' notice are cases concerning ministers of religion. It is suggested that at any rate from these cases it can be deduced that a perquisite or profit of office is none the less a perquisite or profit because the emolument bestowed is voluntary. I doubt whether the analogy can even be carried so far. In these religious cases the offering may be voluntary, but it is not spontaneous.

In the Easter offerings case, *Blakiston v. Cooper* (25 *The Times* L.R., 164 ; [1909] A.C., 104), the moral or religious duty to make the offering was inculcated by the bishop, and, as pointed out in the judgment of your Lordships' House, ecclesiastical machinery was set in motion to procure it.

Nor does the matter rest here. For a portion of the collection definite legal acts were required to effect the purpose. The collection at the offertory in the communion service is provided for by rubric, and by another rubric this offertory is to be disposed of "to such pious and charitable uses as the minister and churchwardens shall think fit, wherein if they disagree, it shall be disposed of as the Ordinary shall appoint."

Moreover, though the Easter offerings collected on the occasion in question were not the fruits of legal compulsion, they did represent and supersede in respect of some of the contributions a legal due. The rubric preceding the one I have just quoted says as follows : "Yearly at Easter every parishioner shall reckon with the parson, vicar or curate, or his or their deputy or deputies ; and pay to them or him all ecclesiastical duties, accustomably due, then and at that time to be paid."

Easter offerings or Easter dues are due of common right from the householder for every member of his family of 16 years of age and upwards.

True it is that the common law rate is 2d. per head only, though by custom it may be more.

It is, I believe, not uncommon, though at the moment I cannot think of an instance, and probably was more common when more offices were paid by fees than are so endowed now that there should be a legal fee of small amount which it was usual to augment. Such fees of office are intended to be covered by the words of Schedule E as profits or perquisites. Easter offerings along with mortuaries and surplice fees are dealt with as part of the legal income of the clergy by the Tithe Act, 1836, section 90, and the Tithe Act, 1839, section 9. They are also dealt with in the New Parishes Act, 1843, section 15.

The case of *Herbert v. McQuade* (18 *The Times* L.R., 728 ; [1902] 2 K.B., 631) has not the authority of your Lordships' House. But if it be taken to be law it was a case where, though the particular incumbent had no title to the annual grant, the annual income of the fund had to be distributed among selected incumbents of his class. In that case, too, there was an element of periodicity.

In fact, in these cases of ministers of religion there is always, I think, some element of periodicity or recurrence which makes another distinction between them and the cases of a single gift by an employer or employers. If they be put aside, little is left in the way of authority on which the Crown can rely except that in the case of *Cowan v. Seymour* (36 *The Times* L.R., 155 ; [1920] 1 K.B., 500) the Court of Appeal thought it important to point out that the gift to the liquidator did not come from his employer, the incorporated company, but from the several shareholders who in combination made up the company.

My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Schedule E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful, and valuable service.

During the course of the argument, however, a subtler consideration seemed to emerge. It was suggested that the hope or chance of a benefit match was part of the inducement to a man to become a professional cricketer in the service of the Kent County Cricket Club, and I suppose it must be put as one of the terms under which he was engaged.

This line of argument is a departure from that hitherto put forward by the Crown. On the part of the Crown it has been accepted that the grant of the benefit match was voluntary ; and the whole weight of the contention has been, that though voluntary, it was still a profit or perquisite.

Anyhow the materials for this contention are wanting. The case stated by the General Commissioners does not find any facts to support it. The contentions on behalf of Seymour were either that the money which he received came from the general public and not from his employers, or that if it came from his employers it was to be treated as a donation or gift, and the General Commissioners accepted these contentions.

If it had been otherwise, a number of facts ought to have been found which we have not before us. The case would probably have stated the number of benefit matches which were usually held yearly, the number of professional cricketers in the service of the club, the usual duration of the tenure of office, or at least the percentage of cricketers in the service of the club who got benefit matches ; and I think it would be defective if it did not state that the expectancy of such a benefit was part of the inducement to Seymour to take his post.

I am not sure that it would not be necessary to find further that this inducement was held out to him by his employers.

The case does not, either in its narrative or in its extracts from the regulations of the club, show that there is any provision in the rules for granting benefit matches. All that it shows is that there are such matches of sufficient frequency to make it desirable to frame rules as to the distribution of the proceeds of such matches when they occur.

In my judgment this is a case of a plain gift not taxable as a profit or perquisite of employment, and I think that this appeal should be allowed.

Lord Carson.—My Lords : I concur with the motion proposed by the Lord Chancellor. In each case it is important that the words of the rule should be kept prominently in mind. They are plain words, of no technical import, and, in my opinion, no previous authorities can assist, as each case must depend upon the particular facts proved. In the present case the General Commissioners were, in my opinion, fully entitled to decide as a question of fact that the sum in question was not wages or perquisites or profits accruing by reason of the employment of the appellant. In fact the money was never, in my opinion, the money of the club at all, but was subscribed by the public for the benefit of the appellant. Speaking for myself, although, of course, the respondent was acting within his rights in the course this litigation has taken, I cannot help thinking that the case might well have been allowed to rest after the determination of the question by the General Commissioners and Mr. Justice Rowlatt. Protracted litigation, whilst easy sailing for the Revenue, is a great burden on the subject in a case where, so far as I can see, no question of principle was involved. I hope the appellant will be fully indemnified against costs.

[Solicitors—Messrs. Halsey, Lightly and Helmsley ; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. May 30.

GILBERT v. GILBERT AND BOUCHER.*

Divorce — Variation of settlements — Petition after decree *nisi* but before decree absolute—Absence of jurisdiction to entertain—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 192.

After a decree *nisi* for dissolution of marriage the Court has no jurisdiction under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, to entertain any application for an inquiry into and variation of settlements until after the decree has been made absolute.

This was an appeal from a decision of Mr. Justice Bateson, which raised a point of divorce practice—namely, whether there was power to initiate and carry on proceedings for variation of a settlement before the pronouncing of a final decree for a divorce.

A decree *nisi* for dissolution of the marriage was made on the husband's petition on April 26, 1926, but had not yet been made absolute.

The wife had, without the knowledge of her husband, settled her property, by two settlements dated September 26 and October 2, 1925, and it thereby became subject to a restraint on anticipation. On October 30, 1926, the petitioner filed a petition for a settlement of his wife's property. An answer was put in showing that the wife's position with regard to her property had changed, as she had settled it.

On March 25, 1927, the petitioner filed a petition to vary the existing settlements. The respondent thereupon applied to the Registrar to have the

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

petition of March 25, 1927, dismissed because the decree *nisi* had not been made absolute. The Registrar dismissed the petition on that ground. The petitioner appealed to Mr. Justice Bateson, who dismissed the appeal, but gave leave to appeal to the Court of Appeal.

It was admitted by the petitioner that no order could be made varying the settlements until after the decree absolute was pronounced, but it was contended that meanwhile a petition could be filed and proceedings carried on under it. It was said to be important to be able to obtain an order as soon as the decree absolute was pronounced because then the respondent's interests would be released from the restraint upon anticipation.

Mr. Bayford, K.C., and the Hon. Victor Russell appeared for the appellant; Mr. Willis, K.C., and Mr. T. Bucknill for the respondent.

Mr. Bayford contended that the effect of Rule 71 of the Matrimonial Causes Rules, 1924, had been impliedly altered by section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, containing the power to vary settlements. That section gave the power "after the decree" and left out the word "final."

The Master of the Rolls, in giving judgment, said that the appeal raised a short, though important, point of practice. [His Lordship stated the facts and proceeded.] Until the Matrimonial Causes Act, 1859, there was no power for the Court to make any variation of settlements on a divorce, but by section 5 of that Act the Court was empowered, "after a final decree of nullity of marriage or dissolution of marriage," to inquire into the existence of marriage settlements and to make such orders with reference to the application of the whole or a portion of the property settled, for the benefit either of the children of the marriage or of their parents, as to the Court should seem fit.

It was clear from the section that the time when the Court might deal with settlements was after the decree absolute had been made. By Rule 71 of the Matrimonial Causes Rules, 1924, application to vary marriage settlements must be made by petition filed after, but within one calendar month of, the decree. In *Clarke v. Clarke and Lindsay* ([1911] P., 186) it was laid down that the Court had no jurisdiction to entertain any application for an inquiry into and variation of settlements until after the decree for dissolution had been made absolute, and that until that time the respondent was under no obligation to answer it. The Master of the Rolls, Sir H. Cozens-Hardy, said (at p. 189):—

"I can see no jurisdiction whatever to take any proceedings to rescind or vary the settlement until after the decree is made absolute. The petition is simply allowed to remain on the file to take effect the moment the decree is made absolute."

That was a very explicit decision of the Court. But it was contended that the Supreme Court of Judicature (Consolidation) Act, 1925, had altered the powers of the Court. Section 192, which replaced section 5 of the Matrimonial Causes Act, 1859, provided that the Court might inquire into and vary settlements which had been made on the parties "after pronouncing a decree for a divorce." It was argued that, as the word "final" before "decree" had been left out, some alteration of the law had been intended by that omission, and that the effect of it was to alter the law as laid down in *Clarke v. Clarke and Lindsay* (*supra*). He (his Lordship) thought that it was impossible so to interpret section 192. The Supreme Court of Judicature (Consolidation) Act, 1925, was not intended to make any alteration in the law, or in the rules or orders of the Court, but to preserve them. It was purely a consolidating statute.

The decision in *Mitchell v. Simpson* (6 *The Times* L.R., 341; 25 Q.B.D., 183) showed that it was impossible to treat a consolidating statute as altering the law. The Court could not derive much assistance from the cases on alimony, the section (190) dealing with alimony being different from those (191 and 192) dealing with settlements. The argument based on the omission of the word "final" from section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, was not sufficient to allow the deduction that there had been an important alteration in the law. The clause stood where it did when *Clarke v. Clarke and Lindsay* (*supra*) was decided. The appeal must be dismissed, with costs.

Lord Justice Scrutton agreed. The presumption with which one started was that a consolidating Act was not intended to alter the law: *Mitchell v. Simpson* (6 *The Times* L.R., 341; 25 Q.B.D., 183). It might be that the language used was so clearly different that, although forming part of a consolidating statute, it must be construed so as to rebut the presumption and alter the law. That was the case in *MacConnell v. Prill and Co., Limited* (32 *The Times* L.R., 509; [1916] 2 Ch., 57), where Lord Justice, then Mr. Justice, Sargant said (at p. 63):—

"No doubt the *prima facie* presumption in the case of a consolidating Act, such as the present Act of 1908, is that the Legislature intended to reproduce the existing position, and my first inclination would be to hold that, as under section 129, subsection 3, of the 1862 Act, any notice is sufficient which sufficiently informs shareholders of the intention to act by way of extraordinary resolution. But this *prima facie* view must yield to plain words to the contrary. And, when regard is had, not merely to the very specific language of section 69 of the present Act, but to the extended operation thereby given to an extraordinary resolution and to the new method of defining it, I think it impossible to escape from the conclusion that the notice of the meeting must not merely indicate but actually specify the intention to pass the resolution as an extraordinary resolution: See the observations of Lord Herschell in *Governor and Company of the Bank of England v. Vagliano Brothers* (7 *The Times* L.R., 333; [1891] A.C., 107, at p. 144)."

The decision of the House of Lords in *Food Controller v. Cork* (39 *The Times* L.R., 699; [1923] A.C., 647) was to the same effect. The well-known passage in the judgment of Lord Herschell in *Governor and Company of the Bank of England v. Vagliano Brothers* (*supra*) showed that the clear words of a codifying Act in their natural meaning were to prevail.

Here section 5 of the Act of 1859 used the words "final decree," and then in spite of the fact that in 1860 a new decree *nisi* was introduced, it was held that the Court had no jurisdiction to inquire into settlements made by the parties before the decree absolute was made. It was argued that the omission of the word "final" in the consolidating Act showed that it was intended to alter the law. But if a decree for divorce within section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, included a decree *nisi*, the Court might make an order for variation of settlements though no decree absolute

was ever made. It would require very clear language in the Act to convince him (his Lordship) that any such alteration in the law was intended, and he could not find such language. The appeal would be dismissed.

LORD JUSTICE SARGANT agreed.

[Solicitors—Messrs. Lewis and Lewis; Messrs. Capron and Co.]

Chan. Div. (Russell, J.) 1927. May 26.

IN RE BANCROFT—BANCROFT v. BANCROFT.*

Will — Construction — Specific bequest — All rights in connexion with play — Contract to sell film rights—Executory at testator's death — Sale completed by executors — Whether legatee entitled to the purchase-money.

A testator, who was the absolute owner of the copyright in English of a play, made a specific bequest of "all my rights to or in connexion with the play." Before the testator's death his agent accepted the offer of a company to purchase the film rights in English-speaking countries for £1,500. The testator's executors assigned these film rights to the company in consideration of the payment of that sum.

Held, that the donee of the specific bequest was entitled to the £1,500.

The late Sir Squire Bancroft appointed the plaintiff, George Pleydell Bancroft (his son) and Sir Gerald Du Maurier executors and trustees of his will. After giving certain specific and pecuniary bequests, the testator made the further specific bequests set out in the first schedule, including one to Sir Gerald Du Maurier in the following words: "I give to Sir Gerald Du Maurier all my rights to or in connexion with the play *Diplomacy*." The testator was the absolute owner of the copyright in English of the play *Diplomacy*, by Victorien Sardou.

By an agreement dated January 8, 1916, the testator had assigned certain film rights in the play to the Famous Players Film Company, Limited. For some time before the testator's death on April 19, 1926, negotiations had been going on to abrogate that agreement, and to sell the film rights in English-speaking countries to the Famous Players Film Company, Limited. On April 7, 1926, an offer by that company to purchase the film rights was accepted on behalf of Sir Squire Bancroft by his agent, Mr. Golding Bright. The executors, being advised that the correspondence between the testator, his agent, and the company constituted an executory agreement of which the company could get specific performance, assigned to the company on October 6, 1926, the sole and exclusive motion-picture rights in the play in English-speaking countries in consideration of the payment of £1,500.

The question for decision was whether, under the will, Sir Gerald Du Maurier was entitled to that £1,500, or whether it formed part of the testator's residuary estate.

Mr. Cecil Turner appeared for the plaintiff; Mr. Danckwerts for the residuary legatees; Mr. Stafford Crossman for Sir Gerald Du Maurier.

MR. JUSTICE RUSSELL, in giving judgment, said that he had no doubt that at the date of the testator's death there existed a contract, binding on the testator, to sell the film rights for £1,500, and binding the purchasers to pay that sum. In those circumstances, since the contract was not carried out in the testator's lifetime, did the right to the £1,500 pass to Sir Gerald Du Maurier? The gift to him was in very wide terms:—"I give to Sir Gerald Du Maurier all my rights to or in connexion with the play *Diplomacy*."

At the time of his death the testator was still the owner, in law, of the film rights, although in equity he had parted with them. But he was only bound to complete the contract in exchange for £1,500. One of the rights "in connexion with the play *Diplomacy*" was the right to get specific performance of the contract of sale and to receive the purchase money. In his opinion Sir Gerald Du Maurier was entitled to the £1,500.

[Solicitors—Messrs. Capron and Co.]

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

K.B. Div. (Rowlatt, J.) 1927. May 30.

GRAINGER v. SINGER.*

Revenue — Income-tax — Case stated — Transmission to High Court—Seven days from receipt—Appellant inspector moved to another district—Delivery of case at his old office—Period for transmission—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 149 (1) (*d*).

Where an inspector of taxes requires the Special or General Commissioners of Income Tax to state a case, and is then moved to another district, it is not necessary for them to deliver the case to that inspector personally, but it is sufficient if the case be sent to the office to which he was attached; and the period of seven days fixed by s. 149 (1) (*d*) of the Income Tax Act, 1918, as the period within which the case must, after being received, be transmitted to the High Court, then begins to run.

His LORDSHIP dismissed the Crown's appeal, by way of a case stated by the General Commissioners of Income Tax, on a preliminary objection taken by the respondent that the appeal was out of time in that the case had not been transmitted to the High Court within seven days after receipt by the party requiring it to be stated as required by section 149 (1) (*d*) of the Income Tax Act, 1918, which provides:—

"The case shall set forth the facts and the determination of the Commissioners, and the party requiring it shall transmit the case, when stated and signed, to the High Court, within seven days after receiving the same."

The material facts and dates appear in the judgment.

Mr. Edwardes Jones, K.C., and Mr. Gurney G. Beagley appeared for the respondent; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

MR. JUSTICE ROWLATT, in a considered judgment, said that an objection was taken to the Crown's appeal that it was out of time. [His Lordship read section 149 (1) (*d*) of the Income Tax Act, 1918, and continued.] Nothing was said about the place to which, or the time within which, the case was to be sent to the party requiring it to be stated; there was nothing expressly requiring it to be sent at all. Perhaps it was assumed that he would call for it.

The hearing before the General Commissioners was on December 14, 1922, and at the close the inspector, Mr. Grainger, expressed his dissatisfaction and required a case to be stated. Ten months elapsed and nothing happened and on October 24, 1923, Mr. Grainger was moved to another district. On March 27, 1924, the draft case was sent to the respondent's solicitor, who lost it.

Two years and five months elapsed, and in August, 1926, someone woke up, found the case and returned it to the General Commissioners. On August 23, 1926, the case, stated and signed, was sent to the office where Mr. Grainger was in 1922 and it arrived there in course of post on August 24, 1926. The acting inspector happened to be away that day and some little delay occurred. It was not till September 1 that it was sent to the secretary to the Commissioners of Inland Revenue and by him to the Solicitor of Inland Revenue, who filed it on September 2.

It was not disputed that the Solicitor of Inland Revenue was the agent of Mr. Grainger and that receipt by him was receipt by Mr. Grainger, but it was contended by the respondent that the case must be taken to have been received when it was delivered at the office of the inspector. If so, the appeal was out of time; if it was not received till it reached the hands of the solicitor it was in time. It was not disputed by the Crown that the requirements of the section were imperative.

The Attorney-General contended that the inspector, Mr. Grainger, was "the party requiring" the case and that it must go to him, not to his successor; and that if he died it would be, not his successor, but his executors who must continue. He (his Lordship) had never known a case where the executors of an inspector had been made parties to one of these appeals.

The question was whether the office was Mr. Grainger's agent to receive the case. There was nothing in the statute to say so; nor was it an agent by estoppel, because the person sending documents there was not a party but the tribunal itself. He must hold that it was not necessary that the inspector should actually receive the case in his hand, but that it would suffice if it were sent to the office to which he was attached.

He concluded that, when the inspector left, he took pending appeals with him. Was the authority of the old office to receive documents for him withdrawn in fact? It would be very inconvenient if it were so. The General and Special Commissioners would not know that he had gone. The office staff would not have done their duty if they had returned the document marked "Gone away." He came to the conclusion that it was their duty to receive it on Mr. Grainger's behalf and he thought that the objection succeeded, though he reached that conclusion with regret. He wished that a time limit could be fixed within which cases must be stated and signed. It was not right that this case should have taken four years in being stated.

[Solicitors—Mr. John Bransbury; the Solicitor of Inland Revenue.]

Prob., Divorce, and Adm. Div. (Bateson, J.) 1927. May 31.

MCCAUSLAND v. MCCAUSLAND.*

Divorce — Petition — Service — Respondent a minor—Personal service—Matrimonial Causes Rules, 1924, r. 7.

Where the respondent to a divorce petition is a minor, personal service of the petition on the respondent is good service, and the appointment of a guardian *ad litem* is not necessary.

In this undefended petition Eric Marcus McCausland, described as a medical practitioner, of Wheatley, Oxfordshire, sought the dissolution of his marriage with Daisy Violet McCausland, *née* Campin, on the ground of her adultery with some man unknown.

Mr. Bayford, K.C., and Mr. G. Tyndale appeared for the petitioner.

MR. BAYFORD referred to a preliminary point of law with regard to the question of service of a copy of the petition on the respondent, who was a minor. Rule 7 of the Matrimonial Causes Rules, 1924, provided that a petition should be served personally by delivery of a sealed copy of the petition. Rule 74 (A) provided that a minor over seven might elect a guardian *ad litem*, and rule 97 provided that in any matter of practice or procedure not dealt with in those rules the Rules of the Supreme Court should be deemed to apply.

By Order IX., rule 4, of the Rules of the Supreme Court service in an action had to be made on the father or guardian of an infant defendant, but the Court could order that service on the infant was good service. The case of *Quinn v. Quinn* (36 *The Times* L.R., 170; [1920] P., 65) only decided that it was not necessary for the petitioner to apply for the appointment of a guardian *ad litem* in respect of a minor respondent. A petition was not an action, but he submitted that service on the present respondent was good service.

MR. JUSTICE BATESON said that cases like this must have arisen before and after *Quinn v. Quinn* (36 *The Times* L.R., 170; [1920] P., 65), but probably the efficacy of the service had not been questioned. There was no such protection of a minor in this Division with regard to service of process as in the other Divisions of the High Court. He held that personal service on the wife was good service.

Evidence having been given, his LORDSHIP granted a decree *nisi*.

[Solicitors—Messrs. Gibbs, White and King.]

House of Lords. (Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Wrenbury, and Lord Carson.) 1927. May 27.

MCDOWELL v. STANDARD OIL COMPANY (NEW JERSEY).†

Trade Mark — Registration — Invented word — Similarity—Calculated to deceive.

An application by a Liverpool oil merchant to register the invented word "Nuvol" as a new mark in respect of illuminating, heating, and

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

† Reported by H. B. HEMMING, Esq., Barrister-at-Law.

lubricating oils was opposed by the Standard Oil Company of New Jersey, who had registered the invented word "Nujol" as a trade mark in respect of medicinal preparations for human use and had for several years past sold in this country under that name a preparation of refined paraffin, and was refused by the Registrar.

Held, that the applicant had failed to discharge the onus which was upon him of showing that the proposed trade mark was not calculated to deceive.

Decision of the Court of Appeal (43 R.P.C., 313) affirmed.

This was an appeal from a decision of the Court of Appeal (43 R.P.C., 313) reversing a decision of Mr. Justice Astbury and restoring a decision of the Registrar of Trade Marks whereby an application by the appellant for the registration of a trade mark consisting of the invented word "Nuvol" (No. 443189 in Class 47) in respect of illuminating, heating, and lubricating oils was refused.

The application was opposed by the respondent company, who were the registered proprietors of the invented word "Nujol" in respect of medicinal and curative preparations of all kinds included in Class 3 and all being for human use, and who had for the past nine years sold under that name a highly purified oil for medicinal and curative purposes. The respondent company were also the proprietors of an extensive business in petroleum oils of all kinds.

The facts sufficiently appear from the opinion of the Lord Chancellor.

Mr. Macmillan, K.C., and Mr. Trevor Watson were for the appellant; Sir Duncan Kerly, K.C., and Mr. F. E. Bray, for the respondents, were not called upon.

The Lord Chancellor.—My Lords, in the year 1923 the appellant, who is a Liverpool oil merchant, was desirous of registering the invented word "Nuvol" as a trade mark in respect of illuminating, heating, and lubricating oils. He had not at that time used the trade mark in connexion with his goods to any substantial extent. He issued the usual preliminary advertisement, and thereupon the respondents, the Standard Oil Company of New Jersey, informed him that they had registered the invented word "Nujol" in respect of medicinal and curative preparations for human use, and were selling here through their agents a preparation of refined paraffin under that name, and they suggested that as the registration of the word "Nuvol" was calculated to lead to confusion between the goods sold under that name and those sold under the trade mark "Nujol" the appellant should withdraw his application. The appellant did not give way, and accordingly the respondents opposed the registration, which was refused by the Registrar on the ground that the word was calculated to deceive and, to use his language, that the two words were too much alike to be allowed independent registration by different proprietors. On appeal to the High Court that decision was reversed by Mr. Justice Astbury, who directed that the registration should proceed, but his decision was in turn reversed by the Court of Appeal, and the decision of the Registrar was restored; hence this present appeal. I should add that at one time a charge was made against the present appellant that he had purposely adopted the proposed mark "Nuvol" with the dishonest intention of appropriating some part of the goodwill which belonged to the respondents in respect of their trade mark "Nujol," but on the evidence led before Mr. Justice Astbury that suggestion was entirely displaced. The learned Judge found that there was no foundation at all for it, and that charge has since been withdrawn or not insisted upon by the other side. Therefore the only question is whether in your Lordships' judgment the adoption of the trade mark "Nuvol" would be calculated to deceive or mislead the trade or the public, and to produce confusion between the goods of these two traders.

My Lords, it has been long ago decided, and is quite clear, that the words "calculated to deceive" which are found in section 11 of the Trade Marks Act of 1905 do not mean "intended to deceive" but "likely or reasonably likely to deceive or mislead" the trade or the public. It has also been held in the case of *Eno v. Dunn* (6 *The Times* L.R., 379; 15 App. Cas., 252) decided in your Lordships' House, that the burden of proving that a proposed trade mark is not likely to deceive lies upon the applicant, and also, a proposition which I think follows upon the last, that if that proof is incomplete, and the matter is, as Lord Watson said in that case, *in dubio,* the application may be refused. I would add that registration under the Acts is a matter of discretion, and although the decision of the Registrar in the matter is by no means conclusive (and under and by the effect of section 8, subsection 2, of the Trade Marks Act, 1919, the question is entirely open for the Courts) yet the fact that the Registrar, an experienced official, has decided against an application on the ground that registration might lead to confusion must still carry considerable weight with any Court or Tribunal which has to review the decision.

My Lords, we start here with the fact that the two words "Nuvol" and "Nujol" are both invented and to most people meaningless words, almost identical both in spelling and in sound, for there is a difference of only one letter in the middle of the word, and unless pronunciation is very distinct it is not difficult to mistake one word when spoken for the other. The appellant therefore starts with a somewhat heavy burden if he has to displace the inference to be drawn from that fact.

The appellant has proved certain facts which are material. He says that the goods are different in the sense that his own goods are oils to be used for lighting, heating, or lubricating, while the goods of the respondents consist of a preparation to be used for medicinal purposes. He says, as I have indicated, that they are used for different purposes, and that makes a distinction. There is no doubt that that observation is quite true, and has force. He also says, and this, with me, carries less weight, that the respondents have not been in the habit of selling their preparation of oil under their own name. I do not think that that matters much, because the preparation of oil has been sold as "Nujol" by the agents who have sold it, and the real question is whether the registration of the appellant's proposed mark would interfere with the sale of "Nujol." As Lord Justice Sargant put it: "The public will be equally deceived for all practical purposes if they merely identify or confuse the producers of 'Nuvol' with the producers of 'Nujol' whether they know the actual name of the producers of 'Nujol' or not." Again, it is said that the Anglo-American Oil Company, who are the sellers of "Nujol," consented to brand the term "Nuvol" on the appellant's casks or drums. That, no doubt, is a fact, but I do not attach much weight to it, because we do not know

why that was done, and upon which side the greater interest of the Anglo-American Oil Company lay.

Those are all facts which your Lordships will consider, but, on the other hand, there are these considerations: First, the similarity, amounting almost to identity, of the name, so that the matter stands almost as if the appellant proposed to write "Nujol" on his goods. Secondly, in each case the goods in question are oils, and consist of petroleum, the only difference being in the degree of refinement. The appellant's oils would, at present at all events, be sold in a somewhat raw state, while the respondents' goods are, to a great extent, refined, but the appellant, and the purchasers from him, would be free to refine the oil to any degree which they might think desirable. Here I would refer again to the judgment of Lord Justice Sargant, who says this: "But, on the other hand, if the applicant once succeeded in obtaining the registration of 'Nuvol' as his mark it could be used in respect of lubricating oil of any grade of refinement, sold in any quantity and at any price. And there might, and I think probably would, be a far smaller difference between the opponents' medicinal oil 'Nujol' and the finest grade of lubricating oil ultimately sold under the name 'Nuvol' than between that finest 'Nuvol' and the coarsest grade of 'Nuvol' sold for lubricating heavy machinery." In other words, the difference is one of degree only, namely, the degree of refinement to which the paraffin may be subjected.

Lastly, there is the fact that the Registrar, with all his experience, thought that the two words were too much alike to be allowed independent registration, and, for myself, I attach considerable weight to the opinion which he expressed.

My Lords, upon the whole, I have not been satisfied that if this mark were registered there would be no risk of confusion, and I think it is unfortunate that the appellant, having had his attention called to the respondents' trade mark, did not withdraw his application, but preferred to take the risk of a successful opposition. I think that this appeal fails, and I move your Lordships that it be dismissed, with costs.

Viscount Dunedin.—My Lords, I concur. I do not conceal that, to me, it is a very narrow case, and I think it is just when it is a very narrow case that real weight ought to be given to the original determination of the Registrar. It is quite true that in the recent case of *Banham and Company, Limited v. Reddaway and Company, Limited* (43 *The Times* L.R., 138; [1927] A.C., 406) the Act of 1919 was not mentioned, but I have looked carefully at section 8, subsection 2, and I do not think that that subsection really makes any difference to the remarks which I, giving the judgment of the House, made in *Banham's* case (*supra*). For these reasons I concur in the motion proposed. After all, it is not only a question of the decision of the Registrar, but in order to grant this appeal we should have to be of opinion that the Court of Appeal also was wrong.

Lord Atkinson.—My Lords, I concur.

Lord Wrenbury.—My Lords, I concur.

Lord Carson.—My Lords, I also concur.

[Solicitors—Messrs. Pritchard, Englefield and Co., for Messrs. Simpson, North, Harley and Co., Liverpool; Messrs. Halse, Trustram and Co.]

Chan. Div. (Eve, J.) 1927. May 31.

IN RE NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.*

Companies—Winding-up—Proof—Contract of marine insurance—No stamped policies—Rejection of proof.

The Court held that the liquidator had rightly rejected a proof by the English Insurance Company, Limited, in the winding-up of the National Benefit Assurance Company, Limited, in that the contract between the two companies in respect of which the proof of debt was advanced was a contract of marine insurance and no stamped policy of marine insurance was issued to the English Insurance Company, Limited, as required by law, and therefore the contract was invalid.

This was a summons by the English Insurance Company, Limited (referred to as the English Company), against the Official Receiver and liquidator of the National Benefit Assurance Company, Limited (referred to as the National Company), in respect of the rejection by the liquidator of a proof of debt in the winding-up of the National Company.

Mr. Porter, K.C., and Mr. Andrewes-Uthwatt appeared in support of the summons; Mr. Dunlop, K.C., and Mr. L. W. Byrne were for the Official Receiver and Liquidator.

Mr. Justice Eve, in giving judgment, said:—By this summons the English Insurance Company, Limited, seek to set aside the rejection by the liquidator of the National Benefit Assurance Company, Limited, of a proof carried in by it in the winding-up of the National Company, on the ground that the debt thereby sought to be established arose out of a contract for sea insurance in respect of which no stamped policies of marine insurance were issued to the English Company.

It is not disputed that if the contract is properly described as a contract for sea insurance it is invalid, in that it does not comply with the provisions of the Stamp Act, 1891 (section 93), or the Marine Insurance Act, 1906 (sections 22 and 23). The sole question for determination is the true construction of the contract between the two companies. Is it, or is it not, a contract of marine insurance?

The contract is embodied in a document dated January 27, 1922, with a schedule and an addendum attached, but not affecting its construction. It is described as a participation agreement and it provides in article 1 that the National Company shall be entitled to, and shall accept, a quota participation equal to one-eighth share of all and every risk, excluding obligatory reinsurance agreements with other companies, arranged by the head office of the English Company upon any marine insurance or upon any war risks, whether alone or in conjunction with marine risks, accepted by the English Company (including their agencies and branches at home and abroad) through their marine department.

The expression "marine insurance" as used in the agreement means all forms of insurance, including war risk and reinsurance, transacted by the marine department of the English Company.

By article 2 the participation was fixed at 50 per

* Reported by A. W. Chaster, Esq., Barrister-at-Law.

cent. of the share retained by the English Company at their own risk of all marine insurances accepted on and after a date therein mentioned; the maximum limit of the National Company by any one slip was fixed at £1,875 and any special reinsurances effected by the English Company of risks within the scope of the agreement were to be for common account of the two parties. Under article 3 the liability of the two parties was to begin automatically at the same time, any cover given by the English Company becoming immediately binding on the National Company, the expressed intention being that the two companies should participate *pari passu* in all the marine insurances accepted by the English Company through its marine department.

Articles 4 to 7, inclusive, free the English Company from any obligation to furnish any particulars in regard to risks accepted and limit the right of the National Company to the receipt of monthly statements of premiums and losses only. It is to be entitled to a proportionate part of the net premiums, salvages, and other benefits received by the English Company, and to bear its proportionate share of all losses, including any loss due to failure on the part of the original assured to pay the premium. The whole control of the business, including the settlement of all claims and the institution or defence of legal or other proceedings, is committed to the English Company, which is to receive as consideration for the agreement and as remuneration for obtaining, managing, and supervising the business a commission of 2½ per cent. on the net premiums paid or allowed to the National Company in respect of its participation, and a commission of 10 per cent. on the profits derived by the National Company from the whole of the business under the agreement.

Such are the relevant terms of the document which I have to construe, but I must not omit to mention two passages which were relied upon as indicating some doubt on the part of the contracting parties as to the efficacy of their bargain in all circumstances. Article 10 begins with these words: "This being an agreement executed in a spirit of trust, one with the other, the participator" (that is, the National Company) "is absolutely bound in every case to follow the fortunes of the (English) Company." And in the arbitration clause it is agreed that all disputes shall be settled by an equitable and liberal interpretation of the provisions of the agreement according to the spirit thereof and that the arbitrators are relieved from all judicial formalities and may abstain from following the strict rule of the law.

The document, it has been suggested, is one whereby the English Company is appointed the agent of the National Company for effecting insurances, or, alternatively, is one in the nature of a partnership agreement. But, whatever be the particular appellation applied to it, there cannot, in my opinion, be any real doubt as to its true character. It is intended to cover marine risks: it is a contract of reinsurance under which, in return for a proportion of the premiums paid to cover marine risks, the National Company is bound to indemnify the English Company against a corresponding proportion of any loss incurred. It is, therefore, a contract for sea insurance and not being expressed in a policy it is invalid in that the only form of contract of sea insurance which the law recognizes is a duly stamped policy.

I think, therefore, that the liquidator was right, and that this summons must be dismissed, with costs.

[Solicitors—Messrs. Parker, Garrett, and Co.; Messrs. William A. Crump and Son.]

K.B. Div. (Rowlatt, J.) } 1927. May 25.

DICKSON v. HAMPSTEAD BOROUGH COUNCIL.*

Revenue—Income-tax—Payments out of profits not brought into charge—Deduction of tax—Liability of person deducting to account to Inland Revenue Commissioners — Housing scheme—Money borrowed by borough council —Interest—Deduction of tax—Council owning profitable undertaking—Interest paid out of council's general fund—Indemnity of council against loss on scheme—Council's liability to account for sums deducted—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), All Schedules Rules, r. 21.

By Rule 21 of the All Schedules Rules of the Income Tax Act, 1918, "(1) Upon payment of any . . . annual payment charged with tax under Schedule D, . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax. . . . (2) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much . . . as is not paid out of profits or gains brought into charge . . . and every such amount shall be a debt due from him to the Crown. . . ."

Under the Housing of the Working Classes Acts, 1890 to 1919, and the Metropolis Management Act, 1855, the respondents, a metropolitan borough council, assigned to the London County Council all rates authorized to be raised by the respondents under the Metropolis Management Act, 1855, or the London Government Act, 1899, to secure money advanced by the London County Council.

The money so raised was used by the respondents in connexion with the construction of flats for the working classes in pursuance of a scheme prepared by them under s. 1 of the Housing, Town Planning, &c., Act, 1919.

In making payments of interest on the sums advanced the respondents deducted income-tax under Rule 21 of the All Schedules Rules of the Income Tax Act, 1918. The interest was paid out of the general fund in the hands of the respondents, into which fund were paid all profits or gains whether derived from a housing scheme or from elsewhere. The respondents had only one banking account, out of which all payments, including the interest, were made and into which all receipts, including the profits and gains derived from the respondents' electricity undertaking, or otherwise, were paid. No special fund in respect of any housing scheme was maintained.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

It was admitted that the respondents possessed profits or gains brought into charge to income-tax sufficient for the payment of interest on the sums advanced, apart from any revenue derived under any housing scheme.

Held, that as none of the respondents' profits and gains other than the receipts of the housing scheme contributed to the payment of the interest, and as the respondents had, under the Housing Acts, an indemnity against loss on the scheme, the respondents were liable under Rule 21 to account to the Commissioners of Inland Revenue for the amount of the deductions.

This was a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The Hampstead Borough Council, the respondents, appealed against assessments to income-tax in the sums of £600, £7,681, and £7,500 for the years ending April 5, 1921, April 5, 1922, and April 5, 1923, made upon them under the provisions of the Income Tax Acts. There was no dispute as to figures. The only question was whether under Rule 21 of the All Schedules Rules of the Income Tax Act, 1918, the respondents were liable to account to the Commissioners of Inland Revenue for the amount of the tax deducted by the respondents on paying the interest under certain indentures of mortgage. If they were liable so to account, the assessments were to stand ; if they were not, the assessments were to be discharged.

The relevant facts and the material statutory provisions were as follow :—

Under the provisions of section 1 (1) of the Housing, Town Planning, &c., Act, 1919, it was the duty of every local authority within the meaning of Part III. of the Housing of the Working Classes Act, 1890, to prepare and submit to the Local Government Board a scheme for the exercise of its powers under Part III., *i.e.,* its powers for, and incidental to, the provision of houses for the working classes in its area.

Section 7 (1) of the Housing, Town Planning, &c., Act of 1919 enacted as follows :—

"If it appears to the Local Government Board that the carrying out by a local authority . . . of any scheme . . . has resulted or is likely to result in a loss, the Board shall, if the scheme is carried out within such period after the passing of this Act as may be specified by the Board with the consent of the Treasury, pay or undertake to pay to the local authority . . . out of moneys provided by Parliament such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury, subject to such conditions as may be prescribed by those regulations."

Under the provisions of section 41 (1) (*b*) of the Housing, Town Planning, &c., Act, 1919, the council of a metropolitan borough was to be the local authority for the metropolitan borough to the exclusion of any other authority so far as regarded the provision of houses within the metropolitan borough.

Section 3 of the Housing of the Working Classes Act, 1900, enacted as follows :—

"(1) Any expenses incurred by the council of a metropolitan borough under Part III. of the principal Act, whether within or without the borough, shall be defrayed as part of the ordinary expenses of the council, and in that Act the expressions 'district,' 'local authority,' and 'local rate' shall, for the purposes of Part III. of the Act, include a metropolitan borough, the council of the borough, and the general rate of the borough.

"(2) Where the council of a metropolitan borough adopt Part III. of the principal Act, the power of the council to borrow for the purposes of that Part shall be exercisable in the like manner and subject to the like conditions as the power of the council to borrow for the purposes of Part II. of that Act."

By section 1 "the principal Act" meant the Housing of the Working Classes Act, 1890. By section 10 (1) of the London Government Act, 1899, and the London (Rating) Scheme, 1901, made thereunder, all money to be raised by rates to meet the expenses of a metropolitan borough council was payable out of the general rates of the borough. Under the provisions of section 25 (1) and 46 (2) of the Housing of the Working Classes Act, 1890, a local authority might borrow such money as was required for the purposes of Part II. of that Act on the security of the local rate in the manner laid down in section 183 of the Metropolis Management Act, 1855.

Under the provisions of section 46 (3) the London County Council might, if they thought fit, lend to a local authority in the administrative county of London the sums borrowed in pursuance of Part II. of that Act. Under the provisions of section 183 of the Metropolis Management Act, 1855, the sums borrowed and the interest paid were charged or might be charged on the rates authorized to be raised under that Act.

5. Section 8 (1) of the Housing Act, 1921, enacted as follows :—

"The London County Council shall, subject to such conditions as may be prescribed by regulations made by the Minister with the consent of the Treasury, repay to the council of a metropolitan borough any loss which may be incurred by that council in carrying out a scheme to which section 7 of the Housing, Town Planning, &c., Act, 1919, applies, and any payments so made by the London County Council shall be deemed to have been made as part of the expenses incurred by them in carrying out a scheme to which that section applies."

In accordance with the powers contained in section 7 (1) of the Housing, Town Planning, &c., Act, 1919, certain regulations entitled "The Local Authorities (Assisted Housing Schemes) Regulations, 1919" (S.R. and O., 1919, No. 2,047), were made by the Minister of Health with the approval of the Treasury.

Article IV. of those Statutory Rules and Orders stated as follows :—

"(1) The local authority shall for the purposes of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, keep separate accounts, to be called 'The Housing (Assisted Scheme) Accounts,' including a separate revenue account, to be called 'The Housing (Assisted Scheme) Revenue Account.'

"(2) They shall cause to be credited to the Housing (Assisted Scheme) Revenue Account in each financial year :—

"(*a*) The produce of a rate of one penny in the pound levied in the area chargeable with the expenses of the assisted scheme, or such less amount as may be necessary to meet the deficit for the financial year ; (*b*) the rents (inclusive of rates where rates are payable by the owner) in respect of any houses provided or acquired by them under the assisted scheme ; and

(*c*) any other income which in the opinion of the Minister may properly be credited to the said account.

" (3) They shall cause to be debited to the Housing (Assisted Scheme) Revenue Account in each financial year :—

" (*a*) The sums required for interest and repayment of principal in respect of all moneys borrowed by them for the purposes of the assisted scheme (including moneys borrowed for the purchase of land which is approved by the Minister as part of the assisted scheme) which in the opinion of the Minister may properly be debited to the said account ; (*b*) the rates, taxes, rents or other charges payable by them in respect of any land or houses acquired, leased or provided by them under the assisted scheme, including any sums payable by way of rent, with the approval of the Minister, to any other account of the local authority in respect of land acquired by them for some other purpose and appropriated for purposes of the assisted scheme. . . ."

By Article VI. :—

" (*b*) During the period after any part of the assisted scheme has been carried into effect, and before the whole of the assisted scheme has been carried into effect, the Exchequer subsidy in respect of that part of the assisted scheme which has been carried into effect shall be calculated upon the basis of an estimate submitted to the Minister by the local authority and approved by the Minister, and in respect of that part of the assisted scheme which has not been carried into effect shall be an amount equivalent to the deficit under the last-mentioned part of the assisted scheme as shown by the entries relating thereto in the Housing (Assisted Scheme) Revenue Account at the conclusion of the financial year. . . .

" (*g*) The Exchequer subsidy in so far as it is calculated upon an estimate shall be determined on the basis of the average annual deficit to be incurred by the local authority under the assisted scheme (or under that part of the assisted scheme which has been carried into effect as the case may be) as shown by the estimate last made by the local authority under this Article, and shall be the equivalent of the amount of the said average annual deficit subject to the deduction from the said average annual deficit of the estimated produce of a rate of one penny in the pound hereinbefore referred to, provided that in the determination of the amount of the Exchequer subsidy during the period to which paragraph (*b*) of this Article applies there shall be added to the amount of the said average annual deficit an amount equivalent to the deficit referred to in the said paragraph (*b*)."

In accordance with the powers given by section 8 (1) of the Housing Act, 1921, certain further regulations, entitled " The London County Council Assisted Housing Scheme (Losses by Metropolitan Borough Councils)," were made by the Minister of Health with the approval of the Treasury and became Statutory Rules and Orders No. 874 of 1922.

Rule 3 (1) stated as follows :—

" For the purposes of the scheme of a council the loss in the carrying out of which is repayable by the London County Council under section 8 of the Housing Act, 1921, the council shall keep separate accounts to be called ' The Housing (Assisted Scheme) Accounts ' including a separate revenue account to be called ' The Housing (Assisted Scheme) Revenue Accounts ' (hereinafter referred to as ' The Revenue Account ') and the Housing Accounts Order (Local Authorities), 1920, shall so far as applicable apply to those accounts."

In accordance with the powers given to the respondents under the provisions of the Housing of the Working Classes Acts, 1890 to 1919, and the Metropolis Management Act, 1855, four indentures of mortgage were made dated February 9, 1921, March 7, 1921, July 29, 1921, and August 1, 1925, between the respondents and the London County Council under the terms whereof the respondents granted and assigned unto the London County Council, their successors and assigns, the general rate and all others (if any) the moneys or rates authorized to be raised by the respondents under the Metropolis Management Act, 1855, or the London Government Act, 1899, to secure the capital and interest in respect of the following sums of money advanced by the London County Council—namely, £50,000, £50,000, £60,000, and £40,261.

The money so raised by these indentures was used by the respondents in connexion with the construction of a large block of flats for the working classes in pursuance of a scheme prepared by them under section 1 of the Housing, Town Planning, &c., Act, 1919, and known as the South End Close Housing Scheme.

In making payments of interest on the sums advanced under the indentures the respondents deducted income-tax at the rate in force at the time under the provisions of Rule 21 of the All Schedules Rules of the Income Tax Act, 1918. The interest was paid out of the general fund in the hands of the respondents, into which fund were paid all profits or gains whether derived from a housing scheme or from elsewhere. The respondents had only one banking account—namely, at Lloyds Bank, Hampstead branch—out of which all payments, including the interest, were made and into which all receipts, including the profits and gains hereinafter mentioned, were paid. No special fund in respect of any housing scheme was maintained.

It was admitted that for all years material to this appeal the respondents possessed profits or gains brought into charge to income-tax amply sufficient for the payment of interest on the sums advanced under the indentures of mortgage, apart from any revenue derived under any housing scheme.

It was contended on behalf of the respondents that the mortgage interest was wholly payable, and paid, out of profits or gains brought into charge to tax within the meaning of Rules 19 and 21 of the All Schedules Rules, and consequently the respondents were under no liability to account for the amount of the tax deducted by them when paying such interest ; that the respondents if they pleased could earmark for the payment of the interest as much as was necessary of the profits or gains brought into charge to tax derived by them from their electricity undertaking or otherwise, and pay the same into a separate banking account kept exclusively in respect of the interest ; that the respondents were in no worse position because in fact they paid the profits and gains into their general banking account and paid the interest therefrom ; that the interest was charged on their general rate and paid from their general funds and the profits and gains were paid into their general funds and were applicable in relief of their general rate and/or in payment of their ordinary expenses ; that it was immaterial that their losses in respect of their housing scheme (save as to certain minor items) were subsequently reimbursed to them by the London County Council.

On behalf of the Crown it was contended, *inter alia*, that the principal and interest of the mortgages were charged on the general rate and therefore not upon profits and gains brought into charge, and the fact that certain receipts which were profits and gains brought into charge were paid into the general fund did not entitle the respondents to say that the interest was paid out of these profits and gains; that the interest, in so far as it exceeded the revenue derived from the housing scheme, was not payable out of other profits or gains of the council brought into charge; that it was not so payable inasmuch as the interest, in so far as it exceeded the available revenue derived from the housing scheme, represented a loss the burden of which by statute could not fall upon the respondents and was, therefore, a loss which did not and could not fall to be paid out of other profits and gains belonging to the respondents; that the Housing, Town Planning, &c., Act, 1919, the Housing Act, 1921, and the regulations made under these Acts clearly showed the intention of the Legislature that assisted housing schemes should be kept entirely separate in matters of finance from the other undertakings of a local authority and that, therefore, such local authority could not lawfully transfer the surplus profits or gains from any of its other undertakings to the relief of loss upon its housing scheme, or to the payment of interest upon capital moneys borrowed for that scheme.

It was contended that the purpose of the Housing, Town Planning, &c., Act, 1919, and the Housing Act, 1921, was the provision of houses for the working classes without loss to a local authority, and the respondents' contentions, if considered in the light of that purpose, could not be sustained, inasmuch as (i) a housing scheme would, if such contentions were correct, result in profit to a local authority (although actually executed at a loss) where such local authority had other enterprises producing profit; and (ii) that a distinction for housing purposes would thus be drawn and inequality would result between local authorities with such other enterprises and those without, a distinction which could not have been intended by the Housing Acts.

The Special Commissioners decided as follows:—

"We hold that the respondents are entitled to apply the proceeds of any profits or gains brought into charge to tax to the payment of interest on the sums advanced on mortgage by the London County Council, it being admitted that such profits or gains were amply sufficient for the purpose.

"We do not consider that the payment of the interest in question should be confined to profits or gains derived solely from the housing scheme. We therefore hold that the respondents are not liable to account for the tax deducted in making payments of interest, and that the appeal succeeds.

"We have arrived at this conclusion after considering the various statutes and cases to which our attention has been drawn; in particular we are of the opinion that the provisions of section 46 of the Housing of the Working Classes Act, 1890, section 3 (2) of the Housing of the Working Classes Act, 1900, and the case of *Sugden v. Leeds Corporation* (29 *The Times* L.R., 402; [1914] A.C., 483) support this view. We also attach considerable importance to the fact that in the various indentures of mortgage the respondents granted and assigned to the London County Council the general rate *and* all other moneys or rates authorized to be raised by the respondents under the Metropolis Management Act, 1855, as security for the sums advanced."

The Special Commissioners discharged all the assessments in question.

Mr. R. P. Hills, with him the Attorney-General (Sir Douglas Hogg, K.C.), appeared for the Crown; Mr. G. R. Blanco White for the Borough Council.

Mr. Justice Rowlatt, in giving judgment allowing the appeal, said that he thought that the conclusion was not difficult to arrive at. The borough council had made payments of interest and had deducted tax. How much were they entitled to retain on the ground that it was paid out of profits and gains already brought into charge? To meet the interest on the mortgages there was a certain income from the housing scheme itself, and to the extent of that income the interest must be treated as payable out of that income. But the income from the housing scheme was not sufficient to meet the outgoings. That deficit was made up by the London County Council at the expense partly of the Exchequer and partly of the ratepayers—anyhow by payments of money which were not profits and gains.

The borough council had other undertakings which showed a profit, such as their electricity undertaking. They kept only one banking account and they said that the interest was to be treated as paid not only out of the profits and gains of the housing scheme, but out of the profits and gains of the electricity undertaking. The consequence was that the payments of sums by the London County Council were made to make up a deficit in a fund which did not include those other profits and gains, but to which the only other contributory was the profit of the housing scheme itself.

Two London County Council cases had been cited. The present case seemed to him to differ from the first case of *London County Council v. Attorney-General* (17 *The Times* L.R., 131; [1901] A.C., 26) and to be on the same footing as *Attorney-General v. London County Council* (23 *The Times* L.R., 390; [1907] A.C., 131). In the first of these cases the interest was paid out of a fund which included the profits and gains so applied. In the present case the untaxed moneys did not go to swell the profits and gains. What was given here was such a sum as should prevent the charge of this interest upon any fund other than the housing scheme.

That was exactly the position in the second *London County Council* case (*supra*). There the London County Council had property which could not produce any money. They enjoyed its value by occupying it. If they had been allowed to retain the tax it would have meant that they were to a certain extent tax free. So in the present case there was legislation which prevented the electricity undertaking from effectively contributing to the housing scheme. If what was contended for could be done the corporation would be enjoying the profits and gains of the electricity undertaking to some extent tax free, because these profits and gains would be used to pay interest which would be immediately refunded. The corporation were indemnified from paying the interest at all except so far as they paid it out of the housing fund.

The fact that the income from the electricity undertaking had been passed through the account from which payment was made had nothing to do with it. What really paid was the receipts of the housing scheme and the subsidy and nothing else. None of the other profits and gains contributed.

The appeal must be allowed, with costs.

[Solicitors—The Solicitor of Inland Revenue; Mr. A. P. Johnson, Town Clerk, Hampstead.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. May 27.

BEDNALL v. BEDNALL AND SHIVUSSAWA.*

Divorce—Custody of child—Legitimated child—Application for declaration of legitimation and for custody—Child not a party—Jurisdiction — Legitimacy Act, 1926 (16 and 17 Geo. V., c. 60), s. 1 ; Schedule, para. 1 (*b*).

The unmarried parents of an illegitimate child married one another, the father being domiciled in England at the time of the marriage. Subsequently the husband obtained a decree *nisi* of divorce on the ground of the wife's adultery, and he applied that there should be inserted in the decree *nisi,* (1) a declaration that the child was the legitimated child of the parties, and (2) an order that he should be given the custody of the child.

Held, that although upon the evidence the conditions of s. 1 of the Legitimacy Act, 1926, had been fulfilled, yet, as the child was not a party to the suit, the Court ought not to adjudicate upon the question whether the child was legitimated by the Act, since the Court was not, unless the child was a party, a "Court of competent jurisdiction" within para. 1 (*b*) of the Schedule to the Act ; and that therefore the Court had, as matters stood, no power to make an order for the custody of the child.

In this petition Captain Cecil Norbury Bednall, of Lewisham Hill, an Army officer, sought the dissolution of his marriage with Doreen Alexandra Bednall, *née* Kennedy, on the ground of her adultery with a Japanese named Shivussawa at Queen Alexandra-mansions, Grape-street, Holborn.

Mr. H. B. D. Grazebrook, who appeared for the petitioner, submitted that if the case were proved the decree *nisi* order with regard to the custody of the child should contain a declaration to the effect that the child mentioned in the petition was the legitimated child of the petitioner and the respondent. The child was born on May 26, 1922, and the parents, now the petitioner and the respondent, were married on July 22, 1922. By the Legitimacy Act, 1926, section 1 (1), it was enacted that where the parents of an illegitimate person married that person should be legitimate from the date of the marriage or the commencement of the Act (January 1, 1927), whichever last happened. The schedule to the Act provided for the re-registration of the birth of a legitimated person by the Registrar-General on the application of both parents. In this case the mother was believed to be in America with the child, who had been taken out of the custody of the father, and no trace could be found of the original registration of the child. The birth certificate had been lost. The father wished if it were possible to have a declaration as to legitimation in connexion with the order for custody.

Counsel pointed out that the schedule to the Act, in paragraph 1 (*b*), dealt with the establishment of the paternity of a legitimated person "by an affiliation order or otherwise by a decree of a Court of competent jurisdiction," and section 6 (1) of the Act enacted : "A legitimated person shall have the same rights and shall be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and, subject to the provisions of this Act, the provisions of any Act relating to claims for damages, compensation, allowance, benefit, or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person."

The petitioner, said counsel, was domiciled in England. He was unmarried at the time of the birth of the child and of the subsequent marriage, and, so far as the petitioner knew, the respondent was a spinster at the time of the marriage. This was the first case before the Court under the new Act. The child was undoubtedly legitimated by the Act, and he submitted that in the circumstances it was competent for the Court to give the petitioner an order for custody of the child drawn up in the manner suggested.

After hearing the evidence, his Lordship granted a decree *nisi,* but reserved his decision on the question of an order for custody of the child.

Mr. Justice Hill, in his considered judgment, said :—

I have pronounced a decree *nisi* of the dissolution of the marriage of the husband and wife which took place on July 22, 1922. There remains the question whether, upon the materials before me, and in the present state of the cause as to the parties, I can make an order for custody of the child. The petitioner alleged that "there is no issue of the said marriage, but there is a legitimated child—namely, Dorita Cecilia, who was born on May 26, 1922." The petitioner's prayer asked for "custody of the said legitimated child." The petition was duly served upon the respondent, and she entered an appearance.

If the child had been issue of the marriage I should have had no hesitation in giving the petitioner custody of her. In the present case, before the Legitimacy Act, 1926, I could have made no order. I have to consider whether, and in what circumstances and upon what proof, I can, since the passing of that Act, make an order in respect of a child claimed to be the legitimated child of the husband and wife whose marriage is the subject of proceedings.

I was asked on behalf of the petitioner to do two things :—(1) To make a declaration that the child was legitimated ; and (2) to give custody to the petitioner. The petitioner was bound to ask for both because until the Court found that the child was legitimated it would have no power to grant custody. But when I am asked to make a declaration that the child was legitimated I must remember that the husband and wife are not the only persons interested in the question whether the child is one to whom the Act applies. The child is interested, but she is not at present a party to the suit. In her absence I do not think that I ought to adjudicate upon the question.

I have, it is true, evidence of the husband, who says that the child was born illegitimate ; that he was the father ; that the mother always treated him as such ; that he married the mother two months after the birth of the child ; that at the date of the birth neither he nor the mother was married to a third person ; and that he was at the date of the marriage domiciled in England. This evidence, if acted upon, would show that all the conditions of section 1 of the Act were fulfilled, and the effect of the Act would be that the child was legitimated as from January 1, 1927. But I repeat that I do not

* Reported by William Latey, Esq., Barrister-at-Law.

think that I ought to act upon that evidence in a proceeding to which the child is not a party.

The Act, by paragraphs 1 (*b*) and (*c*) of the Schedule, contemplates that paternity may be established by a decree of a Court of competent jurisdiction, or by an affiliation order, or by a declaration of legitimacy under the Legitimacy Declaration Act, 1858, as amended by the Act of 1926. Parliament seems to have overlooked the fact that the Legitimacy Declaration Act, 1858, has been, as to nearly all of it, repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, which substitutes for it section 188 of that Act.

Unless the child is a party I do not think that this Court is a "Court of competent jurisdiction." Reference was made to section 6 (1) of the Legitimacy Act, 1926. I do not think that that has any application to custody. If the child is once found to be legitimated, the powers of the Court under section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as to custody, extend to her; for she is a child the marriage of whose parents is the subject of the proceedings.

His LORDSHIP said that it would be for the petitioner to consider the possibility of any further proceeding in which the child would be a party to the suit.

[Solicitors—Messrs. Hewitt, Woollacott, and Chown.]

Chan. Div. (Tomlin, J.) 1927. May 31.

GRAIGOLA MERTHYR COMPANY, LIMITED v. SWANSEA CORPORATION.*

Waterworks — Liability of undertakers — Threatened injury to property—Right of owners to bring *quia timet* action—Waterworks Clauses Consolidation Act, 1847 (10 and 11 Vict. c. 17), s. 27.

Section 27 of the Waterworks Clauses Consolidation Act, 1847, does not merely save the right of the owners of property injured by the authorized waterworks to bring a common law action for damages, but leaves the undertakers liable to all legal proceedings which before the Act were open to such owners for protection against damage or injury arising from the works, whether such damage or injury is actual or threatened. It is therefore open to the owners of property threatened with injury by the authorized works to bring a *quia timet* action to restrain the undertakers from doing an act which threatens to injure such property.

His LORDSHIP delivered judgment dismissing this action, the hearing of which had lasted for 60 days, and directed that the plaintiffs should pay to the defendants two-thirds of their costs.

The action was brought *quia timet* by the Graigola Merthyr Company, Limited, a colliery company, seeking to restrain the Swansea Corporation from letting water into a large reservoir belonging to them on the ground that, if filled, the water would at some later date inevitably flood out the workings of the colliery company in the neighbourhood of the reservoir and cause a great disaster.

* Reported by H. C. GARSIA, Esq., Barrister-at-Law.

Mr. Upjohn, K.C., Mr. J. G. Wood, and Mr. A. T. James appeared for the plaintiffs; and Sir Leslie Scott, K.C., Mr. Holmes, and Mr. T. Jenkin Jones for the defendants.

MR. JUSTICE TOMLIN, in giving judgment, said that this was an action in which a colliery company sought an injunction to restrain the Swansea Corporation from filling a certain reservoir so as to cause damage to the collieries and mines of the plaintiffs under or adjacent to the reservoir. The reservoir was empty and had stood empty for some years. The plaintiffs' case was that the filling of the reservoir would result in their mine being flooded by a sudden inundation. The action was, therefore, a *quia timet* action and nothing else.

The reservoir in question was constructed by the corporation under the Swansea Waterworks Act, 1860, with which was incorporated the Waterworks Clauses Consolidation Act, 1847, excepting certain immaterial sections, and under the Swansea Waterworks Act, 1873, which incorporated the Waterworks Clauses Act, 1863.

The reservoir was completed and filled in 1879 and remained filled until 1911, when it was emptied. The reservoir was kept empty under an agreement dated September 23, 1912, to enable the plaintiffs to work the seams under the reservoir. Those workings were completed in 1917 and the reservoir was then kept empty for a further three years under the agreement. On October 26, 1920, the defendants in that year having expressed their intention to refill the reservoir the present action was begun.

Before he (his Lordship) dealt with the substance of the action it would be convenient to dispose of one point in the nature of a preliminary objection made by the defendants. They said that, having regard to the provisions of the Waterworks Clauses Consolidation Act, 1847, the action would not lie. Section 6 of that Act provided that the undertakers should make to the owners, occupiers, and all other parties interested in any lands or streams taken or used for the purpose of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, full compensation, to be ascertained under the Act, for all damage sustained by such owners, occupiers, and other persons.

Then section 27 enacted that:—

"Nothing in this or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this Act or the special Act."

It was contended by the defendants that under section 27 mineowners were only put in the favoured position of being able to take proceedings to the extent that they could sue for damages for injury actually suffered, but that there was no remedy by way of a *quia timet* action.

He thought that it would be a narrow and unreasonable construction of the section to say that it did nothing more than save the mineowners' common law action for damages. In his judgment it left the undertakers liable to all legal proceedings which, before the Act, were open to the mineowners for protection against damage or injury arising from the works whether actual or threatened. The mineowners were not bound to wait until the blow, however inevitable or disastrous, had actually fallen, before they were entitled to move. The preliminary point, therefore, failed.

His LORDSHIP then proceeded to deal with the

substantive question in the action and, after an exhaustive examination of the evidence, came to the conclusion that the plaintiffs had failed to prove their case. He also held that various charges of misconduct made by either side against the other were not justified.

There was one other matter to which the case directed attention. Of late years cases involving expert evidence had increased in number and length and the overloading of those cases in their preparation was becoming not infrequent. They placed the parties with the lesser resources at a grave disadvantage and they delayed the course of general business in the Courts. In every case of that kind there were generally many irreducible and stubborn facts upon which agreement between experts should be possible. In his judgment the expert advisers of the parties, whether legal or scientific, were under a special duty to the Court to limit in every possible way the contentious matters of fact to be dealt with at the hearing. The present case began in 1920. For six years materials were amassed, experts on both sides paid numerous visits to the *locus in quo*, but they never met on the spot to see whether, as to physical appearances in the mine and on the surface, they could not reach a measure of accord, nor was any other step taken to reduce the issues open at the time. The consequence was that the case had become unmanageable before the trial began. He thought that all concerned in litigation of this class must in future, in the preparation of their cases, more closely address their minds to restricting the area of dispute.

He would dismiss the action, prefacing the judgment with the words, "The Court, not being satisfied upon the evidence adduced that the filling of the reservoir would cause a sudden inundation of the plaintiffs' mines as alleged by the plaintiffs." Regard being had to the time occupied by charges and to the conduct of the parties on each side in connexion with them, he thought that substantial justice would be done by directing the plaintiffs to pay to the defendants two-thirds of their costs of action, making no other order as to costs.

[Solicitors—Messrs. Beamish, Hanson, Airy and Co., for Messrs. Gwilym James, Llewellyn and Co., Merthyr Tydfil; Messrs. Peter Thomas and Clark, for Mr. H. L. Lang-Coath, Swansea.]

Court of Appeal. 1927.
(Bankes, Scrutton, and Atkin, L.JJ.) May 23.

BUERGER AND ANOTHER v. NEW YORK LIFE ASSURANCE COMPANY.*

Insurance (Life)—Policies taken out in Russia—Whether existent and enforceable—Russian law—Currency in which policy moneys payable.

Between 1903 and 1909 the plaintiffs, who were Russian subjects, effected with the defendants, an American insurance company then having a branch in Russia, certain insurances in the form of four endowment life policies and paid the premiums in Russia in roubles down to 1918. The amounts secured by two of the policies were now payable if the policies were still existent and enforceable, and it was admitted by both parties that the contracts were to be governed by Russian law. In an action claiming the amount due on the policies or the return of the premiums the defendants contended that by the laws of Russia the policies had become void, as the Russian Government had in 1919 by decree cancelled all kinds of life insurance and transferred all premiums to the Government Treasury. Uncontradicted evidence was given for the plaintiffs that by a Russian law made in 1923 the People's Commissariat of Justice was charged with the "interpretation" of existing laws and that the Commissariat had interpreted the decree of 1919 as having no application to contracts of life assurance made by Russian subjects with companies having assets which were in the United States and which were not liable to confiscation in Russia.

Held (Scrutton, L.J., dissenting), that as the Court could not, by putting its own construction on the term "interpretation," make for Russia a law which the Russian judicial system did not recognize, the plaintiffs were entitled to recover on the two policies above referred to, and that judgment should be entered for the sterling equivalent of the amounts due in chervonetz roubles at the date when those amounts became due.

This was an appeal by the plaintiffs from the decision of Mr. Justice Greer, dated January 13, 1927, and there was a cross-appeal by the defendants.

The plaintiffs' claim was for the amount due on four policies of endowment assurance issued by the defendant company, or, alternatively, the return of premiums paid by the plaintiffs thereunder. The policies were effected between 1903 and 1909 in Russia, where the defendants were then carrying on business and where the plaintiffs then resided. All premiums due and payable to the defendants under the policies were paid to the defendants in Russia in roubles down to the year 1918. If the policies were still existent and enforceable, the amounts secured by the first two policies were payable at the time when the writ was issued. The defendants relied upon certain decrees of the Russian Government as avoiding the policies. The defences are fully set out in the judgment of Lord Justice Bankes. The plaintiffs did not dispute the decrees, but relied on an interpretation of the Commissariat of Justice to the effect that the relevant decree had no application to their case.

Mr. Justice Greer held that the Commissariat of Justice had no power to give an interpretation of the decree that would become the law of Soviet Russia; and that no interpretation of the decree in question was in fact given, but only an opinion that it should be limited to contracts by Russian companies, as otherwise it would be depriving Russian citizens of claims against foreign corporations. He further held that if the plaintiffs were entitled to judgment it should be for the sterling equivalent of the chervonetz rouble (which was the exact equivalent of the ten roubles gold piece of the pre-war currency) at the date when the respective sums became due.

Mr. Jowitt, K.C., and Mr. van den Berg appeared for the plaintiffs; Mr. Stuart Bevan, K.C., and Mr. H. G. Robertson for the defendants.

* Reported by E. J. M. Chaplin and T. W. Morgan, Esqrs., Barristers-at-Law.

The following considered judgments were delivered :—

LORD JUSTICE BANKES.—In this action the plaintiffs' claim is to establish their right to recover the amounts alleged to be due on four policies of insurance taken out by the male plaintiff between the years 1903 and 1909. The writ in the action was issued on February 15, 1926. In the events which have happened, the amounts secured by the first two of these policies would have become payable before the issue of the writ if the policies were still in existence and enforceable. As the defendants object to this Court's expressing any opinion with regard to the last two of these policies on the ground that in no circumstances would the amounts secured by them have been payable at the time when the writ was issued, I confine my judgment to the first two policies. These two policies were taken out in Russia in the years 1903 and 1905 by the male plaintiff, who was then resident in Russia. It is not disputed that the contracts so created are to be governed by Russian law. The difficulty in the present case, as in previous cases in this Court, is to determine what the Russian law applicable to the case is. That law has to be proved as a question of fact. In previous cases the Court has been confronted by the evidence of a number of experts in Russian law who have flatly contradicted each other as to what the law applicable to the particular case was. The peculiarity of the present case is that only one witness was called. He was called for the plaintiffs. The defendants had experts in Russian law in Court, but they were not called to throw any doubt upon the correctness of the evidence of the plaintiffs' witness.

There are two points in this case : (1) Whether the policies were or were not subsisting and enforceable contracts at the date of the writ ; (2) if they were, what is the sum, expressed in British currency, for which judgment should be entered for the plaintiffs. On both points the witness's evidence, if accepted, was in the plaintiffs' favour. The learned Judge who tried the case accepted the evidence on the second point, but refused to accept it on the first point. He therefore gave judgment for the defendants. Both parties appeal.

The question for this Court is whether the learned Judge's view on either point is correct.

On the first point, the issue is clearly upon the defendants. There is no question as to the policies having been taken out or as to the moneys secured by them having become payable at the date of the writ unless something had happened to avoid the policies. What the defendants rely upon as having avoided the policies is set out in paragraphs 12 to 17 of their defence, as follows :—

12. By the laws of Russia, set out in and made part of the said policies, the defendants were obliged as a condition of carrying on business in Russia to deposit in the Russian State Bank funds and securities to secure payment of their obligations on insurances concluded in Russia which included the said four policies.

13. By a decree of the Russian Government dated December 1, 1918, (*a*) all kinds of insurance were declared and made the monopoly of the State ; (*b*) all insurance organizations in Russia, which included the defendants' branch and business therein, were ordered to be liquidated and declared to be the property of the Government or State—namely, the Russian Socialistic Federative Sovietic Republic, and such liquidation was ordered to be completed by April 1, 1919 ; and (*c*) the business and affairs of life insurance were transferred to a department of the State.

14. By a further order or decree of the Russian Government dated February 8, 1919, addressed to the defendants' representatives in Russia and others, it was decided by such Government and notified to such representatives that the defendants' agency or branch in Russia was subject to the terms of the said decree of December 1, 1918, and to be liquidated under the provisions thereof.

15. By a further decree of the said Government dated November 18, 1919, it was decreed (amongst other things) that all kinds of life insurance and all contracts of life insurance were cancelled and all insurance premiums transferred to the Government Treasury.

16. By section 2 of the Civil Code of the Russian Republic no litigation as to civil relations which arose prior to November 7, 1917, is accepted for hearing by judicial and other institutions of the Republic.

17. In pursuance and by virtue of the said decrees and code, which form part of the law of Russia and to which for their full terms the defendants will refer, the Russian Government has assumed and taken over the liability of the defendants under the said policies and has taken possession of and appropriated all the funds and securities deposited by the defendants in Russia to secure payment of their obligations on insurances concluded in Russia, and by such decrees and code has declared and rendered null and void the policies sued on and has determined and avoided any obligations of the defendants thereunder.

The plaintiffs do not dispute the existence of the decrees there referred to, but they assert that the decree of November 18, 1919, has been authoritatively interpreted in Russia as having no application to a case such as theirs, and that this interpretation constitutes the law of Russia applicable to the present case and must be accepted as such by the Courts of this country. That this is the result of the evidence of the only witness called to prove the law is, in my opinion, established. He founded his view upon a decree of the Pan-Russian Central Executive Committee of February 1, 1923, which, he said, had the force of law and which charged the People's Commissariat of Justice with, *inter alia*, "the interpretation of existing laws on requests of the Central and local authorities."

It may seem strange to our notions to entrust the interpretation of existing laws to a Government Department, but if the Soviet Government choose to do it, it is no affair of ours. Similarly, if the Soviet Government think it right to confer that duty under the elastic term of some Russian word which is translated "interpretation," again, it is no concern of ours. How elastic the term "interpretation" may be can be instanced by many illustrations from decided cases in the Courts of this country, where over and over again the Courts have felt themselves bound to put some limitation upon general language used by the Legislature. A recent instance in this Court and in the House of Lords is the case of *The Ruapehu* (42 *The Times* L.R., 708 ; [1927] P. 47 ; 43 *The Times* L.R., 402).

The witness called for the plaintiffs, after referring to the decree of February 1, 1923, went on to refer to a decision of the People's Commissariat of Justice dated October 16, 1924, made at the request of the Agricultural Bank, whereby they interpreted the decree of November 18, 1919, as having no application to contracts of life assurance such as those in question in this action, that is to say, contracts of life assurance

made by Russian subjects with companies having assets in the United States which are not liable to confiscation in Russia.

It is easy to disagree with the policy which confiscated the defendants' deposits in Russia. It is equally easy to disagree with the reasons given for the interpretation of the law of November 18, 1919, but the fact that one may not agree with what has taken place does not justify one in refusing to accept a competent witness's uncontradicted evidence that it is the law.

I do not propose to examine the cases in which the question has been discussed as to how far, when dealing with the question of foreign law, it is competent for our Courts to put their own construction on a written document, because the question does not seem to me to arise in this case.

Assuming it to be the law in Russia that the People's Commissariat of Justice has jurisdiction to "interpret" the law, it seems to me to follow that it is also within their jurisdiction to say what comes within the term "interpretation" as used in the administration of Russian law, and that a Court in this country cannot, by putting its own construction upon the term "interpretation" as it understands it, make a law for Russia which the Russian judicial system does not recognize.

For these reasons I am unable to agree with the judgment of Mr. Justice Greer on this point, and particularly I am unable to agree with that part of his judgment which suggests that Mr. Krougliakoff's evidence did not go the length of saying that an interpretation by the Commissariat of Justice constituted part of the law of the Soviet Republic. I do not so read his evidence.

Upon the second point, I see no reason to differ from the conclusion arrived at by Mr. Justice Greer. But for the evidence of Mr. Krougliakoff, I confess that I should have felt faced upon the facts with a practically insoluble problem. The witness, however, has propounded a solution as being the Russian law on the subject, and Mr. Justice Greer has accepted his evidence. I do not think it necessary to add anything on this part of the case to the judgment of the learned Judge.

In the result the appeal will be allowed, and the cross-appeal dismissed, in each case with costs. Judgment will be entered for the plaintiffs on the two first policies for amounts calculated in accordance with the decision of the learned Judge.

If any difficulty arises as to amounts there is liberty to apply.

Lord Justice Scrutton.—This appeal again raises the troublesome questions involved in the construction of the revolutionary and confiscatory legislation of the Soviet Government.

Mr. Buerger, a Russian subject resident in Russia during the years 1903 to 1909, effected in Russia four policies of life and endowment assurance with the Russian branch of the New York Life Assurance Company, a United States company. The policies were expressed to pay the assured on his death, or at the expiration of 20 years, whichever should first happen, a sum expressed in roubles. If the amount was payable on death, the amount was payable at the St. Petersburg office; it is not stated where the sum was payable if the assured lived for the 20 years. The premium was expressed in roubles. To guarantee the insured against loss a deposit was made in the Russian State Bank, and that, with all other property belonging to the company, was a guarantee for payment under the policy. The company was to be amenable to Russian laws, present and future, and in case of dispute should be bound by the decisions of the Russian judicial tribunals. Russian insurances were to be managed by a special branch of the company and a chief representative established at St. Petersburg, who could be sued as representing the company. The policy lapses on non-payment of the premium within a certain time, but if a certain number of years' premiums have been paid the assured can, at the end of the 20 years, recover an agreed amount. All claims are agreed to be subject to the jurisdiction of the St. Petersburg Courts only.

In 1913 the assured came to England, and became domiciled, but not naturalized here; this fact does not appear to have any legal relevance, the contract remaining a Russian contract. In 1917-1918 difficulties arose about payment of the premiums; Mr. Buerger was not able to hear whether his agent in Russia had paid the premiums in roubles, as Mr. Buerger, "not wanting to lose on the exchange," wished to do, and a temporary arrangement was made for deposit in sterling of the premiums at pre-war exchange, to be released if the premiums had been paid in Russia. Ultimately no premiums were paid after October, 1918, and the policies therefore lapsed some time in 1919, and the claim in the action was for the agreed sum under the provisions of the policies. Then came the series of Soviet decrees which raise the difficulty. On December 1, 1918, while the policies were still in force, a law was passed by the Council of Commissaries making all kinds of insurance a State monopoly, "liquidating" all private insurance companies, and making their property the property of the Soviet Government; in virtue of this decree it was proved that the Government had confiscated 78 million roubles deposited by the company to guarantee obligations under Russian policies amounting to 47 million roubles. Unfortunately the Government did not themselves meet the obligations under the policies, though they appropriated the funds provided to pay them. For a time the Soviet Government collected premiums on the Russian policies existing, but in November, 1919, they changed their position. By a decree, taking the force of law, which came into force on November 20, 1919, it was enacted: "(1) Life insurance of all kinds (capitals and income) in the R.S.F.S.R. is abolished. (2) All contracts made with insurance companies and savings-banks for life insurance, capitals and incomes, are annulled. (3) All insurance premiums (payments of the insured) are transferred to the revenue of the Treasury." If the matter had stopped there, I cannot doubt that this action would fail. The statute abolishes all life insurance, and all contracts made with insurance companies for life insurance, and I cannot see any way to imply an exception in favour of contracts made by Russian citizens in Russia with Russian branches of foreign companies, especially when the Soviet Government has confiscated all the funds deposited to guarantee such contracts.

The difficulty arises in this way. The Civil Code came into operation on January 1, 1923, and its second section provided: "No litigation as to civil legal relations which arose prior to November 7, 1917, is accepted for hearing by judicial and other institutions of the Republic." Neither, therefore, the judicial institution nor the other Governmental institutions of the Republic can deal with "litigation as to civil legal relations, which arose prior to November 7, 1917." It was not possible, therefore, for either class of institutions to determine controversies on pre-war policies. But on February 1, 1923, a statute establishing the Commissariat of Justice charged it, and declared it competent, to

"interpret existing laws" at the request of central and local authorities; not to make new laws, but to interpret existing ones. A declaration that "the law of such a date has such a meaning" would apparently be within its powers; a declaration that, while the law of such a date says so and so, we substitute something different, would not be within its powers; this would be legislation, not interpretation. Nor is dispensing from the operation of the law interpretation.

However, it appears from a document of October 16, 1924, that the Russian Bank of Agriculture asked the Commissariat of Justice for an "interpretation," apparently of the decree of November, 1919, No. 541, already cited, on the question whether Russian holders of life insurance policies had lost their right to recover insurance compensation. The Commissariat, desiring to "avoid the enrichment of foreign debtors," expresses the opinion that the statute does not apply to claims on foreign insurance companies outside Russia. What effect it gives to the fact that these policies are Russian contracts, to be interpreted by Russian Courts in accordance with Russian law, it does not state. It does express the opinion that the confiscation by the Russian Government of the funds provided to guarantee the policies does not affect the rights of Russian assured.

The assured called Mr. Krougliakoff, a Russian barrister who left the country in 1916, to prove the Russian law, and he produced the decree of November, 1919, and the "interpretation" of 1924, and gave evidence that the Commissariat of Justice was, by Russian law, entitled to give authoritative pronouncements on the true construction of the Russian law, and that the document of 1924 was such an authoritative interpretation of the law. We are told that other Russian experts were sitting behind the defendants' counsel and were not called to contradict Mr. Krougliakoff. The learned Judge declined to accept this interpretation of the decree of November, 1919, but held that the decree, as its words say, annulled the contract of life insurance sued on, and that the plaintiffs must, therefore, fail. The plaintiffs appeal, and argue that there was before the Court only evidence one way, and that the Court was bound to accept it. This raises the question as to the powers and duties of the Court in dealing with evidence of experts in foreign law. It appears to me that, just as in other cases, the Court is not bound to accept the plaintiffs' case as true, though there is no evidence the other way. In particular when the foreign expert produces a foreign statute, and says that here is the foreign law, and that it has a certain meaning, this Court has always held itself at liberty to look at the statute and construe it, taking into account as part of the evidence the statement of the foreign expert as to its meaning. In *Concha v. Murrieta*; *De Mora v. Concha* (40 Ch.D., 543), where the Peruvian Code was referred to, and it was objected that the Court was confined to the view expressed by the foreign expert as to the meaning of the Code, Lord Justice Cotton, in whose judgment Lord Justice Lindley entirely concurred, says, at page 550: "The proper evidence of the law of any foreign country is evidence by lawyers of that country, but if in their evidence they refer to passages in the code of the country whose law we are endeavouring to ascertain, it would, as it appears to me, be most unreasonable to hold that we are not at liberty to look at those passages and consider what is their proper meaning." Lord Justice Lopes, at page 554, expresses himself thus: "I believe the rule in such a case to be that if an expert witness called to prove foreign law states that any text book, decision, code, or other legal document, truly represents that law, then the Court is at liberty to regard the legal document to which he refers, not as evidence *per se*, but as part of the testimony of the witness, and to deal with it, and give the same effect to it, as to any other portion of the evidence of the expert witness." The same view was taken of the effect, as evidence, of a judgment of a subordinate Court of the country whose law is in question, in the case of *Guaranty Trust Company of New York v. Hannay and Co.* (34 *The Times* L.R., 427; [1918] 2 K.B., 623), where Lord Justice Pickford says, at page 638: "The witnesses for the plaintiffs have given evidence that this decision of Mr. Justice Noyes is incorrect in American law and inconsistent with other authorities. The defendants' witnesses have given evidence to the contrary, and both have cited authorities in support of their respective contentions. It seems to me that we must consider whether in our opinion this decision was correct, and must consider it as a question of fact upon the evidence. If this were not so, evidence as to foreign law would be useless wherever there was a decision of any foreign Judge on the point, and our Courts could only follow that decision as a binding authority. This is not the position of our Courts in such a matter. It may be that we have, strictly speaking, the same power to consider a decision of the ultimate Court of Appeal, but I cannot imagine that an English Court would hold a decision of the final Court of Appeal in the State of New York erroneous according to the law of that State." A similar passage appears at page 667 of that case. It is otherwise with a decision of the higher Court of the country, rather as a question of weight of evidence than absolute conclusiveness. Lord Sumner expresses the same view in *Bankers and Shippers Insurance Company of New York v. Liverpool Marine and General Insurance Company, Limited* (24 Ll.L., at p. 93), where he says: "I do not think that the Court of Appeal were wrong in undertaking for themselves the interpretation of that law as of any other document, public or private, produced before them. The language presented no difficulty. The law contained no novel terms of art. On the law of the State of New York existing prior to the passing of the Arbitration Act the witnesses were agreed, though otherwise their evidence was contradictory. No decision of the Court of that State was forthcoming which proceeded on facts quite similar to those in the present case; and the report of *Bullard and Company v. Grace and Company* (240 N.Y. 388), a case then capable of being appealed to the Court of Appeals, did not purport to cover the precise point which now arises. Though the Lords Justices were not competent to lay down the law of the State of New York, and did not assume to do so, they were well equipped to express an authoritative opinion upon the meaning of the relevant sections of the statute. In their place I venture to think that I should have formed the same view." It was said that this only applied to cases when there was conflicting evidence, and it is true that in *Bremer v. Freeman* (10 Moore, P.C., 306) the question of conflicting evidence is mentioned, but the Judges in *Concha v. Murrieta*; *De Mora v. Concha* (*supra*) do not make this limitation on their principle, and I can see no reason why a Court is bound to accept the evidence of an expert witness as to fact, when he supports it by a document the plain words of which render his opinion impossible. When the Russian legislative body enacts that "All contracts made with insurance companies for life insurance are annulled," I cannot see that it is possible to imply an exception of contracts made in Russia by Russian citizens

subject to Russian law and the jurisdiction only of the Russian Courts if they are made with the Russian branch of a foreign insurance company. And to do Mr. Krougliakoff justice, I do not think he said that this was the meaning which he would put on the decree by itself. He relied on the authoritative interpretation of the decree by the Commissariat of Justice. But in my view it is not possible to treat this as an interpretation; it is a partial repeal, or dispensation, not an interpretation of the words used, and, therefore, is not within the authority conferred on the Commissariat by the decree to which we were referred. Further, it appears to me that section 2 of the Civil Code prohibiting judicial or other institutions from dealing with litigation as to civil relations, which arose before November, 1917, a statute which is interpreted by the Commissariat of Justice as preventing State institutions from dealing with controversies which arose about such relations, would prevent the Commissariat of Justice from having jurisdiction to deal with the question of pre-war insurance policies and controversies arising thereunder.

I take the view: (1) That the decree of November, 1919, clearly annuls the contract sued on; (2) that the opinion of the Commissariat of Justice that it does not is not a possible "interpretation" of that decree, but a repeal, a dispensation from it, and is therefore not within the power conferred on the Commissariat by the decree creating it. These conclusions lead to the same result as that arrived at by Mr. Justice Greer, though I think for slightly different reasons. I am not satisfied that his reasons are wrong, but I prefer my own, and think, therefore, that the main appeal should be dismissed.

Mr. Justice Greer, however, thought it right, in case his decision should be held to be wrong, to deal with the question of the principle on which the amount payable should be assessed. The cross-appeal was argued before us, and raises, in my view, a difficult question. Two, however, of the four policies, in my opinion, we cannot deal with. In the third the sum claimed became due only after the issue of the writ, and the defendants objected to our dealing with it. In the fourth the sum would not be due till 1929, and it is quite impossible for this Court to speculate what will be the law on currency in Russia at that date.

The question is in what currency is a valid claim for so many roubles under a contract made before the war to be satisfied, when the currency has depreciated enormously, and changes said to be stabilization have been made in it, either by creating a coin with a new name, such as "Belga" in Belgium, or "Schelling" in Austria, having the same nominal value as the old Belgian franc, or Austrian krone, but alleged to be worth many of those old coins, or by creating a coin with the same name as the old coin, but said to represent a number of the old coins? We have some guidance from decisions of this Court in *In re Chesterman's Trusts—Mott v. Browning* ([1923] 2 Ch. 466), and *Anderson v. Equitable Assurance Society of the United States* (42 *The Times* L.R., 302), that where the pre-war contract was to pay marks, at the time when paper was interchangeable with gold, but above a certain amount only payable in gold, and war legislation abolished their gold value, and the war enormously depreciated their exchange value in paper, the debtor could still satisfy the debt when payable in England by paying an amount of sterling, representing the exchange value at the time, of the contract number of paper marks, though the result was of infinitely less value than the contract amount of pre-war marks. These decisions, however, do not cover the case of a change in currency.

The facts in Russia are as follow, and that they are difficult to interpret is shown by Mr. Krougliakoff's answer to the question: "In August of 1923, and thereafter, what was the rouble? (Answer) That is a very difficult question to answer." The two material policies are a policy of 5,000 roubles dated August 4, 1903, repayable August 1, 1923, with a yearly premium of 255 roubles, and a policy dated February 10, 1905, payable February 7, 1925, with a yearly premium of 256 roubles. At the dates of the policies there were gold coins of 15 roubles (Imperial), 10 roubles (popularly, though not by law, called chervontzy), 7½ and 5 roubles, smaller silver and copper values, and paper notes; paper was freely interchangeable with gold, and the ratio to sterling was fairly steady, 9.45 roubles to the £ sterling. At the outbreak of war the interchangeability with gold was abolished, and the paper rouble depreciated in sterling value. In 1916 it was about 15 roubles to the £; in 1917 as high as 40 roubles to the £. It was at this stage that the plaintiffs were anxious to pay their premium in paper roubles, as "they did not want to lose on the exchange." After the Revolution there were in circulation pre-war paper roubles, Kerensky roubles, and Bolshevist or Soviet roubles. There was no exchange with Europe, and the currency was very much depreciated. On November 3, 1921, came the first Soviet currency law establishing "State currency notes of the 1922 model," one of such roubles of 1922 being equivalent to 10,000 roubles of all the old issues. It is difficult to be sure what a Russian Court would have done with a claim for a pre-war obligation of 10,000 roubles, for all Courts were forbidden to entertain such a claim. But it seems pretty clear that if the New York State deposit in Russia had included 100,000 paper pre-war roubles that deposit would only have been worth 10 roubles of 1922, and when all the old issues were called in on October 31, 1922, the deposit could only be exchanged for 10 roubles of 1922. I do not think that at this stage any pre-war creditor for 100 roubles could have demanded 100 roubles of the 1922 pattern. He would have been referred to the law of November, 1921. The administrative decree of April 6, 1922 (which as applied (section 7) to payments by private undertakings and persons was only repeating the provision of the law of November, 1921, as to ratio), would also seem to point this way. The currency continued to depreciate, and on October 24, 1922, another law authorized notes of the 1923 model, one rouble of which was to be equal to 100 roubles of the 1922 model, or one million of roubles of the model which had been taken out of circulation. The New York Life Assurance Company's supposititious deposit would now be reduced to one-tenth of a 1923 rouble, and again I do not think that a pre-war creditor for 100 roubles could have demanded 100 roubles of 1923. At the same time, in October, 1922, the State Bank was authorized to issue notes based on chervontzy, the chervonetz being taken as equal to the same weight and fineness of gold as the pre-war ten-rouble piece. These were to be backed by one-fourth of their value in gold, but were not interchangeable with gold. All private gold had long ago been confiscated, its possession being illegal. The 1923 rouble continued in force side by side with the chervonetz bank-note, but at a rate of interchange fixed each month by the Government. It appears to me that the debtor owing roubles would have a right to pay in either currency, in chervonetz notes or in roubles of 1923, and would have a right to choose the

most favourable to himself. As I have said, I do not think that the debtor who had promised before the war to pay roubles, could be required to pay roubles of 1923; but still less could he be required to pay chervontzy, which seem to me to be new legal coins, though bearing the old popular, not legal, name of a ten-rouble piece. I do not see how such a debtor could ask for more than an equivalent number of roubles of 1923; I do not think, as above explained, that he could even ask for them.

Lastly, from February 15, 1924, no new 1923 rouble notes were printed, and by a decree of March 25, 1924, they were to be withdrawn at the rate of one rouble in gold to 50,000 roubles in 1923 notes. The New York Life Assurance Company's deposit would now have got to a ridiculously small sum, 1/500,000ths of a 1923 rouble, or 1/500,000,000,000th of a new chervonetz. But the plaintiffs contend, and the Judge has found, that the New York Life Assurance Company must pay the amount of the claim in chervontzy, which now have the same value in gold as the pre-war rouble had in 1903 and 1905.

The amount to be paid in England under the English judgment must be obtained by turning the amount which would be payable by Russian law in roubles at the date of the same becoming due into English money, at the exchange of the date of payment. It appears to me, though it is not necessary to decide it, in view of the earlier part of my judgment, that at that date the chervonetz and the pre-war rouble were different currency of different values, and that the plaintiffs were not entitled to turn pre-war roubles into chervontzy, which by Russian law were only exchangeable for a great many pre-war roubles, on the basis that a post-war chervonetz was equivalent to a pre-war rouble. In my opinion, it was a different coin. But as I have held that the contract of insurance was entirely annulled and unenforceable, this part of my judgment is not effective.

I appreciate that both the plaintiffs and the defendants have suffered great losses by the Russian legislation, but I do not see that either can recoup his losses at the expense of the other; they are common sufferers.

The effective judgment of Mr. Justice Greer must, in my opinion, be affirmed, though I differ from him in his alternative view as to currency.

Lord Justice Atkin.—I need not repeat the facts of this case. It is plain that unless the contract is somehow displaced the defendants came under a contractual obligation to pay to the plaintiffs certain sums in roubles at periods from 1923 onwards. The defendants claim that the contract has been annulled by Russian law. The onus of proof of this fact is upon them. They further say, that even if their liability upon the contract still exists their liability in terms of British currency is infinitesimal, as the roubles which they were under an obligation to pay are only worth one fifty-thousand millionth of the rouble upon which the present exchange is based. The onus of proving the value of the obligation in terms of sterling is, I think, upon the plaintiffs.

The first issue is one of Russian law, for the policies, it is admitted, were made subject to the provisions of the Russian law. The issue is, therefore, an issue of fact, the burden of proof being upon the defendants. A significant feature of this case is that the defendants, though subject to the onus of proof, called no evidence, and rested on the evidence called by the plaintiffs, a Russian advocate, Mr. Krougliakoff. We are informed that the defendants had expert witnesses available in Court; and the result is that we have to deal with the uncontradicted evidence of an expert whose skill and integrity are not sought to be impugned. Mr. Krougliakoff produced, amongst other decrees, a decree dated November 18, 1919, signed by the President of the Council of the Commissaries of the People, and the Superintendent of Affairs of such council, and countersigned by the Secretary, which ordered that life insurance of all kinds in the R.S.F.S.R. is abolished, and all contracts made with insurance companies for life insurance are annulled. Mr. Krougliakoff went on, however, to say that by Russian law this decree did not operate so as to destroy the rights of the insured under it to claim on insurance policies made with foreign insurance companies. He supported his statement by production of a decree, dated February 1, 1923, of the Pan-Russian Central Executive constituting the People's Commissariat of Justice, providing that the Commissariat of Justice was charged, amongst other duties, with the interpretation of existing laws on requests of the central and local authorities. He then produced an official publication of the Commissariat of Justice which showed that on October 16, 1924, the Commissariat, in answer to a request of the Agricultural Bank, had interpreted the law in the sense that he had stated. I shall not read the whole decree. The last words are "Russian holders of insurance policies have preserved the right to claim from foreign insurance companies the payment of insurance compensation." It is, I think, also noteworthy that the present policies, as no doubt all similar policies with foreign companies, contain a clause (28) providing for assignment and endorsement, and stipulating that the signatures under the endorsement must be attested by, amongst others, a notary. On September 26, 1924, that is, three weeks before the formal interpretation, the Commissariat of Justice had ordered all notarial offices not to refuse to certify transfer endorsements of policies of foreign insurance companies. It seems probable that the request of the Agricultural Bank which elicited the pronouncement of the law in October was occasioned by the direction to notaries given in September. The position, therefore, is that Mr. Krougliakoff says that by Russian law Russian holders have preserved the right to claim from foreign insurance companies on their policies; and that the Commissariat of Justice specially charged with the duty to interpret the law have so interpreted it; and that, according to Mr. Krougliakoff, such interpretation is authoritative; and that the defendants have called no evidence to contradict these statements of fact, though if contradiction were possible witnesses were available. As I have said, the uncontradicted evidence is that the departmental interpretation is authoritative; but the question whether it is authoritative or not seems, in the circumstances, not to be of much importance. The statement of the law by the Department of Justice must be of the highest value, and, uncontradicted, would appear to become for practical purposes authoritative.

Now this being the uncontradicted evidence of a Russian lawyer, and the Russian Department of Justice, as to what the law is in Russia to-day, the defendants, without calling any evidence, ask us to say that the lawyer and the department are mistaken; that the Russian law is something different and that the law in Russia really is that Russian subjects cannot claim against foreign insurance companies. They say that we are bound to come to this

conclusion on the interpretation of the decree of November 18, 1919, on which we are to put our own construction. Such a result would appear to me to go far beyond the law and practice relating to the proof of foreign law. It is not sufficient to prove a foreign statute or code by a translation, and then leave the Court to place its own construction on it. The code must be interpreted by an expert in the foreign law. It is, of course, true that when he vouches a statute to support his evidence the statute forms part of his evidence, and must be considered in the consideration of his evidence as a whole. And it is also true that where experts on the foreign law differ amongst themselves the Court will often have to resolve the conflict by looking at the statutes or documents and deciding for themselves the more probable contention. And this course will be more readily undertaken where the dispute is as to the effect of legislation, as in the United States of America, expressed in English in respect of a jurisprudence which is known to the English Judges. And it may also happen occasionally that a foreign expert may arrive at results so extravagant and involving such a misunderstanding of conceptions familiar to lawyers of all countries that an English Court may have to reject his evidence, and eventually come to the conclusion that they can safely interpret the words for themselves, or fall back upon the presumption that the proper methods of construction coincide with the English. But in the first instance the English Courts must rely on the evidence of competent foreign lawyers. I need only cite two authorities of great weight. In *Baron De Bode's* case (8 Q.B., 208), a petition of right involving an issue as to the law in France in 1789, the question arose as to whether the witness who cited a French decree in the nature of a statute must produce the written document. Lord Denman, C.J., at p. 250, said: "The form of the question is, I think, immaterial; in effect, the witness is asked to speak to the decree. It is objected that this is a violation of the general principle, that the contents of a written instrument can be shown only by producing the instrument or accounting for the non-production. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men; and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law; the witness is called upon to state what law does result from the instrument. I do not think that the case of treaties is applicable; there no class of persons are so peculiarly conversant with the subject-matter as to invest it with the character of a science. The cases which have been cited raise much less doubt in my mind than the opinion of one of my learned brothers, who differs from me. In *Boehtlinck v. Schneider* (3 Esp., 58) Lord Kenyon, according to the report, declined to receive proof of the unwritten law of Russia from 'a person conversant with the law of that country,' and asked, Can the laws of a foreign country be proved by a person picked up in the street? And he added: 'I shall expect it to be made out to me, not by such loose evidence, but by proof from the country, whose laws you propose to give in evidence, properly authenticated.' The question is: What is such evidence? And I think the decision can hardly be justified except upon the supposition that the person produced was not scientifically conversant with the law of Russia." Mr. Justice Coleridge, in the same case, at page 265, says this: "What, in truth, is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question is not as to the language of the written law. For, when that language is before us, we have no means by which we are to construe it. Let me put this case. Suppose a gentleman who, like the Vice-Consul in *Lacon v. Higgins* (3 Stark. N.P.C., 178) (a case which I think admits the distinction I shall presently point out), was not professionally connected with the law should tell us: 'I went to the proper office, and made an examined copy of this section of the Code Napoléon, and here it is.' Would that be evidence for this Court what the law of France is? In point of authority, I apprehend it would not be so; certainly it would not be so in point of convenience; for, after all, if we were to attempt extra-judicially to expound that law, we should be liable to the most serious errors. The question for us is, not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation and adjudication. How many errors might result if a foreign Court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be 'null and void to all intents and purposes,' while an English lawyer would state that they were good against the grantor, and that the Courts have so expounded the statutes." I call attention to the last passage as being specially appropriate to the present case.

In the *Sussex Peerage* case (11 Cl. and Fin., 85) the issue was as to the law at Rome at the date of a marriage, and the opinions of Lord Brougham and Lord Denman are valuable, especially as they follow an expression of opinion by Lord Campbell, who had not then held judicial office in England, that the most authoritative form of getting at foreign law is to have the book which lays down the law, an opinion which, after hearing Lord Brougham and Lord Denman, he appears to have withdrawn. Lord Campbell says, at page 114: "The most authoritative form of getting at foreign law is to have the book which lays down the law. Thus we have had the Code Napoléon in our Courts. It is better than to examine a witness, whose memory may be defective, and who may have a bias influencing his mind upon the law." Then Lord Brougham says: "My opinion entirely concurs with that of the Lord Chancellor"—that is, Lord Lyndhurst, not Lord Campbell—"The witness may refer to the sources of his knowledge; but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it. If the Code Napoléon was before a French Court, that Court would know how to deal with and construe its provisions; but in England we have no such knowledge, and the English Judges must, therefore, have the assistance of foreign lawyers. This was fully considered in *Dalrymple v. Dalrymple* (2 Hagg. Consist., 54), in which the opinion of the Scotch lawyers was taken as a matter of fact, they being examined upon oath. In those opinions, they referred to Scotch statutes and Scotch law books. It was agreed on all hands, that that which was there in evidence were not the mere statements of foreign text-writers, but the opinions of skilful and scientific men who were examined on oath." Lord Denman says: "There does not appear to be, in fact, any real difference of

opinion upon this point. There is no question raised here as to any exclusive mode of getting at this evidence, for we have both the materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. That was decided, after full argument, on Friday last, in the Court of Queen's Bench"—that is the decision in the case which I have just cited. "There was a difference of opinion, but the majority of the Judges clearly held, on an examination of all the cases and after full discussion, that proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law, and this book truly states the law,' then you have the authority of the witness and of the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take the evidence from the witnesses." Lord Campbell then says: "I entirely concur with the law as laid down by the noble and learned Lord who has just spoken." *Concha v. Murrieta*; *De Mora v. Concha* (40 Ch.D., 543) appears to me to decide nothing inconsistent with the above, but to lay down the incontrovertible proposition that if experts refer to passages in the Code the Court is to be at liberty to look at those passages, and consider their proper meaning. The decision was based on a passage in the judgment of the Privy Council in *Bremer v. Freeman* (10 Moore, P.C., 306), and was given in a case where there were conflicting statements as to the law of Peru given by two Peruvian lawyers. Lord Justice Cotton, at page 550, says this: "Now, as I have said, the proper evidence of the law of any foreign country is evidence by lawyers of that country, but if in their evidence they refer to passages in the Code of the country whose law we are endeavouring to ascertain, it would, as it appears to me, be most unreasonable to hold that we are not at liberty to look at those passages and consider what is their proper meaning. The case of *Bremer v. Freeman* (*supra*) lays down a rule as to dealing with evidence of foreign law which goes further than we are asked to go here. The Privy Council in that case was not sitting as a Court of foreign law, as in cases of appeals from a colony in which a foreign law prevails; the appeal was from the decision of the Prerogative Court on the question whether a will was admissible to probate. The Judges said that the evidence of the experts was not satisfactory, and they laid down a rule which is correctly stated in the marginal note: 'Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but where the evidence of the experts is unsatisfactory and conflicting, the appellate Court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign Courts and the text-writers, in order to arrive at a satisfactory conclusion upon the question of foreign law.' The Privy Council there examined decisions of the foreign Courts, which to them were merely evidence of matters of fact; *a fortiori* may we refer to the provisions of the code to which both witnesses refer in support of their opinions. We have here only two witnesses, Zevallos and Perla. I should be sorry to say anything wanting in courtesy to Zevallos, but if the two come into conflict, I cannot but attach greater weight to the evidence of Perla, and that for several reasons," which his Lordship then proceeds to give.

Applying those principles, I might content myself with saying that the defendants have not discharged the onus of proving that by Russian law the defendants are discharged, in the circumstances, from performing their contract. But I think that the uncontradicted evidence of Mr. Krougliakoff and the pronouncement by the Commissariat of Justice make it clear that the Russian law is that the defendants are not discharged. I am quite unable to accept the view that the Commissariat of Justice, in answering the question put to them by the Agricultural Bank, were not acting in discharge of their duty by interpreting, but were rather violating their duty by dispensing. I can well imagine cases where the construction of statutes in this country by the Courts may have been considered to have confused interpretation with dispensation; but no one would presume that the Courts had in fact no intention of interpreting; and I see no reason for making that presumption in the case of the Commissariat of Justice. I think the presumption is, as the fact is, that the department was performing its statutory duty, and no more. When a competent Russian lawyer and the Russian equivalent of the Ministry of Justice say, without contradiction, what the law in Russia is, I, personally, do not feel qualified, or inclined, to dispute their statement. The construction put on the original decree may be right or wrong; it seems to me not to be so unreasonable as to be impossible, or even improbable. It clearly restricts the effect of the confiscation otherwise produced. I see no reason why these Courts should out-Herod Herod and chastise Russian policy-holders with scorpions when the Russians only chastise them with whips. That an injustice has been done to the foreign insurance companies may be very true. They have had their assets in Russia confiscated by decree or executive act before the decree in question. But it is plain that the policy-holder was not confined to recourse against the Russian assets, and I see nothing absurd or improbable in the statement that the Russians confiscated only the Russian assets of foreign insurance companies, and did not entirely confiscate the policy rights of the policy-holders. I think, therefore, that the defendants did not discharge themselves from their liability on the contracts.

The question of the currency appears to me to be more difficult, and I have had considerable doubt about it. Nevertheless, I have come to the conclusion that the Judge's decision on this point must be upheld. This question, like the former, is one of Russian law, and I think Mr. Krougliakoff's evidence, again uncontradicted, is that the Russian law maintained throughout the pre-war rouble based on gold and has now reverted to it. In these circumstances, I think that the learned Judge was justified in coming to the conclusion that the plaintiffs were entitled, if at all, to judgment for the amount of sterling based upon the exchange with the Russian gold rouble at the material date.

I think, therefore, that judgment should be entered for the plaintiffs for the appropriate sum on the first two policies, but that no declaration should be made on the remaining policies.

[Solicitors—Messrs. Cosmo, Cran, and Co.; Messrs. Ashurst, Morris, Crisp, and Co.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P., and Bateson, J.) 1927. Apr. 27.

PRICE v. PRICE.*

Husband and Wife—Wilful neglect to provide reasonable maintenance—Limit of time for proceeding not applicable—Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), s. 11—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), ss. 4, 8—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51), s. 1 (1).

A complaint by a wife against her husband for wilful neglect to maintain her or her infant child need not, under s. 11 of the Summary Jurisdiction Act, 1848, be brought within six months from the time when by such neglect he caused her to live separately and apart from him, inasmuch as by s. 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the complaint may now be made notwithstanding that the neglect has not caused her to leave and live separately and apart from him. The decision in *Ellis v. Ellis* (12 *The Times* L.R., 514; [1896] P. 251) has therefore now no application.

This was an appeal from an order made by the Birmingham justices on January 26, 1927, adjudging a husband to have been guilty of wilful neglect to provide reasonable maintenance for his wife and an infant child, and ordering him to pay £1 a week for their maintenance. In the notice of appeal it was alleged (*inter alia*) that the justices were wrong in law and in fact in holding that the husband was guilty of wilful neglect.

Mr. Talbot-Ponsonby, for the appellant, said that the husband in his affidavit swore that his wife left him in May, 1920, for no valid reason. In January, 1927, he was summoned for wilful neglect. Counsel referred to *Ellis v Ellis* (12 *The Times* L.R., 514; [1896] P. 251), in which Sir Francis Jeune and Sir Gorell Barnes held that persistent cruelty by a husband to a wife, and wilful neglect by him to provide reasonable maintenance for her, in consequence of which he caused her to leave and live separately and apart from him, within the meaning of section 4 of the Summary Jurisdiction (Married Women) Act, 1895, were not continuing offences. Therefore the time limit imposed by the reference in section 8 to section 11 of the Summary Jurisdiction Act, 1848, applied, and a complaint must be within six calendar months of the offence.

Mr. Clifford Mortimer, for the respondent, submitted that the decision in *Ellis v. Ellis* (*supra*) was no longer applicable since section 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, became law. That subsection read:—

"An application by a married woman for an order . . . under the Summary Jurisdiction (Married Women) Act, 1895 . . . on the ground of cruelty or neglect by her husband may be made notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from him, and accordingly the words 'and shall by such cruelty or neglect have caused her to leave and live separately and apart from him' in section 4 of that Act are hereby repealed."

Counsel referred to the judgment of the learned President in *Diggins v. Diggins* (43 *The Times* L.R., 37; [1927] P. 88), discussing the amendment made in the law by the Act of 1925.

Lord Merrivale, after reviewing the facts, held that there was evidence upon which the justices were entitled to make the order which they had made. The gist of the matter in *Ellis v. Ellis* (12 *The Times* L.R., 514; [1896] P. 251) was that the point of time was fixed as the law then stood in pursuance of the Act of 1895. No such point of time was fixed by the Act of 1925. The matter was at large when there was desertion, and it must equally be at large when there was failure to maintain. The decision in *Ellis v. Ellis* (*supra*) therefore had no application to proceedings under the Act of 1895 as amended by the Act of 1925. The appeal would be dismissed, with costs.

Mr. Justice Bateson agreed.

[Solicitors—Mr. H. C. L. Hanne; Messrs. Foster, Grave, and Jay, for Messrs. Philip Baker and Co., Birmingham.]

* Reported by William Latey, Esq., Barrister-at-Law.

House of Lords. (Viscount Haldane, Viscount Dunedin, Lord Phillimore, Lord Blanesburgh, and Lord Warrington of Clyffe.) 1927. May 27.

SALVESEN OR VON LORANG v. ADMINISTRATOR OF AUSTRIAN PROPERTY.*

Divorce — Marriage — Invalidity — Nullity — Want of formalities—French marriage—Subsequent domicile of both parties in Germany—Decree of nullity by Court of domicile—Whether conclusive.

Where a man and woman have married in a foreign country and have afterwards become domiciled in another foreign country, and the Court of their domicile has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a Court of this country where they are not domiciled cannot, in the absence of proof of substantial injustice, review the decision of the Court of the domicile.

This was an appeal from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary, Lord Morison, in an action of multiplepoinding.

On June 15, 1897, the appellant, formerly Miss Kate Salvesen, a British subject, domiciled in Scotland, went through a form of marriage in Paris to Herr Franz Ferdinand Sigismond von Lorang, an Austrian subject. In the year 1898 the parties settled in Wiesbaden, in Germany, where they lived together as man and wife until 1914. From 1914 until 1918 Herr von Lorang served with the Austrian Army and the appellant lived in Switzerland. In 1919 they returned Wiesbaden and lived there as man and wife until the end of the year 1923. In that year the Administrator of Austrian Property claimed

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

the movable property of the appellant in Scotland on the ground that she became an Austrian national by her marriage, and that in consequence her property in that country fell to be paid to him under the Treaty of Peace (Austria) Order, 1920, and the Treaty of Peace (Austria) (No. 2) Amendment Order, 1921.

The holders of the movable property brought an action of multiplepoinding on December 21, 1923, to have it determined who was entitled to the property and to obtain their own discharge. The Administrator repeated his claim. The appellant also claimed the property. She averred that she met Herr von Lorang at Wiesbaden in 1896 and they became engaged to be married. Had they been married by a religious ceremony in Austria they would have been required to undertake to bring up in the Roman Catholic faith any children of the marriage. This both parties desired to avoid. Herr von Lorang also objected to a civil marriage in Austria. Accordingly it was agreed that the marriage should take place in Paris.

The appellant further averred that she had only recently discovered that her marriage in Paris was null and void, because the parties had not observed the formalities of residence and publication which the French law required, and because the Registrar in Paris had been induced to perform the marriage ceremony upon the faith of a certificate under the hands of Herr von Lorang and the then jurisconsult of the Austrian Embassy, which falsely stated that Herr von Lorang was domiciled in France and was not obliged to publish the marriage in Austria. On the present action being brought the appellant intimated that it was her intention to bring a suit in the Civil Court of Wiesbaden, the Court of the domicile and residence of both Herr von Lorang and herself, to have the marriage declared null and void. The action of multiplepoinding in Scotland was continued to allow her to take proceedings in Wiesbaden. The suit was brought in Wiesbaden, and the Administrator made no attempt to intervene in the proceedings.

By decree published on March 28, 1924, which became final on May 4, 1924, the Court at Wiesbaden declared the marriage null and void.

Herr von Lorang was legally represented in the suit and moved for the dismissal of the petition. The jurisdiction of the German Court to pronounce a decree of nullity of marriage in the present case was admitted. The final decree of the German Court was produced by the appellant in the action of multiplepoinding in Scotland, and the Court was asked to give effect to it. Thereupon the Administrator made averments against the validity of the decree of the German Court to the following effect :—

The alleged grounds of nullity pleaded by the appellant were not by French law effective to invalidate the marriage, but merely conferred upon the French Courts a power to annul it on a full consideration of all the circumstances, including the interests of morality and of any children that might have been born of the union between the parties. In the present case one child, who was still alive, was born of the union, and the parties intended to remarry hereafter. The French Courts would, if the question came before them, hold the marriage to be valid. The alleged defects in the celebration of the marriage, which formed the basis of the German decree of nullity, had by the law of France been purged by the prolonged cohabitation of the parties as man and wife publicly and to the knowledge of their friends and neighbours. The Administrator alleged that the proceedings in the nullity suit at Wiesbaden were instituted under a collusive arrangement between the parties for the express purpose of defeating the Administrator's claim in this action, and were uncontested, and resulted in the German Court being misled as to the French law applicable to the case, and pronouncing a decree which was null and void.

The Administrator maintained that he was entitled to have an opportunity of proving those averments with the view of establishing his contention that the Paris marriage was valid, and that Mrs. von Lorang was accordingly an Austrian national on July 16, 1920.

The substantial question for determination was whether the decree of the German Court, pronounced in a suit between the appellant and her alleged husband and declaring her Paris marriage null and void according to French law, should be held binding on Scottish Courts for the purpose of excluding the respondent's averments from inquiry.

Lord Morison repelled the respondent's claim for a proof and preferred the appellant to the property in question.

The First Division, by a majority (the Lord President, Lord Blackburn, and Lord Ashmore, Lord Sands dissenting), recalled the interlocutor of the Lord Ordinary and remitted the case to him to allow the parties a proof of their respective averments.

Mr. Macmillan, K.C., Mr. Normand, K.C., and Mr. W. D. Patrick (all of the Scottish Bar) appeared for the appellant ; the Lord Advocate (the Hon. William Watson, K.C.), the Solicitor-General for Scotland (Mr. MacRobert, K.C.), and Mr. Albert Russell (of the Scottish Bar) for the respondent.

The following considered judgments were delivered.

Viscount Haldane.—My Lords : This is an appeal from the First Division of the Court of Session. The interlocutor questioned recalled an interlocutor of the Lord Ordinary, Lord Morison, in an action of multiplepoinding. The subject-matter was a fund consisting of moneys and shares in movable property held by the real raisers as bankers or agents. This fund was claimed by the appellant on the one hand and by the respondent on the other. The latter alleged that the fund was payable to him as being subject to a charge created by the Treaty of Peace (Austria) Order, 1920, on the footing that the appellant was then, in virtue of her marriage with Herr von Lorang, an Austrian national. The appellant replied that she had ascertained that her marriage was null and void, and that, therefore, she was never an Austrian national, and she obtained a sist or continuation of the proceedings in the multiplepoinding which would give her time to bring a suit in Germany, the country of the domicile of Herr von Lorang and herself, to have the validity of the marriage ascertained.

In 1924 the Court at Wiesbaden gave judgment declaring the marriage to have been null and void. This decree was then produced by the appellant in the multiplepoinding proceedings in the Scottish action. The Lord Ordinary gave effect to it, and dismissed the claim of the respondent. The First Division on appeal, by a majority, Lord Sands dissenting, recalled his interlocutor, and remitted to the Lord Ordinary to allow a proof before answer. The question before your Lordships is whether the judgment of the German Court was conclusive, or whether the invalidity of the marriage was still open to question by the Courts here at the instance of the Administrator who had not been a party in the German proceedings.

The history of the case may be stated briefly. The

marriage with Herr von Lorang, who was then an Austrian subject, to the appellant, who was a British subject domiciled in Scotland, took place in June, 1897. In 1898 the pair settled in Germany, at Wiesbaden, and lived there as man and wife with a brief interruption of residence, due to the war, until the end of 1923. Undoubtedly Wiesbaden had become the place of their domicile. The respondent claimed the fund, and the action of multiplepoinding was instituted in December, 1923. The appellant resisted the claim of the respondent and took proceedings in the German Court of their domicile, traversing the validity of her marriage. She averred that she met Herr von Lorang at Wiesbaden in 1896 and became engaged to him. Had they been married by a religious ceremony in Austria, the country of his nationality, they would have had to undertake to bring up any children in the Roman Catholic faith. This they both desired to avoid. On the other hand, merely civil marriage in Austria would not have been agreeable to Herr von Lorang's friends there. Consequently they decided that their marriage should take place in Paris. The appellant pleads, in the present action, that she had only recently discovered that her marriage in Paris was null and void, for the reason that the parties had not observed the formalities of residence and publication which the French law required, and because the registrar in Paris had been induced to perform the marriage ceremony upon the faith of a certificate to which she was no party, under the hands of Herr von Lorang and the jurisconsult of the Austrian Embassy, which stated, what was untrue, that Herr von Lorang was domiciled in France and was not obliged to publish the marriage in Austria. It made no difference according to her that the marriage was also celebrated at the English Church in Paris, according to the rites of the Church of England. The proceeding in the Court at Wiesbaden was commenced by petition of the appellant against Herr von Lorang. The latter appeared and was represented by an advocate, but he took no active part in the proceedings. In the result the Court, acting on the principle *locus regit actum*, declared the marriage null and void. The evidence of Professor Brunet, a qualified French jurist, was taken. The Court satisfied itself that the marriage had been constituted, neither in accordance with the conditions required by French law, nor in accordance with those required by the law of domicile. No later French law which would apply nor any circumstances had cured the invalidity thus brought about. The respondent Administrator was not a party to these Wiesbaden proceedings.

The final decree of the German Court of the domicile was produced in the Scottish action, in which the Court was asked to give effect to it. The present respondent, as I have just stated, did not appear in the German proceedings. But in the Court of Session he claimed that he was entitled to have their validity, as against himself at least, investigated, notwithstanding that the parties to them, Herr von Lorang and his wife, were domiciled in Germany and not in Scotland.

My Lords, I do not think that there are any materials before us on which exception can be taken to the judgment in Germany as having been obtained by what amounts in law to collusion. I will assume that both the husband and his wife had as their main motive to obtain that judgment in order, if possible, to avoid the application of the Austrian Administrator's title to claim. But I think that on the grounds assigned by the Lord Ordinary and Lord Sands, if they had the legal right to do this, the motive for which they exercised it could make no difference in a case in which fraud practised on the German Tribunal is not now alleged, and no collusion in any attempt to deceive that tribunal is established. The real question is simply whether the Court of the domicile was competent to dispose conclusively and finally of the question before it. If so it does not matter in law whether it had an exclusive jurisdiction. Had the question been one of divorce for adultery there could to-day have been no controversy as to the binding effect of the German decree. The status of married persons as dependent on divorce is a matter for which the Court of their domicile is the appropriate Court, and its decision is treated by our Courts as being not only valid but conclusive. The case before us is, however, not one of dissolving an existing marriage but of deciding that no valid marriage ever took place. The marriage was declared by the Court of the domicile to have been void by reason of non-compliance with the formalities required by the law of France, when it was celebrated. If this was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding on third parties as having been a judgment *in rem*. For what does status mean in this connexion? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which private international law recognizes as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This juridical result is more than any mere outcome of the agreement *inter se* to marry. It is due to a result which concerns the public generally and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of. There is nothing unusual in this doctrine.

I cannot see how, for instance, a husband could plead as a good answer to a claim for necessaries supplied to his wife that the marriage which had been publicly celebrated was one which he was entitled, if he took proceedings, to have declared void either for impotency or for want of compliance with formalities which the public authority which had celebrated the marriage had assumed to have been complied with. For the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities. The disability of monastic celibacy, for example, or that of a minor, or that of consanguinity, may be binding by the law of one country so as to invalidate the married status, while not binding by that of another. When, therefore, it is necessary to determine what married status implies and how far rights or acts are affected by it, it is necessary to determine the law by which they are fixed. It may be going too far to assert that these are all recognized in this country as referable only to the law of the domicile. But at least it is now established, since the decisions in *Le Mesurier v. Le Mesurier* (11 *The Times* L.R., 481; [1895] A.C., 517), *Lord Advocate v. Jaffrey* (36 *The Times* L.R., 820; [1921] 1 A.C., 146), and *Attorney-General for Alberta v. Cook* (42 *The Times* L.R., 317; [1926] A.C., 444), that for a decree of dissolution of a marriage

the Court of the domicile is the true Court of jurisdiction. That jurisdiction ought on principle to be regarded as exclusive. But for the purposes of the present case it is not necessary to refer to the point, for if the German Court was competent to pronounce the judgment it did in the case before us the judgment, being that of the Court of the domicile, was conclusive in our Courts here, so far as competency is concerned, unless there is something in the decree of dissolution for nullity which distinguishes such a proceeding from one for divorce for adultery. In *Niboyet v. Niboyet* (4 P.D., 1), in which the judgment of the majority of the Court is no longer law, Lord Justice Brett, in the dissenting judgment which he delivered, observed that the Court of the domicile was the only Court that was entitled to alter the status of married people, but he went on to indicate that the principle, while it applies so as to include suits for judicial separation and for restitution of conjugal rights, did not apply to suits for a declaration of nullity. He gives no reasons for saying this. Whether there cannot be jurisdiction which is not that of the domicile in restricted instances to entertain a suit for nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German Court was competent as against all other Courts conclusively to declare the marriage in the present case void. I am unable as matter of principle to see how its competence as the Court of the domicile can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country. For the purpose of the question raised that status must be taken to have been a *res* and the judgment was therefore one *in rem*.

My Lords, if the status in question was a *res* within the meaning of the principle, the duty of our Courts is clear. In *Castrique v. Imrie* (L.R., 4 H.L., 414) this House, adopting the language of Mr. Justice Blackburn, who was one of the Judges who advised it, laid down that the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide on the disposition of the thing, and the Court has acted within its jurisdiction.

In the careful judgment which he delivered in the First Division the Lord President held that the principle so laid down applies to a decree of divorce, making it conclusive of the dissolution of the marriage, at all events if the ground of the divorce was one or other of those recognized by the law of Scotland, namely, adultery or desertion. But he limits the application of the principle. It applies, in his view, to a decree of judicial separation, for this alters the married status; it applies also to a decree of declaration of marriage. He thinks, too, that a decree of nullity founded on the impediment of impotency also falls within the principle. This is, indeed, in his view, not a bar to the constitution of marriage, but only a resolutive condition of the contract, invalidating by non-performance a marriage that was complete, and assimilating the case to divorce. But the Lord President goes on to say that, as in other instances nullity proceedings on certain grounds may be instituted by third parties having interest, the principle under discussion cannot be one of universal application. He therefore thinks that a sentence of nullity on the ground of insanity, propinquity, prior marriage, or non-compliance with the *lex loci*, is not a judgment disposing of married status and so a judgment *in rem*, notwithstanding that the sentence, if obtained in an action in which the pretended spouses are the parties, may be *res judicata* as between themselves. It seems, he says, plain that the competency of such actions by third parties having interest, such as the respondent here, cannot spring from the intention of the persons who were parties to the pretended marriage; nor does the force of the decree pronounced in them necessarily depend on its being given by the Court of the pretended husband's domicile. Even accepting this, I do not think that the proposition is at all conclusive on the particular question before us.

My Lords, I do not find even the judgment of the Lord President convincing, and am compelled to prefer the other view worked out by Lord Sands. There does not appear to be any reason why a judgment of nullity, even on such restricted grounds as the Lord President mentions, should not be regarded as disposing of the status of married persons. It does not do so the less because third parties may have it open to them to litigate elsewhere questions of validity in certain restricted instances before such questions have been disposed of in the Court of the domicile. Such status is not dependent only on the contract of the parties to the marriage. Before Lord Lyndhurst's Act, for example, a man and woman in England standing in an affinity within the prohibited degrees could marry, and the marriage, though voidable, could only be got rid of by the sentence of an Ecclesiastical Court pronounced within the lifetime of the parties. But the status though voidable was not the less a status, a *res* with which the Court could deal. That shows that, though voidable and not void, it was that as to which the sentence of the appropriate Court was essential for its dissolution.

My Lords, for these reasons I am unable to agree with the view of the Lord President that the foreign judgment in the case before us did not as soon as given establish conclusively against the respondent and every one else that the appellant, at the relevant date in the multiplepoinding proceedings, was not an Austrian national *quâ* wife of an Austrian subject. If so, the claim of the Administrator in the multiplepoinding became inept on March 28, 1924, the date of the decree of the Wiesbaden Court, which was made final on May 4 in that year. The interlocutor of the Lord Ordinary repelling the claim for the Administrator was not pronounced until April 21, 1925, and ought accordingly to receive effect.

There were cited numerous authorities for the contention of the respondent in the Court of Session. These I have examined, but they do not appear to me to modify the conclusion at which I have arrived as to the principle which must be applied. In considering them it should be borne in mind that some of the *dicta* in the older cases have been affected by the Matrimonial Causes Act of 1857, which for the first time enabled divorce *a vinculo* to be granted by a Court of general law in England. Before that year it was the prevalent view that a marriage duly celebrated in England could not be got rid of (except by Act of Parliament) validly so far as England was concerned, even by a foreign decree, at least when the domicile at the time of the marriage was English. In the report of *Warrender v. Warrender* (2 Cl. and Fin., 488), *Lolley's* case (2 Cl. and Fin., 567), which had been decided by eminent English Judges, is explained, and it is yet more precisely explained by Lord Westbury in *Shaw v. Gould* (L.R., 3; H.L., 55, at p. 85), and by Lord Selborne in *Harvey v. Farnie* (8 App. Cas., 43, at p. 54). *Lolley's* case (*supra*)

appears in reality to have turned on domicile as much as on the indissoluble character of an "English marriage." After 1857 the indissoluble character of an English marriage disappeared, and the effect of this disappearance is noticeable in the later decisions. In the judgment in *Le Mesurier v. Le Mesurier* (*supra*) the modern doctrine of domicile as the true test prevails unrestrainedly.

Turning to some of the authorities cited, a beginning may be made with a case in which the only question was as to the jurisdiction of the Consistorial Court in England to inquire into the validity of a sentence of a foreign Court declaring a marriage to have been illegal by reason of non-compliance with the *lex loci contractus* of the foreign country where it was celebrated. There is very little in the judgment there which even touches the point before us. *Scrimshire v. Scrimshire* (2 Hagg. Consist., 395) was a suit in which the validity of a foreign marriage was denied on the ground that it had not been celebrated according to the law of the country in which it was celebrated. This was held to have been proved by a sentence to that effect of nullity in France, and by the evidence. As the marriage appeared to have been illegal by the *lex loci contractus*, the decree here was against the validity. But inquiry in the Consistorial Court in England was admitted. *Scrimshire v. Scrimshire* (*supra*) is a relevant authority, but the result was not based on principles relating to domicile, which in 1752 were obscure but to-day are well established.

In *Sinclair v. Sinclair* (1 Hagg. Consist., 294) before Lord Stowell, at that time Sir William Scott, the respondent pleaded, as an answer to a suit by his wife for separation on the ground of cruelty and adultery, that the marriage had been celebrated at Paris, and had been dissolved by a sentence of the Court at Brussels on the ground of nullity. The parties were not domiciled at Brussels. The marriage appears to have been really celebrated in England. As the parties were within the English jurisdiction Sir William Scott considered that the Consistorial Court could examine the validity of the marriage. He thought that it was to go too far to hold that a sentence of nullity (the reasons for the nullity do not appear) would not carry great weight if sentence were pronounced in the country where the marriage was solemnized. But he was not prepared to say that a judgment of a third country on the validity of a marriage not within its own territories nor had between subjects of that country would be universally binding. He decided that there was no foreign sentence which would prevent the Consistorial Court from entertaining the suit.

In *Kennedy v. Earl of Cassillis* (2 Swanston, 313) a note is quoted (at p. 326) extracted from the MSS. of Lord Chancellor Nottingham. He says, referring to the case of *Cottington* (2 Swanston, 326), that where a woman, although she was said to have already a husband living in Turin, claimed to be a lawful wife here, on the ground that she had been divorced from that husband by the Archbishop of Turin, he, Lord Nottingham, had held that it was against the law of nations not to give credit to the judgment and sentences of foreign countries. For what right had one kingdom to reverse the judgment of another? What confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences!

This is an authority, so far as it goes, which supports the contention of the appellant here. *Simonin v. Mallac* (2 Sw. and Tr., 67) was a petition for nullity. The petitioner (the wife) was married to her husband in England. Both were of French domicile, and they had come here only to be married. She obtained a decree of nullity in France on the ground of want of parental consent and of publication. She then came to reside in England and petitioned for a declaration of nullity here. Sir Cresswell Cresswell held that as her marriage had been solemnized in England, the parties had contracted with reference to the law of this country as to validity. He decided that he had jurisdiction. This decision was given in 1860, but the marriage took place before the Divorce Act of 1857.

In considering the application of other authorities cited to us it is essential to bear in mind the limited scope of the only question before us. It is simply whether, when the Court of the domicile of both the parties has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a Court here where they are not domiciled can review that decision. The reasons given by Sir Nathaniel Lindley, M.R., in *Pemberton v. Hughes* (15 *The Times* L.R., 211; [1899] 1 Ch., 781) are, in my opinion, conclusive against any attempt to reopen any such case on the footing of supposed irregularity of procedure. Our Courts, as he says, never inquire whether a competent foreign Court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed. In the present case the question was not divorce by way of dissolution for any offence, but because of nullity for want of essentials required for the contract. It is said that this makes a difference, inasmuch as the marriage, if a nullity, could not change the domicile of the supposed wife. That is possibly true, on the grounds assigned by the then President of the Divorce Court, Sir Gorell Barnes, in his elaborate judgment in *Ogden v. Ogden* (24 *The Times* L.R., 94; [1908] P. 46, at p. 78). But it does not affect the litigation before us, in which the decree of nullity in the Court of the husband's domicile was pronounced with retrospective effect before the claim of the Administrator of Austrian Property could be established. None of the cases cited to us seem to me to affect this simple point.

My Lords, for the reason that the judgment of the Wiesbaden Court was both competent and binding upon us, I think that we ought to recall the interlocutor of the First Division and to restore that of the Lord Ordinary. The appellant should have her costs in the Inner House and here. I move accordingly.

Viscount Dunedin.—My Lords: Although I had made up my mind as to what, according to my opinion, the judgment of the House ought to be in this case, yet before I had penned a single sentence of the opinion which I should deliver, I had the advantage of reading the opinions of the noble Viscount on the Woolsack and of Lord Phillimore. Agreeing as I do with these opinions and also with every word of what I may without offence term the exceedingly able judgment of Lord Sands, if this were an ordinary case I should simply announce my concurrence. But the case is so important to the law that I need not apologize for adding some remarks of my own; only, as it would be useless to retrace the ground so thoroughly explored in the opinions mentioned, these remarks will be necessarily discursive, but I hope may serve some purpose.

First I would like to say that I thoroughly endorse the view of Lord Phillimore that the outlook of the English Courts was necessarily different before and

after 1857. I would like to add that I think there is another date of great moment, viz., the date of the decision of *Warrender v. Warrender* in this House (2 Cl. & F., 488), viz., 1835. I may add that besides the citation given by the noble Viscount the case is also very fully reported in 2 Shaw and MacLean, p. 154. Now I venture to say this : that before that judgment, without my considering whether it really was the law or not, any English lawyer would have said that the law of England is that an English marriage is indissoluble by any Court ; it is something that cannot be broken, indissoluble in essence, and looking to *Lolley's* case (Russell and Ryan, 237) who could say that he was wrong ? I think satisfactory proof of this may be found in the argument of Attorney-General Campbell, afterwards Lord Chancellor, in the *Warrender* case (*supra*), wherein he says (2 S. & MacL., at p. 170) : " It may be considered as absolutely certain that the Bar of England could not have furnished a single counsel who would have set his name to the opinion, that judicial indissolubility was not a legal quality of every English marriage." But when *Warrender's* case (*supra*) was decided, that, as an abstract proposition, could no longer hold, though I doubt whether the majority of English lawyers appreciated it. They did not in those days pay much attention to Scotch cases. Besides, as a decision it did not necessarily say that *Lolley's* case (*supra*) was wrong, because Lolley was an Englishman and went to Scotland only for the purpose of obtaining a divorce, while Warrender was a Scotchman. In other words, if the law of *Le Mesurier v. Le Mesurier* (*supra*) had then been fully known, Lolley's divorce in Scotland was no divorce at all. No one can read Lord Brougham's judgment without coming to the conclusion that he thought that *Lolley's* case (*supra*) was wrong in what it laid down, and when Lord Lyndhurst twitted him with having gone out of his way to approve *Lolley's* case (*supra*) in *M'Carthy v. De Caix* (2 Cl. & F., 568) when he was Chancellor, Lord Brougham retorted that he was then only sitting in Chancery, and was bound by *Lolley's* case (*supra*), but now he was in the House of Lords and was not. My Lords, I do not think it necessary to consider whether I should follow the iconoclastic tendencies of my fellow-countryman. All I want to point out is that in my view all early English decisions, certainly up to 1835, and I think up to 1857, must be read in the light of the general opinion of the indissolubility of an English marriage.

The other point on which I want to say a few words is the question what is a judgment *in rem*. All are agreed that a judgment of divorce is a judgment *in rem*, but the whole argument of the majority of the Judges in the Court of Session turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a " *res*," as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the Court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savours of a *res*, and has all along been treated as such. Now the learned Judges make this distinction. They say that in an action of divorce you have to do with a *res*, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford Dictionary the word " status " is defined, *inter alia*, as " The legal standing of a person ; condition in respect of, *e.g.*, liberty or servitude, marriage or celibacy, infancy or majority." The judgment in a nullity case decrees either a status of marriage or a status of celibacy.

The learned Judges rest strongly on what was said on the subject in *Ogden v. Ogden* (24 *The Times* L.R., 94 ; [1908] P. 46), but, first, I am not bound by *Ogden v. Ogden* (*supra*), and so far as the dicta contradict what I have just said, I do not agree with them. And, further, a close perusal of the judgment in *Ogden v. Ogden* (*supra*) will show that it is very much wrapped up with the question of jurisdiction, and, if the first marriage was null, there was no jurisdiction in the French Court against the so-called wife defending. But here the jurisdiction is undoubted. On this point I would cite the words of Sir James Hannen in the case of *Turner* (*or Thompson*) *v. Thompson* (4 *The Times* L.R., 243 ; 13 P.D., 37, at p. 41) : " A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicil of her husband if she lives with him in the country of his domicil. There is no ground here for contending that she did not take up that domicil. She had the intention of taking up her permanent abode with him and of making his country her permanent home." These words exactly fit this case. I am therefore of opinion that a decree of nullity savours of a *res* just as much as a decree of divorce. I accept the conditions laid down by Lord Lindley when he was Master of the Rolls in *Pemberton v. Hughes* (15 *The Times* L.R., 211 ; [1899] 1 Ch., 781, at p. 790). In order that a foreign decree may be immune from disturbance by an English Court—and in my opinion " Scottish " may with perfect justice be substituted for " English "—it must be pronounced between persons subject to the foreign jurisdiction, and deal with a matter with which the Court is competent to deal, and it must not offend against English ideas of substantial justice.

Although, as I said before, these remarks are discursive, and I do not wish to retrace traversed ground, yet I would put in the form of short propositions the points that I hold proved, the proof of several of them being worked out, not by me, but by the opinions of my noble and learned friends.

1. The German Court had jurisdiction over the parties, they being domiciled in Germany equally whether there was marriage or no marriage.

2. This was a genuine action, and there was no collusion or fraud used to deceive the German Court.

3. The validity of the marriage depended on French law, that being the law of the *locus celebrationis*.

4. The German Court took proper steps to inform itself of the French law, and gave judgment according to the law proved before it.

5. That judgment is a judgment which is equivalent to a judgment *in rem*, and is therefore binding on the Scotch Court without further inquiry.

It follows that I agree with the motion made from the Woolsack.

Lord Phillimore.—My Lords : I have read and I concur in the opinions of Viscount Haldane and Viscount Dunedin.

With regard to the respect to be paid to the judgment of a Court having jurisdiction over the place where the parties are domiciled, it is suggested that the English decisions, though not strictly authoritative, may, in the comparative dearth of Scots authorities, be looked upon as declaring common British law, or that at any rate they may be regarded as authorities on international law ; and the Administrator of Austrian Property contends that they show that the Court before which a matrimonial suit is tried will not regard a previous decision of the Court of the domicil as conclusive. Counsel for the

lady appears to concede that this may be the result of the English decisions, but they say that this is a special English view applying only to English marriages. Whether this means putative marriages solemnized in England, or such marriages solemnized elsewhere between two English persons, or applies to both cases, did not clearly appear in the argument. I think that this matter requires a further analysis.

There are two classes of decisions affecting the matrimonial status: those which decide that a putative marriage is or is not valid, judgments of declarator or nullity, and those which put an end to an unquestioned marriage, judgments of dissolution of marriage or, in popular language, divorce. With regard to these latter, English Courts before 1857 would, from their nature, be inclined to refuse to recognize a decree of dissolution of marriage because in their view of the law marriage (*matrimonium verum et ratum*) was indissoluble. They were Church Courts and the law of the Church so taught them. Neither they nor foreign Courts, in their view, could break the indissoluble chain. It was only in obedience to the so-to-speak brute force of a private Act of Parliament that they submitted to recognize a dissolution. And this law of the Church was the marriage law of England. Hence the decision in *Lolley's* case (Russell and Ryan, 237). It was perhaps conceivable, if people got into a strange country where non-Christian views or different views of Christianity prevailed, and became domiciled there, that the sentence of dissolution by the appropriate Court of the country might be accepted.

Lords Brougham and Lyndhurst in *Warrender v. Warrender* (2 Cl. and F., 488) thought that this would not be so and that *Lolley's* case (*supra*), which was that of a domiciled Englishman making a temporary stay in Scotland in order to give the Scots Courts jurisdiction, would have been decided in the same manner even if Lolley had become domiciled in Scotland. It is, however, the fact, as Lord Cranworth points out in *Dolphin v. Robins* (7 H.L.C., 390), that Lolley certainly had not a Scotch domicil.

However this may have been before 1857, circumstances entirely changed, when instead of a number of Church Courts there was established one statutory civil Court empowered and instructed to grant decrees of dissolution of marriage in certain cases.

Since 1857 there was no reason why the English High Court of Justice in its Matrimonial Division should refuse to recognize a decree of dissolution of marriage made by the Court of the matrimonial domicil, at least on any ground which would be deemed sufficient by the present English law and possibly upon any ground deemed sufficient by the law of the domicil. (See Phillimore's "Commentaries upon International Law," Vol. 4, section 507.)

Indeed, this matter is now set at rest. Since the opinions expressed in the cases of *Le Mesurier v. Le Mesurier* (11 *The Times* L.R., 481; [1895] A.C., 517) and *Lord Advocate v. Jaffery* (36 *The Times* L.R., 820; [1921], A.C., 146), and the decision of the Privy Council in *Attorney-General for Alberta v. Cook* (42 *The Times* L.R., 317; [1926] A.C., 444), it is established that the law of England recognizes the competence and the exclusive competence of the Court of the domicil to decree dissolution of a marriage. The last case, though in form a decision upon the law of the Province of Alberta in Canada, is authoritative as a decision upon the law of England, because it had been previously determined in the case of *Board v. Board* (35 *The Times* L.R., 635; [1919] A.C., 956) that the matrimonial law of Alberta is that of England.

It may now be taken that the decision in *Niboyet v. Niboyet* (3 P.D., 52, and 4 P.D., 1), where the Court of Appeal by a majority reversed the decision of Sir Robert Phillimore, is not sound.

I pass from executive decrees to deliberate pronouncements—decrees of declarator or of nullity. The first authorities to be considered are those of *Scrimshire v. Scrimshire* (2 Hagg. Consist., 395) and *Sinclair v. Sinclair* (1 Hagg. Consist., 294). In both cases a ceremony of marriage was gone through in France between English subjects domiciled in England. In both the parties continued so domiciled. In both there was a decree of nullity by a foreign Court, which was set up by the man as a defence to matrimonial relief claimed by the woman.

In *Scrimshire v. Scrimshire* (*supra*) the man did not rely upon the decree of nullity as conclusive. He pleaded facts and the law of France, the *lex loci celebrationis*, according to which the marriage was null, and (it being a course of procedure in the Ecclesiastical Courts to plead evidence) he pleaded the French decision as the best evidence of the French law (it was so done later in *Simonin v. Mallac*, 2 Sw. and Tr., 67) and upon the whole matter the Court decided in his favour.

In *Sinclair v. Sinclair* (*supra*) the woman relied not merely upon the French ceremony but also upon a subsequent marriage which she said had been solemnized in England, and she claimed a divorce *a mensa et toro* by reason of her alleged husband's adultery, no doubt expecting to get alimony. The case, so far as it is reported, was tried upon the preliminary objection of the man that the Court had no jurisdiction because the woman was disentitled by reason of a decree of a Court in Flanders given against her, both in respect of nullity and in respect of her adultery.

This latter finding, though not an objection to the jurisdiction and therefore improperly relied upon at this stage, would have been a good defence to the woman's claim for relief. But the Judge, Sir William Scott, after commenting upon the grotesqueness of such a joinder of causes of suit, came to the conclusion that it was not proved, at any rate at that stage, that there had been a decree against the woman for adultery. The historical circumstances of the condition of Flanders at that moment rendered certainty in these matters difficult of attainment.

If the alleged decree against the woman for adultery was not proved, the decree, if that were a real one, of nullity would be at this stage of no avail to the man because the woman was relying upon the double ceremony and the man did not suggest that the Flanders decree had been given upon anything but the French ceremony. There could be no doubt, therefore, that the man's protest to the jurisdiction had to be overruled and that he must be put to answer in the usual way the case that was made against him. We do not know what followed. However, in the course of his judgment, Sir William Scott made use of language which, owing to the great respect always paid to that eminent Judge, has been treated as weighty. He does seem to speak as if, in matrimonial cases where the validity of the marriage was in dispute, the Court would not consider itself concluded by any previous decision of any other Court even when rendered between the same parties, but would look at such decisions merely as helps or guides or adminicula of proof. If and so far as it was a matter of the law of France as the place of the alleged celebration, he would have regarded, it would appear, the decree of a French Court as valuable evidence of French law, in the same way that Sir Edward Simpson treated the French decision in *Scrimshire v. Scrimshire* (*supra*). But it would

seem as if this was all the weight that Sir William Scott could attach to it even if it were the Court of the domicil of the parties.

When, however, one remembers that in the case with which he was dealing, as in the case of *Scrimshire v. Scrimshire* (*supra*) (which he probably had in his recollection), there was no question of a sentence by the Court of the domicil, one can see that it may well be a mistake to apply his language generally.

At that time there was no one matrimonial Court in England. There were as many Courts as there were dioceses, and indeed more, because there were some special jurisdictions; and he cannot have thought, if there had been a decree of nullity procured by a man living in the Diocese of London who afterwards removed and made his domicil in Southwark, that the Court of the Bishop of Winchester would not, if the question were raised either by the same woman or by another woman relying upon a subsequent marriage, be concluded by the decree of the Chancellor of London.

The next case, occurring after a long interval, which bears upon this matter seems to be *Simonin v. Mallac* (*supra*). Rightly understood this case does not seem to be an authority for the proposition that an English Court in the case of a putative English marriage will not treat the decision of the Court of the domicil of the parties as conclusive.

These were two French people who came over to Dover to celebrate an English marriage and returned to France where they were both always domiciled, and where, as the man refused to ratify the marriage by a French ceremony, the woman sued in the French Court and got a decree of nullity, and then, not content with that decree, sued also in the English matrimonial Court for a similar decree. It was an unusual proceeding. It was not like the usual suit on a foreign judgment where execution is sought in this country, nor was it a case like those which I have mentioned, in which a foreign decree of nullity was set up as a bar to application for matrimonial relief.

When the petition is looked at it will be seen that the lady did not rely on the foreign decree as conclusive. She set out facts, including the French law, and the French decree as evidence of the French law, just as it had been used in *Scrimshire v. Scrimshire* (*supra*), and then proceeded to submit that the law governing the validity of marriage was the law of the domicil of the parties and not the *lex loci celebrationis*. Thereupon the decision of the Court, right or wrong, was upon this issue only. The Judges held that, at any rate in respect of the particular defect alleged (*impedimentum impeditivum*) the law of the place of celebration prevailed over the law of the domicil. It may be said that the Court ought to have guarded itself in respect of the French sentence of nullity, but inasmuch as it was not invited to hold this sentence as conclusive but to examine the matter for itself, it is not to be wondered at that the Court did not take this point.

The English decision which goes furthest in support of the conclusion arrived at by the Court of Session is *Ogden v. Ogden* (24 *The Times* L.R., 94; [1908] P., 46), in which case the Court of Appeal disregarded the sentence of the French Court, which was the Court of the man's domicil, and proceeded to hold that a marriage celebrated in England between a competent English woman and a Frenchman who was capable of marrying her but could not validly marry her at the moment according to the law of France for want of the necessary consents was a valid marriage, notwithstanding that the French Court had pronounced it null. The impediment was, it is to be noted, an *impedimentum impeditivum* and not an *impedimentum dirimens*, such as incest or a colour bar.

This authority looks at first sight as if an English Court would not in the case of an English marriage hold itself concluded by the decision of a foreign Court though the latter was the Court of the domicil. But in truth the problem in *Ogden v. Ogden* (*supra*) was almost insoluble. The short cohabitation between the parties which followed the ceremony of marriage did indeed take place in England, but after this very temporary residence the man returned to his home in France and never lost his French domicil. On the other hand the woman did not follow the man to France and, if she were not married to him, never acquired a French domicil. To treat her as domiciled in France would be to treat her as a wife, who takes her necessary domicil from her husband. But the French Court proceeded to say that she was not a wife, and when the suit of *Ogden v. Ogden* (*supra*) came on, that was, and necessarily was, her contention.

The President, Sir Gorell Barnes, insists upon this point at page 78 of the report, and therefore took the French decree, as he expressed it, as only a declaration of the status of the parties in France. The French decision could not be relied upon as *res inter partes judicata*, for it was being questioned by the second putative husband, and the woman could not set it up as a judgment *in rem* by the Court of her domicil. Moreover it was clear that the Court of her own domicil never would have held the marriage null.

To these observations upon *Ogden v. Ogden* (*supra*) I should add that the case was unfavourably commented upon in the judgment of the Privy Council in *Attorney-General for Alberta v. Cook* (*supra*), and that whether it was a right or a wrong decision upon the very peculiar facts of the case I cannot regard it as an authority that English law would not recognize the decision of a competent Court having jurisdiction over the place where the parties are domiciled as final and conclusive.

As to the general principles of international law upon this subject as viewed by British Courts it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status the Court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively. I have used the expression "the law which determines the personal status" because there are countries which would refer to nationality rather than to domicil; but the principle is the same.

The text first quoted in *Shaw v. Gould* (L.R., 3 H.L., 55) and then cited in *Le Mesurier v. Le Mesurier* (*supra*, at p. 538), and in *Lord Advocate v. Jaffrey* (*supra*, at p. 152) was not, I apprehend, intended to be confined to decrees which effect something, but deals also, if not primarily, with decrees which decide upon the existing status: *Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quaeritur, uni solummodo judici, et quidem domicilii, universum in illa jus sit attributum.*

My Lords, there is no reason for supposing that the law of Scotland differs in this respect from general international law. The passage in *Longworth v. Yelverton* (5 Rettie (H.L.), 144, at p. 147), where the reason given for refusing to put in force the special Scotch process of referring an issue to the conscience of the other party was because a judgment of declarator of marriage would thus be obtained on a personal admission and yet nevertheless as a judg-

ment *in rem* or a judgment upon personal status would be binding on a new wife, indicates sufficiently the trend of Scottish law.

I do not think that the case of *Smith or Murison v. Murison* ([1923] S.C., 624) or even the obiter observations which occur in the judgments affect this conclusion.

Finally, my Lords, if the Court is a competent Court, still more if it is the only competent Court—and in my opinion the Wiesbaden Court was the only competent Court for these parties—its judgment must, for the very reason of the thing, be, as such a judgment as that described in *A. v. B.* (L.R., 1 P. and D., 559), a "definitive decree declaring a marriage void, which should be universally binding and which should ascertain and determine the status of the parties once for all."

My Lords, I cannot conclude this delivery of my opinion without one cautela or reservation. If it could be said on behalf of the Administrator that this was a collusive suit and a judgment procured by collusion, it would, in my view, be unavailing. As the Solicitor-General said in the *Duchess of Kingston's* case (20 St. Tr., at p. 479): "*Fabula, non judicium, hoc est; in scena, non in foro, res agitur.*" I should lay such a judgment aside. But I agree with the Lord Ordinary and the Lord President that no such collusion is suggested in this case as amounts to a case of fraud upon the German Court. No doubt the parties desired that the German Court should pronounce the marriage null. But it is not suggested that any false evidence was given or that any material evidence was designedly excluded, or that the opinion of the advocate on the French law was not the honest opinion of a competent person, though it may or may not have been correct.

For these reasons I concur with your Lordships in holding that the interlocutor of the Court of Session should be set aside and the judgment of the Lord Ordinary restored.

LORD BLANESBURGH.—My Lords: The difficulty in this appeal, as I see it, has been not so much to determine whether in ordinary circumstances a decree of nullity pronounced by the Court of the domicil of the parties is conclusive everywhere as it has been to determine whether in the unusual circumstances and reactions of the nullity suit in the present case the Wiesbaden decree made in it is outside the general rule, at least so far as the Court of Session in this action of multiplepoinding and at the instance of the Administrator of Austrian Property is concerned. My Lords, I confess that if it had not been for the complete exposition of the case in all its aspects and from all points of view which is to be found in the weighty judgments of the Lord President and Lord Sands, the difficulty I have experienced in reaching a decision entirely satisfactory to myself might, in the special circumstances here existing, still have remained unresolved.

But, having examined and re-examined these judgments with all the care of which I am capable, and being assisted to a conclusion also by the fuller examination of the English authorities which has been made in this House, I now see no effective answer to the conclusions reached by Lord Sands or to the reasoning by which he supports them.

Accordingly, I concur in the motion which has been made by the noble Viscount on the Woolsack.

LORD WARRINGTON OF CLYFFE.—My Lords: I have had the advantage of reading the opinions pronounced by the noble Viscount on the Woolsack and by Viscount Dunedin and Lord Phillimore. I agree with their reasoning and conclusions and I have nothing to add.

[Agents—Messrs. Thomas Cooper and Co., for Messrs. John and W. K. Gair and Gibson, Writers, Falkirk, and Messrs. Beveridge, Sutherland, and Smith, W.S., Leith; the Solicitor to the Clearing Office (Enemy Debts) of Austrian Property, for Messrs. J. and R. A. Robertson, W.S., Edinburgh.]

Judicial Committee of the Privy Council.
(Viscount Sumner, Lord Atkinson, Lord Carson, Lord Darling, and Sir Lancelot Sanderson.)

1927. May 27.

BHAGCHAND DAGDUSA GUJRATHI AND OTHERS v. SECRETARY OF STATE FOR INDIA IN COUNCIL.*

India—Action against public officer—Requirement of two months' notice—Whether subject to exception—Case of hardship or irreparable damage—Action for injunction—Question of *ultra vires*—Government of India Act, 1858 (21 and 22 Vict., c. 106), s. 65—Code of Civil Procedure (Act. V. of 1908) (Indian statute), s. 80.

By s. 80 of the Indian Code of Civil Procedure, "No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description, and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

Held, that the above provision is not *ultra vires,* as the regulation of civil procedure is not subject to s. 65 of the Government of India Act, 1858, and that it is applicable to all forms of action and to all kinds of relief, and is not subject to any exception in an action where an injunction is prayed or in cases where hardship or injury not reparable by money compensation may arise; and that therefore, where a plaint, such as is referred to, is issued before the expiration of two months from the notice required, the action is unsustainable *in limine.*

This was an appeal from a judgment of the High Court of Bombay of August 15, 1923, affirming a decree of the District Judge of Nasik.

Mr. J. M. Parikh appeared for the appellants; Sir George Lowndes, K.C., and Mr. Kenworthy Brown for the Secretary of State for India in Council.

VISCOUNT SUMNER, in delivering their Lordships' judgment, said:—In this action 48 plaintiffs joined

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

in suing the Secretary of State for India and the Collector and District Magistrate of Nasik for two kinds of relief, (*a*) a declaration that certain official notices and orders were *ultra vires* and invalid, and (*b*) an injunction permanently restraining all executive action thereunder. Unless the right to the first relief was made out, the prayer for the second necessarily failed. The suit was begun less than two months after notice of the intention to bring it had been given to the respondents. It was dismissed by the District Judge on all grounds, and by the High Court of Bombay as well, but, as to one of the learned Judges, not altogether on the same grounds. The plaintiffs now appeal.

In April, 1921, serious disorder occurred at Malegaon, in the district of Nasik, Bombay, connected with the Khilafat agitation, and in the consequent unlawful assemblies and riots there was loss of life and much damage to property. The Mahomedan weavers, who formed the large majority of the male inhabitants of the place, were the chief culprits, though it is not likely that they acted without instigation from other parties. Some persons were punished criminally, but the question remained how the injured parties were to be compensated and how order was to be maintained in the future. An inquiry was accordingly held, and amounts were fixed, by way of compensation to persons who had suffered in the riots. The Government decided to put in force the provisions of the Bombay District Police Act No. IV. of 1890, and orders were duly made for the employment of additional police at the expense of the inhabitants and for payment of compensation for the injuries sustained. Under these orders the income-tax payers, a small class, and the great body of the weavers were designated as the parties to pay the sums required. No question as to the correctness of these proceedings now arises.

Under the Act it was for the Collector to get in the amount of the compensation and for the Municipality of Malegaon to enforce payment of the police rate. Both were unable to do so. Coercion of the weavers generally, who had few belongings and lived in the main from hand to mouth, proved to be impracticable. As to the ratepayers, the Municipality lacked means of enforcing a general payment, and were openly set at defiance. By the spring of the following year the position had become exceedingly unsatisfactory. Some small sums had been collected from the income-tax payers but, in spite of much patience on the part of the executive and a lapse of time sufficient to have allayed the original turbulence, the measures taken under the Police Act had practically come to nothing.

Accordingly, in March, 1922, the District Magistrate of Nasik, who was Collector as well, proposed to the Commissioner for the Central Division that, instead of seeking to recover the amounts due for compensation from the weavers directly, a tax should be imposed personally on the merchants at Malegaon, who sold to the weavers the yarn for the saris, which they made, and bought from them their finished product. The amount of the tax in each merchant's case was to be measured by the amount of his dealings with the weavers during a period indicated. These merchants constituted a small class, likely to be easy to deal with, and many of them were weavers themselves. In the ordinary course, whatever they paid they would pass on to their customers by charging more for their yarn and giving less for the saris. It was unlikely that the weavers as a body could resist this readjustment, having no capital of their own and no means of quitting Malegaon to carry on their industry elsewhere. The magistrate was careful to point out that, if his suggestion was adopted, a modification would be required in the order of August 16, 1921, under which payment of the compensation had been imposed in terms on the Mahomedan weavers. The Commissioner passed this proposal to the Home Department, expressing his approval, and forwarding a copy of this approval to the Collector of Nasik. In April, 1922, the Government also approved the proposal and directed that the District Magistrate should be so informed, and, having thus dealt with the question of compensation, took up that of the expense of the extra police force. Here, too, it was decided to adopt the same plan, namely, to recover the sums outstanding from the shopkeepers, both Mahomedan and Hindu, who dealt in saris and yarn.

A notification, No. 152, dated June 6, 1922, was then published in the Bombay Government Gazette. This is the document which, with demand notices issued thereunder, the appellants by their prayer in this suit seek to have declared to be invalid and unlawful. It purports to be made by the Governor in Council and to direct, under section 25, that "the cost of the additional police shall be defrayed wholly by a tax imposed on the Mohammedan income-tax payers, who are inhabitants of the said town, and by a rate, assessed on the property of such other inhabitants as are" notified in manner set forth, and under section 25A that the above cost and the total amount of compensation awarded by the District Magistrate of Nasik should be assessed and recovered, first from payers of income-tax in certain amounts and instalments, and secondly :—

"The balance of the combined charges, after the amount recoverable from persons of Class I. has been deducted, shall be recovered on behalf of the Momin adult weavers of Malegaon from both Mohammedan and Hindu shopkeepers of Malegaon dealing in saris and yarn, who shall pay every year up to May 31, 1923, beginning from July 1, 1921, a rate calculated by the District Magistrate, Nasik, at a sum not exceeding six annas, multiplied by the average number of saris hitherto purchased by them from Momin weavers of Malegaon annually, or a sum not exceeding Rs.5, multiplied by the average number of bales of yarn hitherto sold by them to Momin weavers of Malegaon annually, as the case may be.

"And, whereas the Municipality of Malegaon has made a default in the recovery of the charges on account of the said additional police, the Governor in Council is pleased to direct, under the proviso to section 26 (1) of the said Act, that the recovery of the said charges shall be made by the Collector of the District along with the compensation money as an arrear of land revenue. . . ."

The employment of additional police in consequence of the rioting, which caused the damage, and the compensation for the damage thus done are respectively dealt with in section 25 and section 25A of the Act. It will be seen that the Act prescribes no forms and few formalities. The District Magistrate, with the Commissioner's previous sanction, fixes the proportions in which individuals are to make payments towards the compensation, which he has ascertained, for damage done and decides whether all the inhabitants of the local area affected or only particular sections or classes, and if so which, are to pay, and he then directs and requires the Collector to recover the amounts accordingly. How the Commissioner's previous sanction is to be given and how the decision of the magistrate and his direction and requisition to the collector are to be formulated the section

does not say. So with the additional police, though their employment in the first instance has to be directed by notification, the mode in which the cost is to be defrayed is to be simply directed by Government in accordance with subsection 2 (A) and (B), and notification at this stage is not prescribed. Furthermore, in regard to each section, it is to be noticed that the determination of the incidence of the tax in question is an executive and not a judicial act. It is a function of the Government in the one case, and of the District Magistrate in the other, but in both cases its character is the same. Whatever may be said of the inquiry under section 25A (1) A into claims to be compensated for the damage sustained, the magistrate's action under section 25A (1) B is not a judicial proceeding, and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors. (Cf. *Ezra v. Secretary of State,* 30 Calc., 36, at pp. 83 to 85.) Even the Commissioner's sanction is only stated to be previous; it is not required to be given once for all. Nothing prevents it from being given from time to time or after consultation, nor is there anything about it which confines it to starting the magistrate on a course of action, which he is thereafter to pursue independently and alone.

There is, furthermore, nothing in either section to restrict the exercise of this taxing function to one occasion and one only. The powers which they give are not spent by a single exercise. The finality referred to in section 25A (4) relates exclusively to the Commissioner's function of review. The directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided, but it is quite a different thing to say that the giving of one direction exhausts all the magistrate's powers and leaves him thereafter incapable of any substituted or amending action. Such a provision would be appropriate only to the judgment of a Court and not to administrative action such as this. Such a construction would tend to deprive the enactment of its practical utility.

On the Government Notification, No. 152, the appellants' contentions may be summarized thus. The notification includes in one document without distinction two separate matters—compensation for damage and the cost of additional police. In respect of the former it passes over the District Magistrate altogether, ousts his jurisdiction, and determines the incidence of the compensation tax by direct Government decree. Without discharging the orders previously made, it requires the collection of tax from Hindus and from shopkeepers, which under those prior orders had been imposed only on Mahomedans and weavers, a thing without legal warrant. Either the Government is making a new order, which is bad because it trespasses on the exclusive functions of the District Magistrate, or it is applying to his old order a new method of exacting the tax from persons who are in terms outside the ambit of the old order as it stands. In the alternative, it constituted the shopkeepers agents for the weavers, contrary alike to fact and to law, and, under the strongest personal penalties in case of failure it called on them to pay on behalf of principals, who had neither authorized payment nor put them in funds to make it. The obvious explanation of the real intent of the notification, which is furnished by the previous reports and communications, is brushed aside by the appellants on the singular plea that this written instrument, unlike others, is to be looked at in isolation from the circumstances in which it was promulgated, and as a matter of construction is so drawn as to contain on its face two plain transgressions of the very Act, in pursuance of which it is expressed to be published.

It is, of course, easy to be wise after the event. It may be admitted that the notification would have been improved (*a*) by a statement that the new mode of raising the money was directed in lieu of the old one, the orders for which were *pro tanto* discharged, and (*b*) by the complete omission of any reference to the mode in which the shopkeepers might recoup themselves by adjustments of the prices of yarn and saris respectively. Probably the draughtsman could find ample excuse in the circumstances of a harassing period of office. At any rate, although the same notification includes both the cost of the police and the payment of compensation, the two matters are clearly severable, and the exercise of the powers of the Government under section 25 is not prejudiced by the additional notification of the course which the District Magistrate was about to take under section 25A.

The short answer, however, to all this is to be found in construing the document reasonably in the light of the existing circumstances, and by referring for the rest to section 79 of the Act:—

"No . . . order, direction . . . or notification, made or published, and no act done under any provision herein contained, or in substantial conformity to the same, shall be deemed illegal, void, invalid or insufficient for any defect of form or publication, or any irregularity of procedure."

In the circumstances the meaning of the notification is obvious. As regards the cost of the additional police, the Government direction is actually expressed to be in supersession of those previous notifications dealing with the incidence of the payments, and the substituted incidence, which is in other words a new tax, is described alike for the police and for the compensation payments. Being, in fact, a substitution for the previous tax and sufficiently so described in the case of the police charges, it is, in their Lordships' opinion, a mere defect of form not to have reiterated the words showing expressly, as to the compensation charge also, that the taxing part of the notification is new. The same consideration applies to the fact that the notification speaks of the total amount of the compensation having been awarded by the District Magistrate under section 25A and then goes on to speak of the mode of recovery as having been directed by the Governor-in-Council. Nothing in section 25A prescribes this part of the notification at all, and to this extent it may be needless to refer to section 79. The fact was that the Commissioner's previous sanction having been given (none the less regularly that he expressed it in two lines endorsed on the District Magistrate's letter to himself, of which he caused a copy to be sent to that official), the District Magistrate proceeded on June 12, 1922, to send to himself as Collector a requirement to recover payments from persons named, with particulars for calculating the amounts, which had been originally suggested by himself in principle and had now been determined by himself in detail. After this substantial conformity with the provisions of section 25A, their Lordships think that the errors in the Notification, if errors there were, do not matter.

The appellants, however, have contended that the whole proceeding was invalid because it involved the

fundamental injustice of requiring a class of persons, not shown by any evidence to have been implicated in the riots, to bear a penalty, which ought rightly to have fallen only on those who were, and because agents were taxed instead of principals, for which the Police Act affords no warrant. The expression used in the Notification—"on behalf of the Momin adult weavers of Malegaon"—is made to play a large part in this contention.

It may be readily admitted that the words were not felicitous. They lend themselves to misunderstanding. On April 21, 1922, the subdivisional magistrate of Nasik had issued a notice to the people of Malegaon in which he stated that "the shopkeepers, who sell yarn to the Momins . . . are to be considered as agents for the purposes of recovery of these amounts." In itself this action was insignificant, and it may not have been known to the Government when the Notification was issued, but the use of words which seemed to support this notice instead of words clearly negativing it was unfortunate. What was meant, however, was that the shopkeepers were to be substituted for the weavers, as the section of the inhabitants to be charged with payment of the levy under the Act, with an addition, well-meant but probably unnecessary, that they might and would find means of passing on the burden to the weavers. In any case, these words were outside the requirements of the Police Act. They do not contravene it, though they do not correctly describe what was being done.

As for the rest of this branch of the complaint, the Act does not require proof of the active complicity of a section of the inhabitants before such an order as the Act contemplates can be made. To imply such a requirement would defeat the objects of the Act. It is the essence of measures of this kind, which in one form or another are not uncommon, that one class has to pay for the misdeeds of another, but this in itself constitutes no objection to the course that was taken. There is no issue before their Lordships with regard to the propriety of applying these provisions of the Police Act under the circumstances which had arisen, and they express no opinion about it, but they are not to be taken as suggesting that any question could be raised as to the action of the Government and District Magistrate in itself. Those who are called on to apply such an Act as this have not only the power but the duty of enforcing it when, in their judgment, a case has arisen which calls for its application. They are the best and the only judges in that matter.

Some minor objections were taken, which are either complete misapprehensions or are sufficiently met by section 79. It will suffice to mention two. In writing to the Commissioner on March 7, 1922, the District Magistrate had said :—

"To prevent any injustice being done to the Hindus, I would propose that the Deputy Collector in charge of Malegaon Subdivision should hold a summary inquiry at which the Hindu shopkeepers . . . should be called upon to be present, and that they should be given an opportunity of furnishing proof that, before, during and after the riots, they were actively and publicly on the side of Government. . . . When, after this inquiry is finished, these lists of merchants are fixed, the Deputy Collector should estimate approximately the number of saris and the bales of yarn that actually pass through each man's hands . . . The Deputy Collector would make this assessment very much in the way in which income-tax assessments are made. . . . The assessment would be rough and ready, but . . . it would be on very liberal lines."

Subsequently, on April 21, 1922, the District Magistrate instructed the subdivisional magistrate to take this summary inquiry in hand, adding directions which show that what was further required was an administrative measure to furnish information, on which he himself would proceed to make definitive orders, simultaneous with the expected Government notification. Founding on this, the appellants say that the Hindu shopkeepers ought to have had the opportunity of criticizing and refuting the information obtained by the Deputy Collector and that, failing such opportunity, the assessment, which was made on the footing of his report, cannot be enforced against them. This argument overlooks the fact that the first proposed inquiry was to enable the shopkeepers to show that they had at some time been on the side of the Government and of law and order, which at no time have any of them attempted to show ; that the inquiries actually made, as to the trade which the different merchants did, appear to have been such as would have been admissible for income-tax purposes ; that in any case the District Magistrate's suggestions formed no part of the order made under section 25A, or constituted a condition precedent to its validity ; and that the Act is silent as to any such inquiry, though, when an inquiry is desired, it is named expressly, and that the implication of such an inquiry—dilatory and often inconclusive as it would be—would tend to defeat the operation of the Act itself. No substantial injustice appears to have been done, for, although the notices issued to individual merchants, dated April 25, 1922, invited them to show cause against the proposed assessments of the amount of the tax falling severally on them, they do not appear to have adopted this remedy, but preferred to try the effect of this collective suit for an injunction as a total discomfiture of the Government.

The other contention is this. When the District Magistrate issued his requirement to the Collector on June 12, 1922, he named dates for payment of the instalments prescribed, which appear to make the first year for the recoveries begin on January 1, 1922. In the notice served by the Collector on shopkeepers individually under the same date, the first year of liability is stated as beginning on July 1, 1921. It is said that this constitutes in form a retrospective imposition of tax, not warranted by the Act, which, in fact, bars the exercise of the contemplated relief by way of passing on the charge to customers, since, in 1922-1923, a shopkeeper could not make deductions or additions from or to his purchases or sales which had been made in 1921. The answer is that the discrepancy as to the date of commencement of the first year is a mere irregularity, and that there is nothing retrospective about the matter. The payment imposed is imposed *de futuro* and the dates are mere elements in a calculation of the amounts and dates of the instalments. As to passing on the burden to the weavers at all, that was purely optional and formed no part of the order.

In one matter, however, not relatively important in itself, their Lordships think that the prescriptions of the Police Act were not observed. In regard to the cost of additional police, the Act provides as follows :—

"25 (4). If the local area, in which any such tax is to be imposed, or any such rate is to be assessed, is a municipal district, the amount of the charge shall be paid by the Municipality from the municipal fund,

or the rate shall be assessed by the Municipality conformably to the direction given by Government."

"26 (1). Every tax imposed or rate assessed under the last two preceding sections . . . by a Municipality shall be recovered by such Municipality from each person assessable therefor in the same manner as a municipal tax due by him: Provided always that, in default of such recovery, it shall be lawful for the Government to direct the Collector to recover such tax or rate. . . ."

Now on December 1, 1921, before the plan of direct collection from the weavers had been given up, the President of the Municipality of Malegaon had reported to the Collector of Nasik on the position as it then was. He recalled that, soon after the disturbances, when it was contemplated that the cost of the additional police should be recovered by the Municipality, he had represented to the Collector that it was totally unable to undertake the work in question. He stated that the weavers had become increasingly recalcitrant, that they flatly refused to pay and abused the officials employed. He quoted them as saying openly that the Municipality had no business to undertake the work, when the majority of ratepayers were thoroughly opposed to payment, and he added that even the income-tax payers (only 26 in number) paid nothing but passively awaited the issue of warrants of distress under section 183 of the District Municipal Act. His report concluded thus:—

"Irregular recovery of municipal taxes and large outstandings every year are due to the same reason. I may add that not a single pie of additional police charges has been recovered up to now. The situation, therefore, is very delicate, and it must be handled with great tact and circumspection. I, therefore, seek your advice as to how I should proceed in the matter. I should also be enlightened on the point whether the work of executing warrants of distress against income-tax payers should be taken in hand."

The proviso to section 26 (1) of the Police Act speaks of "in default of recovery" by the Municipality, not "in case of wilful default," and, if the Government read this report under the circumstances as a simple confession of failure so far, there can be no question that the interpretation was justified. The Municipality had never desired to be charged with this recovery: they had sufficient experience of the difficulty of getting any money out of the weavers to desire no more of such responsibilities, and they had come as near as they respectfully could to inviting the Government to collect its money for itself. Accordingly, the recovery of the costs of the additional police was placed in the Collector's hands.

It appears, however, to have been overlooked that the object and effect of what was done in June, 1922, were to supersede the old levy by a new one, to be made on different persons and to be measured in a different manner. It was a new exercise of the powers given to the Government by section 25 (2), to which, therefore, the mandatory provisions of subsection (4) at once attached. The report made by the President of the Municipality dealt only with the superseded method of recovery, and could not be said to amount to a refusal to try to recover anything, old or new, or to an anticipatory declaration of default under all circumstances. The appellants, accordingly, urge that the Municipality ought to have had the opportunity of making their own assessments, pursuant to section 25 (4), and of seeing what they could do with a body of shopkeepers, men of substance and probably men of peace, who at any rate had a good deal to lose by defying the law, for the chances of success in dealing with them were greater than those attending on a conflict with a numerous body of turbulent workmen, who had little or nothing to lose. They say that the conditions had not been fulfilled, which the Act fixes as precedent to the Collector's right to get in the police rate from them. The point is legally open to them now, little as it can be supposed that they actually desired at the time to have had any demands made by the Municipality on them.

The provision that, when Government decrees integrally a levy for the recovery of the cost of additional police, its execution must be put into and left in the hands of the Municipality, when there is one, until default is made, appears to their Lordships to be more than a form which might be waived, or a matter in which irregularity is excused. It cannot be a mere irregularity to disregard an express statutory prescription, however honestly or excusably, nor is a short cut permissible because the prescribed course promises little advantage. The Police Act interposes between the punitive action of the Government and the incidence of the burden on the individual the executive action of a Municipality which may be supposed to feel a responsibility towards its ratepayers and to mitigate, from their point of view, the severity of the chastisement. It has, therefore, a constitutional importance, which must be recognized, whether the practical moment of this arrangement is really considerable or not. On this point only and on this ground alone their Lordships are of opinion that the demand made by the Collector for payments in recovery of the costs of the additional police was premature, and not in accordance with the Act.

It accordingly becomes necessary to consider the answer which section 80 of the Code of Civil Procedure affords to the appellants' claim. This answer, if it is applicable at all, applies to the whole suit, but, in view of the numerous and precise attacks which have been made throughout the proceedings on all the Government officials concerned, and of the differences of opinion which have been expressed in India upon them, it did not seem to their Lordships either right or wise not to examine them, with the object of seeing whether they had any foundation.

This section and its predecessor, section 424 of the Code of 1882, have stood for over 40 years, substantially in the same form, as a protection to officials in precise terms against personal responsibility for official action. How far-reaching such protection ought to be is a matter of policy; how far it actually extends is a question of judicial construction.

That this suit is one to which section 80 applies is common ground; the contest is as to its effect when applied. The plaint avers (para. 17) that "Notice, as required under section 80 of the Civil Procedure Code, has been given to the Collector." This was given on June 26, 1922, and the act, purporting to have been done by him in his official capacity, which was relied on, was the issue of notices for the recovery from the plaintiffs in the suit of the tax referred to in Notification 152. It does not appear that any notice was served on the Secretary of State, though the section requires it, but no independent ground of defence has been raised on this. The plaint proceeds in the same paragraph, "As the suit is for an injunction, and as the defendants are about to recover the amount demanded in the notices soon, the suit is filed before the completion of the period of two months." No particulars were given to show that the Collector intended to enforce the orders before August 15, 1922, nor was any satisfactory evidence given to this effect. The plaintiffs appear to have

relied simply on the fact that part of the relief claimed in the suit was an injunction.

For many years there has been a marked difference of opinion between the High Court of Bombay, on the one hand, and all the other High Courts in India, on the other, as to the true application of section 80 of the Civil Procedure Code (Act V.) of 1908 and of section 424 of the Code (Act X.) of 1877, which it superseded, in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is a perpetual injunction. After some differences of opinion among their subordinate Courts, the High Courts of Calcutta, Madras and Allahabad have now agreed in deciding that these sections are to be strictly complied with and are applicable to all forms of action and all kinds of relief. See the cases of *Rajlucki Debi* (25 Calc., 239) and *Dakshina* (50 Calc., 992) ; of *Kalekhan* (37 Mad., 113) and *Koti Reddi* (41 Mad., 792) ; of *Bachchu Singh* (25 All., 187) and *Abdul Rahim* (46 All., 884). In Bombay, on the other hand, in the cases of *Gajanan Krishnarao* (35 Bomb., 362), *Naginlal* (37 Bomb., 243), and *Gulam Rosul* (40 Bomb., 392), which were suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, it has been intimated or held that, if the immediate result of the Act would be to inflict irremediable harm, section 80 does not compel the plaintiff to wait two months before bringing his suit, though, if nothing is to be apprehended beyond what payment of damages would compensate, the rule is otherwise and the section applies.

As the Code of Civil Procedure is applicable to all the High Courts in India, and as section 80 is intended to afford a protection (whatever exactly it may be) to all officials, high and low, it is certainly undesirable that a difference of opinion such as this should be left unresolved. What appears to have influenced the learned Judges is, first, their assumption as to the practical objects with which it was framed (see *Shahebzadee's* case (7 Calc., 499) ; *Peary Mohan Das* (16 C.W.N., 145), and *Raghubans'* cases (32 Calc., 1130)) ; and, secondly, is the fact that this protection takes the form of providing for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the officials' action. It is only right to observe in this connexion that, under section 80 (2) of the Bombay Police Act, at any rate, and it may be under other similar provisions, damages would not be recoverable from a public servant who gave effect in good faith to orders issued with apparent authority. It appears, therefore, to have been due to anxiety not to expose a plaintiff to the risk of the execution of an invalid order without practical redress that they adopted a construction which is not in accord with that accepted generally. The point has been put in this way. Section 80 is but a part of a Procedure Code, passed to provide the regulations and machinery, by means of which the Courts may do justice between the parties. A construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the whole tenor and purpose of the Act, and the implication of a suitable exception or qualification is, therefore, justifiable and even necessary. In effect, however, their decisions are not altogether reconcilable with one another, either as to the extent to which they go, or as to the reasoning on which they are based. Whether the section should be read as if it ran "no suit other than a suit in which an injunction is claimed," or as if it ran "no suit shall be instituted except when serious or irreparable damage might be occasioned to the plaintiff, if not prevented by the previous grant of an injunction," does not appear to have been settled. In the one case all suits falling within the section could safely anticipate the prescribed delay by the simple device of adding a claim for an injunction at the end of the plaint. In the other it would depend on the view which a Judge might take of the elastic and indefinite expression "serious or irreparable damage," whether the official should have or should lose the benefit of the statutory interval of two months, nor can this difficulty in the least depend on the intention which may be speculatively attributed to the Legislature in prescribing any interval at all. To some extent the Bombay decisions purport to rest on the authority of English cases, of which the principal are : *Attorney-General v. Hackney Local Board* (L.R., 20 Eq., 626) and *Flower v. Low Leyton Local Board* (5 Ch. D., 347). These were decided respectively upon the Metropolis Management Act Amendment Act, 1862, and on the Public Health Act, 1875, and turned on the construction then put on the Public Authorities' protection clauses therein contained. The Public Authorities' Protection Act, 1893, has now repealed these clauses, and has adopted another form, to which the authority of *Flower's* case (*supra*) has not been considered applicable (*Harrop v. Ossett Corporation,* 14 *The Times* L.R., 308 ; [1898] 1 Ch., 525 ; *Fielden v. Morley Corporation,* 14 *The Times* L.R., 566, 576 ; [1899] 1 Ch., 1 ; 16 *The Times* L.R., 219 ; [1900] A.C., 133). In the *Hackney* case (*supra*), Vice-Chancellor Bacon held that the words "any act done or intended to be done under their Parliamentary powers" could not apply to a nuisance, to which such powers could not in any case extend. The difficulties of this construction are shown in the judgment of Lord Justice Bowen in *Chapman, Morsons and Co. v. Auckland Union* (23 Q.B.D., 294, at p. 302), where he endeavours, but without much confidence, to find a less unsatisfactory basis in the words "writ or process," within which a bill for an injunction might not fall. In *Flower's* case (*supra*) the Court of Appeal held that the Public Health Act, 1875, section 264, did not extend to a bill in Chancery, but only to an action at law, a consideration inapplicable to section 80 of the Civil Procedure Code, and assumed that the object of the delay provided by the section was to give time for a tender of amends. It is to be noted that the Public Health Act, 1875, the previous Act of 1848, and the Metropolis Management Act were cases where a subordinate statutory authority had been entrusted with specific and limited powers, and it would seem from *Davis v. Swansea Corporation* (22 L.J., Ex. 297) that the profession had long taken section 139 of the Act of 1848 to be applicable only to actions of tort. Similarly in *Flower's* case (*supra*), counsel hardly contested that an exception of "cases of necessity," as mentioned in the Court below by Vice-Chancellor Malins, must be understood. A view, therefore, about a bill for an injunction "against serious and irreparable damages requiring the intervention of the Court," almost undisputed in the Court of Appeal, would not be any guide to the meaning of the Civil Procedure Code, where the clause applies to all officers of Government and to all their official acts, and where the words "in respect of," a form going beyond "for anything done or intended to be done," show it to be wider than the statutes on which the English authorities were decided.

On the other hand, the view which has been taken in the other High Courts may be shortly summarized

thus. The argument that a statutory provision as to procedure is subject to some exception of cases where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connexion with a code fixing the admissibility of evidence or with a limitation section, recognizing rights but barring remedies. For this, however, there is no authority. The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit, and mandatory, and it admits of no implications or exceptions. A suit in which, *inter alia,* an injunction is prayed is still "a suit" within the words of the section, and to read any qualification into it is an encroachment on the function of legislation. Considering how long these and similar words have been read throughout most of the Courts in India in their literal sense, it is reasonable to suppose that the section has not been found to work injustice, but, if this is not so, it is a matter to be rectified by an amending Act. Their Lordships think that this reasoning is right. To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while section 80 is mere procedure, is fallacious, for section 80 imposes a statutory and unqualified obligation upon the Court. So, too, the contention, that the "act purporting to be done by the Collector in his official capacity, in respect of which" the suit was begun, was his threatened enforcement of payment, is fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future, the act alone "in respect of which" the suit lies, if at all, is the order already completed and issued.

As for the suggestion that section 80, in such a case as this, is itself *ultra vires,* it arises from a misapprehension of *Moment's* case (29 *The Times* L.R., 140; 40 Ind. Ap., 48). The regulation of civil procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, section 65.

An attempt was made to distinguish between the effect of section 80 in the case of the Secretary of State and in the case of the Collector, and to argue that, even if it defeated the action as against the first-named defendant, it would fail to protect the second. Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but, without the presence of the Secretary of State before the Court, the Notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned.

The consequence is that the appellants' present position in regard to the taxes imposed on them is as if their action had never been brought. It was unsustainable *in limine.* They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise. Whatever may be the case between other parties, as against the respondents, they must fail. They have taken their own course and have brought this result on themselves. The suit was begun and prosecuted as a joint suit to challenge the official action as soon and as completely as possible. The evidence did not prove risk of serious or irremediable damage to anybody, and was not directed to doing so. The sums payable were in many cases very small, and were throughout far from being oppressive. Any sums paid under the Collector's demand would be returnable if that demand was proved to have been bad, and no one of the plaintiffs was shown to have been unable to make the first payment, the only one falling due within the two months. There was no reason for not complying with the words of the section, except over-confidence in what may be called the Bombay view of it. Accordingly, their Lordships will humbly advise his Majesty that this appeal should be dismissed with costs.

[Solicitors—Messrs. T. L. Wilson and Co.; the Solicitor to the India Office.]

K.B. Div. (Rowlatt, J.) 1927. June 2.

DAVIS v. HARRISON.*

Revenue—Income-tax—Professional footballer —Transfer to different club—Payment of a sum as accrued benefit—Assessability.

The respondent was employed to play football for a club in return for payment, and, on his being transferred in accordance with the rules of the Football Association to another club, he was given by the first-named club a sum of £650 as accrued benefit.

Held, that the payment was neither a gift nor compensation for loss of employment, but was really remuneration for services and was therefore assessable to income-tax.

This was a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Prescot, Lancashire.

On January 26, 1925, George Harrison (the present respondent) appealed against an additional assessment to income-tax under Schedule E in the sum of £650 made upon him for the year ending April 5, 1924, in respect of a sum of £650 paid to him as a professional football player by the Everton Football Club Company Limited.

The following facts were proved or admitted :—

By an agreement dated April 28, 1913, made between the Everton Football Club Company, Limited, of the one part and the respondent of the other part, the respondent agreed to play football for the Everton Club upon the terms and conditions therein mentioned.

The Everton Club was a member of the Football Association, Limited, which was an association consisting of clubs and associations playing association football and being otherwise qualified according to the laws of the game as settled by the International Football Association Board and the rules, regulations, and by-laws of the association.

The Everton Club was also a member of the Football League, Limited, which was a combination of 44 football clubs.

The agreement of April 28, 1913, provided, *inter alia* :—

"4. The player shall observe and be subject to all the rules, regulations and by-laws of the Football Association, the Football League, the Southern League, the Inter-League Board, the English League Board, and any other association or combination of which the club shall be a member.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

" 6. In consideration of the observance by the said player of the terms and conditions of this agreement the said W. C. Cuff on behalf of the club hereby agrees that the said club shall pay to the said player the sum of £4 0s. 0d. per week from April 30, 1913, to April 30, 1914, with a bonus of ten pounds on signing, the receipt whereof is hereby acknowledged."

In accordance with the rules of the association the respondent was duly registered by the association as a professional player for the Everton Club on May 6, 1913.

On April 20, 1920, the Everton Club passed the following resolution :—

" The secretary is instructed to apply for permission to pay the following players the sum of £500 each in lieu of benefits :—

" . . . , G. Harrison, . . ."

The permission was given and the sum of £500 was paid to the respondent.

On May 4, 1922, the Everton Club gave a written undertaking to the respondent agreeing to his having a second benefit, if still engaged by the club, in the season following his having completed ten consecutive seasons with the club, subject to the consent of the League Management Committee being obtained.

On April 19, 1923, a fresh agreement was entered into between the Everton Club and the respondent whereby the respondent agreed to play for the club upon the terms and conditions therein mentioned.

The agreement provided, *inter alia* :—

" 4. The player shall observe and be subject to all the rules, regulations, and by-laws of the Football Association and of any other association, league, or combination of which the club shall be a member.

" 8. In consideration of the observance by the said player of the terms, provisions, and conditions of this agreement the said Thomas H. McIntosh, on behalf of the said club, shall pay to the said player the sum of £6 per week from May 7, 1923, to August 18, 1923, and £8 per week from August 20, 1923, to May 3, 1924.

" 10. Bonuses to be paid in accordance with League rules."

In accordance with the rules of the association hereinafter referred to the respondent was again registered by the association as a professional player for the Everton Club on April 20, 1923.

During October and November, 1923, negotiations were entered into for the transfer of the respondent from the Everton Club to the Preston North End Football Club, and on November 30, 1923, the respondent was transferred to the Preston North End Club.

On December 4, 1923, the Everton Club passed the following resolution :—

" The action of Mr. A. Coffey and secretary in transferring this player [*i.e.*, the respondent] to Preston North End at a fee of £2,000, payable, half on December 31 and balance on or before December 31, 1924—action confirmed—and it was decided to apply to the League for permission to pay him £650 as accrued benefit."

At a meeting of the committee of the league held on or about December 30, 1923, permission was given to the Everton Club to pay the sum of £650 to the respondent.

A cheque for that amount was accordingly drawn by the Everton Club, and before April 5, 1924, the respondent was informed that the cheque was waiting at the office of the club to be taken up. It was actually handed to the respondent on May 3, 1924.

The rules of the Football Association provided, *inter alia*, for the registration of professional players by the association, and also that players might be transferred from one club to another.

Rule 9 of the Football League provided :—

" Clubs may enter into agreements with players after three playing seasons' continuous service providing for a benefit after five playing seasons' continuous service. All benefit must be sanctioned by the management committee, but shall not exceed £650. Players shall be qualified for a second benefit after ten playing seasons' continuous service. All benefit moneys must be paid over to players within 14 days, or, if left in the hands of the club, a definite and written agreement must be entered into and a copy furnished to the League within 14 days of the benefit becoming due and sanctioned. The service referred to in this rule must be substantially with the first team. Benefits to other players must be proportionately smaller and sanctioned by the management committee before promised."

Rule 10 provided :—

" When a player is transferred the club transferring him may, with the consent of the management committee, as a reward for loyal and meritorious service, pay to such player in lieu of presumed accrued share of benefit a percentage of the amount which the club has guaranteed, or would have been likely to guarantee, such player for a benefit reckoned upon the playing seasons of service in proportion to the qualifying period for a benefit with such club."

The General Commissioners were of opinion that the payment of £650 was, as a fact, a payment made on account of compensation for loss of office and was not assessable to income-tax, and they allowed the appeal.

The Crown appealed.

Mr. R. P. Hills (with him the Attorney-General, Sir Douglas Hogg, K.C.) appeared for the appellant.

The respondent was not represented and did not appear.

Mr. Justice Rowlatt said that he was a little embarrassed by the fact that he had only heard arguments on one side, though Mr. Hills, as always, had presented the contentions of the Crown with great fairness. His Lordship thought that the Crown was entitled to succeed. This was a case of a professional footballer who had received what was called a benefit, but it seemed to be a payment, not as the result of direct subscriptions by the public and indirect subscriptions in the form of gate money, but simply a sum given by the club to one of its professionals.

This professional had had one sum of £500, and was then promised another £650 at the end of ten years. At the end of nine years he was transferred and was given the £650 as part of the arrangement. He (his Lordship) had to decide whether income-tax was chargeable under Schedule E on that sum. In *Reed v. Seymour*, in the House of Lords (43 *The Times* L.R., 584), there was, in the judgment of Lord Phillimore, one sentence which had to be considered carefully, because the learned Lord said that a sum of money handed by an employer to his employee even during the term of his employment, and even for meritorious services, might be a gift. But the word " might " left open the question whether the payment for long and meritorious service was really remuneration or merely an expression of good will, though the good will was engendered by the service. It must be a question of fact in each case.

There was a very large element of business in this case. The club was a member of the league, and over the league was the association. [His Lordship referred to the rules set out in the case, especially rules 9 and 10 of the league rules.] Before he was transferred the club had given the respondent a

written guarantee. The rules contemplated a power to grant benefits, and it must have been regarded as a power which was likely to be exercised if funds permitted. It seemed to him (his Lordship) a businesslike arrangement all through, the payment not only arising out of the player's services, but for his services.

But the General Commissioners had decided in the player's favour on quite a different ground. They had said that it was a payment of compensation for loss of employment. The words authorizing payment "for loyal and meritorious service" were against the respondent on this point; it was still payment for his services. Really, he was not losing his employment at all. He was being transferred by arrangement with the two clubs and was passing out of the employment of one of them, but was not being turned adrift. It was not compensation for loss of employment, like damages for dismissal without notice. He was merely receiving in advance what he would surely have had the next year, and he had earned it as income as much as anything else.

The appeal must be allowed.

[Solicitor—The Solicitor of Inland Revenue.]

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore, and Lord Carson.)
1927. May 31.

BOARD OF TRADE v. CAYZER, IRVINE AND COMPANY, LIMITED.*

Arbitration—Statute of Limitations—Award a condition precedent to an action—Cause of action not arising till after award—Limitation Act, 1623 (21 Jac. I., c. 16), s. 3.

A steamship belonging to the claimants was requisitioned in 1917 on behalf of the Admiralty on the terms of charterparty T.99. Clause 18 provided that the Admiralty should not be liable for ordinary marine risks, and clause 19 that the war risks should be undertaken by the Admiralty. Clause 31 provided for arbitration as follows:—"Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law." The steamship was sunk by collision in July, 1917, and in November, 1923, the claimants began arbitration proceedings against the Crown in respect of the war risk. The Admiralty set up the defence of the Statute of Limitations, 21 Jac. I., c. 16. The arbitrator made his award in 1925 in the form of a special case, finding that the ship was lost in consequence of warlike operations.

Held, that as the words of clause 31 of the charterparty contemplated that an action at law could not be brought until the result of an arbitration had been obtained, no cause of action arose until after the award, and therefore the period of six years, fixed by 21 Jac. I., c. 16, did not begin to run till the making of the award, and no question of the Statute of Limitations arose.

Decision of the Court of Appeal (42 *The Times* L.R., 731; [1927] 1 K.B., 269) affirmed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 731; [1927] 1 K.B., 269) reversing an order of Mr. Justice Rowlatt (42 *The Times* L.R., 163) upon an award made in the form of a special case.

The question raised by the appeal was whether a claim by the respondents to compensation for the loss of their steamship Clan Maclachlan, which was requisitioned for use on Government service on the terms of a T.99 charterparty was barred by the Statute of Limitations. Charterparty T.99 provided that the owners should be liable for marine risks, but that the Admiralty should be liable for war risks. It contained an arbitration clause whereby it was mutually agreed that the arbitration should be "a condition precedent to the commencement of any action at law."

In July, 1917, the Clan Maclachlan came into collision with the Italian steamship Europa off the Straits of Gibraltar and was sunk.

On August 21, 1917, the respondents gave notice to the Ministry of Shipping that it was possible that the responsibility for the loss would fall to be dealt with as a war risk. On August 24, 1917, the Director of Transport replied that the Ministry admitted no liability at that time. On August 27, 1917, the respondents wrote that as soon as the position had been fully considered they would notify the Ministry if a claim for a war risk was likely to be made.

At that time the boundary line between war and marine risks was a matter of doubt and difficulty, but it had since been defined by a series of decisions in the House of Lords, *Britain Steamship Company, Limited v. The King* (36 *The Times* L.R., 791; [1921] 1 A.C., 99); *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191); and *Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292)—the last of which was not decided until March, 1923. The claim of the respondents here was postponed until the position had been thus clarified. Notwithstanding these decisions of the House of Lords, the appellants, the Board of Trade, who had succeeded the Shipping Controller, still denied liability and, ultimately, on November 29, 1923, the respondents appointed Mr. Claughton Scott their arbitrator, and on the failure of the appellants to appoint an arbitrator he became sole arbitrator.

The appellants, who appeared under protest, contended at the hearing that inasmuch as the arbitration proceedings were not taken within six years after the date of the loss of the ship, the respondents' claim was barred by the Statute of Limitations (21 Jac. I., c. 16). The arbitrator held that the respondents' claim was not barred by that statute and that the collision was a consequence of warlike operations.

At the hearing before Mr. Justice Rowlatt the sole point taken by the appellants was whether the claim was statute-barred. Mr. Justice Rowlatt held that the Statute of Limitations applied and gave judgment for the appellants.

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

The Court of Appeal (the Master of the Rolls, Lord Justice Scrutton, and Mr. Justice Romer), on the contrary, decided that, having regard to the form of submission to arbitration, which made the obtaining of an award a condition precedent to the commencement of any action at law, time did not begin to run until the date of the award and that the respondents' claim was not barred by the statute.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. Russell Davies (the Attorney-General, Sir Douglas Hogg, K.C., with them) appeared for the appellants; Sir John Simon, K.C., Mr. A. T. James, and Mr. James MacMillan for the respondents.

The Lord Chancellor.—My Lords: In the month of May, 1917, the Admiralty requisitioned the respondents' steamship Clan Maclachlan upon the terms of the well-known form of charterparty T.99. Under the terms of that document the Admiralty took the risk of loss by warlike operations; and the charterparty contained the following arbitration clause:—

"Clause 31. Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

On July 19, 1917, the Clan Maclachlan, while on a voyage from Cardiff to Malta with a cargo which included coal for His Majesty's ships and dockyards and other naval stores, came into collision with an Italian steamship off the Straits of Gibraltar, and became a total loss. The respondents forthwith gave notice to the Ministry of Shipping that the loss might fall to be dealt with as a war risk; but they did not at once take steps to enforce their claim, as certain cases raising questions as to the meaning of the expression "warlike operations" were then before the Courts. Those cases were finally decided in this House in or before November, 1923; and on November 29, 1923, the respondents appointed Mr. Claughton Scott their arbitrator under clause 31 of the charterparty, to determine the question of the liability of the Crown, and gave notice to the Board of Trade (which had taken the place of the Ministry of Shipping) of that appointment. The Board of Trade made no appointment, and accordingly Mr. Claughton Scott was appointed sole arbitrator.

The arbitrator made his award in the form of a special case raising a number of questions; but the only question which survives for your Lordships' determination to-day is whether the arbitrator should have found that the claim of the respondents was barred by the Statute of Limitations (21 Jac. I., c. 16) by reason of the fact that the first step in the arbitration, namely, the appointment of the arbitrator, was not taken within six years after the date of the loss of the steamship. That question has been answered by the Court of Appeal in the negative, and the Board of Trade now appeals to this House.

My Lords, I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *In re Astley and Tyldesley Coal Company* (15 *The Times* L.R., 154), that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitations. A decision against that view might seriously prejudice the practice o referring disputes to arbitration, and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred. But this is not the case of an ordinary submission to arbitration, nor is it the case of a dispute arising under the common clause in a contract providing for the submission to arbitration of all disputes arising under the contract. The arbitration clause contained in the charterparty known as T.99 is in a special form, and provides that an arbitration under the clause shall be a condition precedent to the commencement of any action at law. The effect of that condition, as interpreted in *Scott v. Avery* (5 H.L.C., 811) and other cases, is that, until the arbitrator has performed his duty and has found whether any and what liability exists, or on the making of his award will exist, the claimant cannot even commence to enforce his claim at law, or, in other words, that until an award is made he has no complete cause of action. Mr. Justice Crowder, in advising the House in the case of *Scott v. Avery* (*supra*), said that it appeared to him that under the contract in that case, which contained a similar provision, "no cause of action can arise before the sum to be paid is ascertained and settled by the arbitrator." Lord Cranworth, in accepting that view, said that "the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say." And Lord Campbell was of opinion that, "upon a just construction of this instrument, until those questions had been determined by the arbitrators no right of action could have accrued to the insured."

My Lords, it appears to me that the decision given in *Scott v. Avery* (*supra*) disposes of the present appeal. Under the statute of James, which applies to this case, time runs from the cause of action; and it seems to me to follow beyond question that under the clause which we are considering, and having regard to the case cited, time runs not from the date of the loss of the steamship but only from the making of the award. If this be so, then the arbitrator, however willing he may have been to give effect to all legal defences, could not properly have found that time had run against the claimants.

It is argued that on this view of the law claimants under a document containing an arbitration clause in the *Scott v. Avery* (*supra*) form might delay their proceedings indefinitely, and a claim might be made 10 or 20 years after the damage had arisen. This may be so, but if so it is a feature which results from the form of contract which the parties have chosen to adopt; and it may be noted that it is at any time open to either party to expedite a decision of the matter by himself instituting proceedings for arbitration.

I should add, in order to prevent misapprehension, that the question as to the right of the Crown to take advantage of the Statute of Limitations, which was referred to in the Court of Appeal, has not been argued in this House and, on the view which I have taken of the matter, does not arise.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

Viscount Dunedin.—My Lords: The Lord Chancellor has narrated the facts and has quoted the clause on which the question turns. I need not, therefore, either recapitulate or requote.

It has, I think, to be kept steadily in view that the liability which is here in question is not a liability in respect of tort. If a ship were sunk by a collision occasioned by the fault of another ship there is an immediate liability which springs into existence when the collision occurs. But here there was not any liability arising from the collision as against the Government, except the liability that sprang from contract. One goes, therefore, to the contract, and then one finds that there is not undertaken by the Government any liability unless there has been found to be such a liability by the award of an arbitrator. It cannot be more forcibly put than it was by Lord Chancellor Cranworth in *Scott v. Avery* (5 H.L.C., at p. 848): "If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken and no right of action has arisen"; or again by Lord Herschell, in *Caledonian Insurance Company v. Gilmour* (9 *The Times* L.R., 146; [1893] A.C., 85, at p. 90): "Under the policy the only contract on the part of the appellants to make any payment at all is a contract to pay the sum ascertained in a particular manner, viz., by the arbitration provided for by . . . the policy."

The Solicitor-General made a strenuous effort to distinguish the clause in *Scott v. Avery* (*supra*) from the present clause. In that I think he was quite unsuccessful. The two clauses are practically the same. The arbitrator in each is to be the judge, both of the existence of the liability and of the sum to be paid if he finds liability established; and it is that sum, and that sum alone, that the Government has contracted to pay.

The question here raised is, What is the application to these facts of the expression "cause of action" in the statute of James? Now Lord Campbell, in *Scott v. Avery* (*supra*), said—and it is the sentence of his judgment which Lord Watson quotes in *Caledonian Insurance Company v. Gilmour* (*supra*) stating that it is the main reason of judgment: "In this contract it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined."

The Solicitor-General contended that "cause of action" in this sentence was not the same thing as "cause of action" in the statute of James, but really only meant "right of action," which he would differentiate from "cause of action." Here, again, I think his contention fails. The expression is, I think, deliberately chosen, and it may not be out of place to remark that the same expression is used by two of the consulted Judges whose opinion was upheld—viz., Mr. Justice Crowder and Mr. Justice Coleridge (*Scott v. Avery*, *supra*, at pp. 823, 824, 845). "Cause of action" in the statute of James means that which makes action possible; and in the present case that is the award of the arbitrator; for, until it is in being, no action is possible.

It was urged that the claimants might indefinitely postpone moving in the arbitration. This is not likely in fact, for people do not generally indefinitely stand out of money which they conceive to be due to them. But, besides that, there were certainly means available to the defendants to get the arbitration started if the plaintiffs unduly delayed.

I am therefore of opinion that the judgment of the Court of Appeal was right.

LORD ATKINSON.—My Lords: This is an appeal by the Board of Trade, acting in the capacity of Shipping Controller by virtue of the statute 11 and 12 Geo V., c. 8, section 1, and under an Order in Council of March 24, 1921, No. 447, made thereunder, from an order of the Court of Appeal, dated July 19, 1926, which reversed an order of Mr. Justice Rowlatt, dated December 8, 1925, upon an award dated February 9, 1925, stated in the form of a special case by H. Claughton Scott, Esq., one of His Majesty's counsel.

The question for decision in the appeal is whether, in the circumstances appearing, Messrs. Cayzer, Irvine and Company, Limited, the respondents, at all material dates the owners of a steamship named the Clan Maclachlan, and the claimants in the above-mentioned arbitration, are entitled to recover from the appellants a sum of money to be ascertained as compensation for the loss of the above-mentioned ship.

The facts of the case have already been fully stated. It is unnecessary to re-state them beyond what is required to make my judgment intelligible.

It is not disputed that on May 14, 1917, this vessel was requisitioned for the use of the Government on the terms of a *pro forma* charterparty marked T.99. No formal charterparty was ever signed, but it is not disputed that the vessel entered the Government service on the terms of this *pro forma* charterparty and continued to be employed in that service up to the date of her loss. It was provided by this charterparty by clause 18 that the marine risk to which this vessel might, in the Government's service, be exposed should be for the account of the owners, and that risk of war as therein defined or described should be taken by the Admiralty on the ascertained value of the steamer, if she should be totally lost, at the time of such loss, and that should any dispute as to the value of the steamer arise the same should be settled as laid down in clause 31 of the charter.

Clause 31 runs as follows:—

"Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

On July 19, 1917, the steamship Clan Maclachlan came into collision with the Italian steamer Europa off the Straits of Gibraltar, and was sunk, becoming a total loss. The dividing lines between war risks and marine risk were about this period not accurately defined or described. It was only after several cases decided in the House of Lords from 1920 onwards that these dividing lines and these respective risks were with some accuracy defined. At the time of the loss the Clan Maclachlan was insured against marine risks with various underwriters.

No notice of claim was ever made by the owners of this ship to the Ministry of Shipping or other Government Department until August 14, 1923, when the solicitors for the respondent company wrote to the solicitor to the Board of Trade a letter dated August 14, 1923. This letter, after referring to the litigation in the House of Lords in *Britain Steamship Company v. The King* (36 *The Times* L.R., 791; [1921] 1 A.C., 99) and other cases of that kind, winds up with this following paragraph: "The result of the decisions

is that marine underwriters are entitled to say that this risk falls on the Government as bearing the war risk under T.99 charter. We shall be much obliged if you will kindly look into the matter accordingly and let us know that liability is admitted. Failing an admission of liability, our clients will, of course, proceed with arbitration under the terms of the charter."

The Admiralty did not appoint any arbitrator under the appropriate clause in the Arbitration Act of 1889, and consequently, on December 10, 1923, Mr. Claughton Scott was, under the provisions of the sixth section of the above-mentioned Act, empowered to act as sole arbitrator. The proceedings before him included the liability of the Admiralty to the claim made against them, as well as the *quantum* of the amount of the claim. The arbitrator, at the request of both parties, consented to make his award in the form of a special case for the opinion of the Court on questions of law, and on February 9, 1925, he made and published his award in the form of a special case. It contained the following recitals amongst others :—

" And whereas the said vessel whilst on such requisitioned service was lost in collision in the month of July 1917 and whereas the claimants allege and the respondents deny that the said vessel was lost by risks of war which were taken by the Admiralty under the terms of the said *pro forma* charterparty and whereas the said *pro forma* charterparty T.99 provides that any dispute under the charter shall be referred under the provisions of the Arbitration Act, 1889, to the arbitration of two persons one to be nominated by the owners and the other by the Admiralty and whereas certain disputes and differences have in consequence arisen between the claimants and the respondents as in the following case are more particularly mentioned and described and whereas the claimants allege and the respondents deny that the said arbitration clause in the said *pro forma* charterparty amounts to a valid submission of the said disputes and differences to arbitration in accordance with the provisions of the said clause." The following are in it stated to have been the contentions put forward before the arbitrator by the Board of Trade :—

" 19. It was contended before me on behalf of the respondents—

" (*a*) That there was no submission to arbitration within the meaning of the Arbitration Act, 1889, inasmuch as (according to the respondents' contention) there was no written agreement to submit present or future differences to arbitration.

" (*b*) That assuming that there was a valid submission to arbitration, any right which the claimants might have had to proceed by way of arbitration was taken away by the provisions of the Indemnity Act, 1920.

" (*c*) That proceedings in the arbitration were not taken within six years after the date of the loss of the said steamship, and that by reason thereof the claimants' claim was barred by the Statute of Limitations (21 Jac. I., c. 16).

" (*d*) That at the time of her loss the Clan Maclachlan was not engaged upon any warlike operation.

" (*e*) That both vessels were to blame for the said collision, and that in consequence thereof it could not be held that the said collision was a consequence of warlike operations within clause 19 of the said *pro forma* charterparty.

" (*f*) That the payments made by the marine underwriters and the conduct of the said underwriters and the claimants with regard to the said proceedings against the owners of the steamship Europa constituted a good defence to the claimants' claim upon the facts found by me in clauses 1 to 17 hereof inclusive."

The following are the arbitrator's actual findings :—

" In so far as it is a question of fact, I find, and in so far as it is a question of law and subject to the opinion of the Court, I hold and declare :—

" (19) (*a*) That there was a valid submission to arbitration within the meaning of the Arbitration Act, 1889 ; and that I had jurisdiction in the matters referred to me.

" (*b*) That the claimants' right to proceed by way of arbitration under the said submission has not been taken away by the provisions of the Indemnity Act, 1920.

" (*c*) That the claimants' claim was not barred by the Statute of Limitations (21 Jac. I., c. 16) by reason of the fact that these proceedings were not taken within six years after the date of the loss of the said steamship.

" (*d*) That at the time of the said loss Malta was a war base and the Clan Maclachlan was engaged in a warlike operation within the meaning of clause 19 of the said *pro forma* charterparty, namely, in carrying war stores to a war base.

" (*e*) That the said collision was a consequence of warlike operations within the meaning of the said clause 19.

" (*f*) That neither the payments made by the marine underwriters nor the conduct of the said underwriters or of the claimants with regard to the proceedings against the owners of the steamship Europa and the settlement thereof constitute any defence to the claimants' claim.

" (*g*) That the claimants are entitled to an award in their favour in these proceedings against the respondents under clause 19 of the said *pro forma* charterparty.

" The question for the opinion of the Court is whether in respect of the contentions mentioned in paragraph 19 hereof I have come to a right determination in point of law.

" If the Court should be of opinion that I have come to a right determination in point of law in respect of each of the said contentions, then my award shall stand and I direct that the respondents shall pay to the claimants the costs of this my award and their costs of the reference to be taxed if not agreed.

" If the Court should be of opinion that I have come to a wrong determination in point of law as to the validity of the submission or as to my jurisdiction, then I award that the respondents are under no liability in these proceedings and I direct that the claimants shall pay to the respondents the costs of this my award and their costs of the reference to be taxed if not agreed."

The important question at once arises what would be the effect of clause 31 of the charterparty on any action at law which might be brought by the owner of the Clan Maclachlan, based on the *pro forma* charter T. 99, to recover damages from the Board of Admiralty or its successors, in this matter the Board of Trade, for the loss of their ship. In my view, if the case of *Scott v. Avery* (5 H.L.C., 811) was rightly decided—as it has been many times held to have been, and that by the most distinguished Judges—such an action would not be maintainable until the condition precedent, *i.e.*, the holding of the arbitration, had been performed, if even then. It is necessary, how-

ever, to examine closely the language used by the noble Lords in the House of Lords who delivered judgment in that case, in order to appreciate the meaning and reach of the words they used. The head-note states with sufficient fullness and accuracy what were the points raised and the decision upon them. The action was brought upon a policy of insurance to recover damage for the loss of a ship. One of the conditions of the policy was that the sum to be paid to any insurer for the loss should in the first instance be ascertained by the committee, but if any difference should arise between the insurer and the committee relative to the settling of any loss, or to a claim for average or any other matter relating to the insurance, the difference was to be referred to arbitration in the way pointed out in the condition. Then comes the vital provision, namely, that " no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy until the matter has been decided by the arbitrators, and then only for such sum as the arbitrators shall award, and the obtaining of the decision of the arbitrators was declared to be a condition precedent to the maintaining of any action. It was held that these conditions were lawful, and that even should the difference relate to other matters than those of mere amount, no action was maintainable till the award was made. From the fifth and sixth pleas filed by the defendants it is obvious that the matter to be referred to arbitration was not merely the *quantum* of the damages. The Lord Chancellor, Lord Cranworth, in giving judgment, at page 849, said :—

" It appears to me perfectly clear that the language used indicates this to have been their intention, that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say. . . . It appears to me perfectly clear, that until the award was made, no right of action accrued."

Lord Campbell, at page 851, said : " In the first place, I think that the contract between the shipowner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties ; and, upon a deliberate view of the policy, I am of opinion, that it embraced not only the assessment of damage, the contemplation of *quantum*, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured. That being the intention of the parties, about which I believe there is no dispute, is the contract illegal ? There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered ; therefore, unless there is some illegality in the contract, the Courts are bound to give it effect. There is no statute against such a contract : then on what ground is it to be declared illegal ? '

He then ridicules the notion that it is void as against public policy, and at the bottom of page 854, after referring to *Thompson v. Charnock* (8 Term Rep., 139), he says : " There is no case that goes the length of saying, that where the contract is as it is here, that no right of action shall accrue until there has been an arbitration ; then an action may be brought, although there has been no arbitration. Now in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatsoever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever and no cause of action accrues until the arbitrators have determined. Therefore, without overturning the case of *Thompson v. Charnock* (*supra*) and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration."

This judgment of Lord Campbell's has been many times approved of. In *Caledonian Insurance Company v. Gilmour* (9 *The Times* L.R., 146 ; [1893] A.C., 85) the action out of which the appeal in that case arose, was brought by Gilmour, the respondent, against the appellant company to recover on a policy against loss by fire of a sum of £1,700, or the amount that he might prove to be payable to him by the company as insurers. The policy had a condition endorsed upon it in these words : " Where the company does not claim to avoid its liability under the policy, on the ground of fraud or non-fulfilment of any of the conditions hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties or of two independent persons . . . who should choose an umpire. And it is hereby expressly declared to be a condition of the making of this policy, and part of the contract between the company and the insured, that where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment, as aforesaid, the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy." A point was made by the insured, that as the arbitrators were not named in the clause referring to arbitration, it was void. This point was held to be irrelevant to the suit. It was held by the House that the condition as to ascertaining the amount of the damage by arbitration was incorporated into, and formed an integral part of, the contract of indemnity, and was a condition precedent to the bringing of an action upon the policy, and secondly that the contract, being one upon which no cause of action accrued until the amount of damage had been determined by arbitration, was excepted from the rule of Scotch law that a reference to arbitrators not named could not be enforced.

The case of *Scott v. Avery* (*supra*) was followed. Lord Herschell, in delivering judgment, said (page 90): "I may add that the reasoning of the noble and learned Lords who took part in the decision of *Scott v. Avery* (*supra*) appears to me completely applicable to the present case. Its cogency is not affected by any of the distinctions which then existed between the law of England and that of Scotland in relation to arbitration clauses."

Lord Watson, in delivering his judgment, referred at length (page 96) to *Scott v. Avery* (*supra*). He pointed out that it was held by the House affirming the judgment of the Exchequer Chamber, that until an award was made no action was maintainable, and quoted apparently with approval the passage from Lord Campbell's judgment at pages 851 and 854 of the report which I have already quoted.

In the cases of *Trainor v. Phœnix Fire Insurance Company* (8 *The Times* L.R., 37) and *Scott v. Mercantile Accident and Guarantee Insurance Company* (66 L.T., 811), the decision in *Scott v. Avery* (*supra*), was followed and approved of. In *Spurrier v. La Cloche* (18 *The Times* L.R., 606; [1902] A.C., 446) the respondent sued the appellants, as agents in Jersey of the Sun Fire Office, to recover a sum of £1,000 insured by a fire policy dated January 4, 1897, effected by the respondent on his collection of foreign stamps. The appellants pleaded that the policy was made subject to a condition (No. 12) in which it was expressly agreed and declared to be a condition precedent to the liability of the company that the claimant should have no right of action against it except for the amount of the claim, if admitted, or the amount of any award of the arbitrator or arbitrators or umpire, and that the respondent had appointed one arbitrator and the company another, that the arbitrators had not agreed upon an umpire, and that the condition had not been fulfilled, and the appellants prayed that the action might be dismissed. The respondent pleaded that this condition was contrary to the law of Jersey, and of no force or effect. The Committee of the Privy Council which heard the case was composed of Lords Macnaghten, Davey, Robertson and Lindley, and Sir Ford North. Lord Lindley delivered the judgment of the Board. At page 450 of the report he said: "It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: See *Scott v. Avery* (*supra*) and *Caledonian Insurance Company v. Gilmour* (*supra*). The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Mr. Deans contended that the arbitration clause was invalid by the law of Jersey, because not only the amount payable, but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the Court, and went further than *Scott v. Avery* (*supra*). But if a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction of any Court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular Court to enforce it, that the Court of Exchequer went wrong in *Scott v. Avery* (*supra*). The oversight was pointed out and corrected in the Exchequer Chamber, and again in the House of Lords."

I think clause 31 of T.99 brings this case within the authority of *Scott v. Avery* (*supra*) and the cases which followed it. I think the condition in its last three lines is as effectual for that purpose as are the more lengthy provisions upon the subject to be found in these authorities. Moreover, I am unable to see how a provision to the effect that an arbitration shall be a condition precedent to the commencement of any action does not as effectually secure that no action at law can be brought on the matters referred until this arbitration has been held as any of the lengthy conditions found in the authorities I have cited.

With regard to the Statute of Limitations (21 Jac. I., c. 16), it has no application, I think, to actions or suits which, by the contracts of the parties to them, are placed in such a position that they cannot be commenced, begun, or enforced. The whole purpose of this Limitation Act as to persons who have good causes of action which they could, if so disposed, enforce, is to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. I think it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, because of his own contract, enforce against anyone.

I think the appeal fails, and should be dismissed with costs.

Lord Phillimore.—My Lords: When an action in progress is referred to arbitrators for disposal, and no special directions are given limiting or conditioning the functions of the arbitrators, as, for instance, directing them, as I have known it happen, to take account of moral or social considerations, the arbitrators must decide the case as a Judge would, or as an official referee would, and give effect to all legal defences such as the Statute of Limitations.

But when there is no action in progress, and the parties agree to refer their disputes to arbitration, it will depend upon the terms of the agreement to refer, or the submission to arbitration, whichever phrase you use, whether the arbitrators are in deciding to give effect to this class of legal defence or not.

It may be, as the Judges thought in the case of *In re Astley and Tyldesley Coal Company* (15 *The Times* L.R., 154), that in the absence of special direction it is to be inferred that the parties intended the arbitrators to do precisely what a Judge would.

It is not necessary, in my view, to decide whether this is so, but for the purpose of the present case I can assume it. I can assume it, because the clause in this charterparty which provides for the submission of disputes arising under it is not, in my judgment, such a submission to arbitration.

I cannot better express my view than by adopting the language of Mr. Justice Cresswell when advising this House in *Scott v. Avery* (5 H.L.C., 811) and calling this reference one which makes the arbitration "ancillary to an action or suit."

The arbitration is not to take the place of an action at law, but is a necessary step towards an action at law.

It is true that an award in such an arbitration may decide all questions in dispute concerning the rights of the parties, so that nothing be left but an action to enforce it to which action there can be no defence, or that without action an order of the Court may be obtained for enforcing the award.

But it is also true that the award of the arbitrators may not completely determine the rights, let alone the remedies, of the parties.

Your Lordships are dealing with a common form of charterparty in use by the Admiralty. It may happen not infrequently that some clause may be varied by the parties by express agreement, and it may well be that the dispute will take this form. First of all, was the shipowner bound to do so and so without extra remuneration under the terms of the charterparty; and secondly, if he was so bound, was there a subsequent agreement of some particular date which released him from his obligation or varied it?

Questions of release or set-off would be outside the jurisdiction of the arbitrators. I doubt whether any adjudication on figures other than such as would be derived from pure calculation would be within the province of the arbitrators.

For the purposes of this case, I should introduce another consideration. The authority of the arbitrators extends to deciding upon questions of right and not upon questions of remedy. If there is any question of the latter class, it is to be raised and decided in the subsequent and consequential action at law.

So far as this matter came under consideration in the great case of *Scott v. Avery* (*supra*), the language of the learned and noble Lords who decided that case is to this effect.

The Lord Chancellor speaks "of no right of action accruing," until after the award. Lord Campbell says "no cause of action accrues until the arbitrators have determined."

The same point is very clearly expounded in *Caledonian Insurance Company v. Gilmour* (9 *The Times* L.R., 146; [1893] A.C., 85)—*see* especially *per* Lord Field at p. 102.

But if this be so there is no action or suit to which the Statute of Limitations can apply until the arbitrator has found in favour of the claimant.

These are sufficient grounds for holding that the appeal by the Board of Trade fails, but the matter may—as it was put in the course of the argument—be put in another way equally fatal to the appeal.

Assuming that the arbitrator is to consider remedy as well as right and to give effect to legal defences, and that he does, as indeed the arbitrator did in this case, take into account the Statute of Limitations. He would ask himself whether a cause of action accrued to the claimants more than six years ago, and he would have to answer in the language of *Scott v. Avery* (*supra*), "No." A claim which might have ripened into a cause of action did accrue; but it cannot ripen till after his decision.

One word more. It is said that this construction of the clause in the charterparty would enable a shipowner to bring, after many years' delay, the stalest of claims. To this there are other answers, but one is sufficient. It would be easy to amend the form of charterparty and introduce a clause such as one finds in a number of similar commercial instruments, making it incumbent upon a claimant to make his claim in writing within some brief defined period after the occurrence of the event which gives rise to the claim.

I agree that this appeal should be dismissed.

LORD CARSON.—My Lords, I agree and I am unable to add anything to what has been already said by the noble Viscount on the Woolsack.

[Solicitors—The Solicitor to the Board of Trade; Messrs. Ince, Colt, Ince and Roscoe.]

Prob., Divorce, and Adm. Div. (Hill, J.) 1927. May 5.

RICHARDSON v. RICHARDSON AND THE NATIONAL BANK OF INDIA, LIMITED.*

Bankers — Garnishee order — Bank balance of debtor in foreign branch of English bank — Banker's duty to customer — Rules of the Supreme Court, Order XLV., r. 1.

Money held by an English bank to the credit of a judgment debtor at a foreign branch cannot be made the subject of a garnishee order by an English Court, as such money is not recoverable within the jurisdiction.

A decree *nisi* of dissolution of marriage was granted on November 15, 1925, to Mrs. Mary Sidey Richardson, and the respondent, Edward George Richardson, was condemned in the costs, taxed at £182 10s. 2d. Orders for the payment of this amount were served on the respondent, but were not complied with, and the wife became a judgment creditor in respect of this sum. On March 9, 1927, a garnishee order absolute was made by the learned Registrar in respect of the sum of £12 2s. 1d. admitted by the bank to be held to the husband's credit in their head office in London. In affidavits filed in the garnishee proceedings it was stated that the judgment debtor had a considerable amount to his credit at either one or both of the bank's branches at Dar-es-Salaam (Tanganyika) and Mombasa (Kenya Colony). The bank maintained that the head office had no knowledge of such accounts. If there were any such moneys they were foreign currency, namely, shillings of Kenya Colony or Tanganyika, and only payable in such currency at the branches of the bank where the accounts were open and not elsewhere. No sterling accounts were kept there, and any payment by the London office to the judgment creditor would still leave their branches at Mombasa or Dar-es-Salaam liable for any action brought by the judgment creditor in the local courts. The Registrar did not make subject to the garnishee order any sums to the credit of the judgment debtor at the bank's branches in Africa.

The judgment creditor appealed on summons from the Registrar's order to the Judge in Chambers, who adjourned the summons for argument in Court.

MR. ROBERT FORTUNE, for the judgment creditor, submitted that for this purpose a banking company registered in London and its foreign branches were one and the same legal entity, and if it did not pay on a garnishee order in respect of moneys held in foreign branches to the credit of the judgment debtor it could be sued.

SIR ROBERT ASKE, for the bank, submitted that if this argument were right a bank receiving a garnishee order would be obliged to telegraph notice of it to all its foreign branches. In effect the debt, in so far as the credits in Africa were concerned, was a foreign debt payable in a foreign country, but the judgment creditor had her remedy. The judgment could be registered under the Kenya ordinance and she could then proceed to execution in that colony.

MR. JUSTICE HILL delivered a written judgment as follows:—

The petitioner wife is a judgment creditor of the respondent husband for costs amounting to

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

£182 10s. 2d. On January 28, 1927, the judgment creditor obtained a garnishee order *nisi* directed to the National Bank of India, Limited. The Bank appeared to the summons. The Bank is a company registered in England. Its head office is in London. It has branches at many places abroad, including Mombasa in Kenya Colony, and Dar-es-Salaam in the Tanganyika mandated territory. The judgment debtor was formerly employed in Mombasa, and in January, 1927, was employed in Dar-es-Salaam. The affidavit in support of the garnishee proceedings deposed to a belief that the judgment debtor had an account with the bank at Mombasa or at Dar-es-Salaam. A copy produced by the bank of the judgment debtor's account at the head office in London showed transfers in 1926 from his account at Mombasa to his account at London and showed a credit balance of £12 2s. 1d. on the London account. The bank does not dispute that that amount is subject to the garnishee order.

The judgment creditor, however, seeks to make subject to the garnishee order any amounts to the credit of the judgment debtor at the branches in Africa on January 28, 1927. As to that the bank, by the affidavit of its London sub-manager, says that the head office does not know whether the judgment debtor had in January, 1927, an account at either of the branches. The bank takes up the position that if there are any moneys to his credit at either branch, they cannot be made the subject of a garnishee order here, and that, even if they could, they ought not to be made the subject of a garnishee order here because payment under the order here would not be a good discharge in the Courts of Kenya Colony or Tanganyika. The bank further says that any account at the African branches is kept in a foreign currency, namely, Kenya or Tanganyika shillings, which is a different currency from the English currency.

The questions so raised, especially the first, are obviously of great and general importance to banks with foreign branches. I have come to the conclusion that the bank is in the right. For the purposes of the judgment, I assume that on January 28, 1927, there were moneys to the credit of the judgment debtor at one of the African branches. Certain contractual obligations of a bank and its customers, in the absence of special agreement, are well ascertained. They include these implied terms as stated by Lord Justice Atkin in *Joachimson v. Swiss Bank Corporation* (37 *The Times* L.R., 534 ; [1921] 3 K.B., 100, at p. 127), two of which are : (1) the promise of the bank to repay is to repay at the branch of the bank where the account is kept, and (2) the bank is not liable to pay until payment is demanded at the branch at which the account is kept. The Court was there dealing with a current account, and the actual decision was that, in the absence of a special agreement, a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent.

The same principle underlies the judgment of the Judicial Committee of the Privy Council in *Rex v. Lovitt and Others* (28 *The Times* L.R., 41 ; [1912] A.C., 212), which related to a deposit account at the New Brunswick branch of the Bank of British North America. The judgment refers to older cases and says :—

"In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were 'property situate within the province' of New Brunswick."

In another part of the judgment are these words, which are in point :—

"According to the defendant's contention the bank in London might be called on at any time by a person of whom it would probably know nothing, and with only a very limited time in which to obtain the detailed information that would be necessary from the St. John's branch, to pay $90,351 in London without any deduction for cost of transmission or any agreement as to the rate of exchange. No such obligation appears by express words or necessary implication in the contract of the parties, and it is very improbable that it was ever contemplated or intended by them. It is true that the money was to be 'accounted for by the Bank of British North America,' but when the circumstances are considered it is seen that those words mean only that the bank is to account for the money as being money payable by them or their agents at St. John. Thus, if the manager of the St. John's branch refused payment, or if the branch itself were closed, the bank in London would, of course, be liable as a principal, but that fact does not affect the locality of the debt as originally fixed by the parties."

So in *Republica de Guatemala v. Nunez* (43 *The Times* L.R., 187 ; [1927] 1 K.B., 669, at p. 687) Lord Justice Scrutton speaks of a person who "deposited in an English bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England," and as to current account, in *Clare and Co. v. Dresdner Bank* (31 *The Times* L.R., 278 ; [1915] 2 K.B., 576) Mr. Justice Rowlatt said : "There is no obligation on a bank to pay in one country a debt due to a customer on current account in another country."

It will be noted that in *Rex v. Lovitt and Others* (*supra*) the words are "primarily at all events." If a demand is made at the branch where the account is kept and payment is refused, the position is altered. Undoubtedly the bank is then liable to be sued wherever it can be served. Thus in *Leader and Others v. Direction der Disconto-Gesellschaft* (31 *The Times* L.R., 83), referred to in *Clare and Co. v. Dresdner Bank* (*supra*), a demand having been made at Berlin, where the account was kept, and having been refused, and a writ having been properly served on a branch in England, judgment was given against the bank in England under Order XIV., the claim being treated as for a liquidated demand. It may perhaps be asked whether the cause of action in such a case is for damages for breach of contract to pay at the branch or for money lent. I have not found any case in which that point was discussed. No doubt the bank in such a case is liable in damages but it may be that, having itself, by its branch, refused to repay notwithstanding the fulfilment of the condition which was implied in the contract for its benefit, it becomes unconditionally liable to repay. Be that as it may, the bank is not liable anywhere until the demand is made at the branch where the account is kept.

A further difficulty, on the question whether the liability in this country is in damages or in debt, arises when the bank is sued here and the account is kept at the branch abroad in a foreign currency. The questions arising upon a liability, to pay in a foreign currency, enforced in the Courts here had not at the time of *Leader and Others v. Direction der Disconto-Gesellschaft* (*supra*) received that full consideration which it has since received in *Di Ferdinando v. Simon*,

Smits and Co. (36 *The Times* L.R., 797 ; [1920] 3 K.B., 409), and recently in *Lloyd Royal Belge v. L. Dreyfus and Co.* (27 Ll. L., 288). The Court of Appeal has made it clear that the cause of action upon refusal to pay in a foreign currency is damages and not debt.

These considerations lead to the following conclusions in the present case as between the bank and the debtor : (1) that previously the bank was liable to pay only at the African branch, (2) that upon demand at, and refusal by, the African branch the bank could be sued here, but that, the breach having been a refusal to pay in a foreign currency, the cause of action here could only be for damages ; the bank could not be sued here for money lent.

It has occurred to me to consider whether the obligation of the bank could be put in another way. It is the practice of banks at the request of a customer to transfer amounts to the credit of the customer from one account to another. And perhaps it is an implied term of the contract that the bank shall at the request of the customer make such transfer at the expense of the customer and, if a conversion from one currency to another is necessary, at the rate of exchange ruling at the time of the transfer. This would get over the difficulty about the difference of currency. But, even if such a term is to be implied, and the request to transfer can be made to the head office and not to the branch where the account is kept, it seems to me that the cause of action must be for damages for refusal to transfer, and that a refusal to transfer at request would not make the money recoverable as money lent elsewhere than at the branch where the account is kept.

Such being the position as between the judgment debtor and the bank, I have to consider whether Order XLV., r. 1, applies. The bank is no doubt indebted to the judgment debtor and the bank is within the jurisdiction. The order deals with the case where "any other person is indebted to such debtor and is within the jurisdiction." But both upon principle and upon authority, that means, "is indebted within the jurisdiction and is within the jurisdiction." The debt must be properly recoverable within the jurisdiction. In principle, attachment of debts is a form of execution, and the general power of execution extends only to property within the jurisdiction of the Court which orders it. A debt is not property within the jurisdiction if it cannot be recovered here (on the authority of the case of *Martin v. Nadel* (22 *The Times* L.R., 561 ; [1906] 2 K.B., 26), as explained by *Swiss Bank Corporation v. Böhmische Industrial Bank* (39 *The Times* L.R., 179 ; [1923] 1 K.B., 673)). The decision and judgment in that case show that the order does not apply unless the debt is properly recoverable within the jurisdiction. In the latter case the customer's account was in London. Of it Lord Justice Scrutton said : "It is a sum held by a banker, who is resident in this country, for his customer and not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country." In *Martin v. Nadel* (*supra*) deposit had been made in Berlin, and of it Lord Justice Scrutton said : "That debt was not in London ; it was in Berlin. Nadel having deposited the £500 with the branch in Berlin could not without more have made good a claim to be paid . . . by the London branch. Before he could do anything, he must make his claim on the Berlin branch who had the money, not on the London branch who had not."

In *Joachimson v. Swiss Bank Corporation* (*supra*) the Court of Appeal said that the service of a garnishee order *nisi* was a sufficient demand. But the Court had not to consider whether the service of an order *nisi* on the London branch would be a sufficient demand for repayment by a branch abroad. I do not see how it could be so regarded, and when the branch at which the account is kept is abroad the order *nisi* cannot be served there.

In the result, I am of opinion that, in respect of moneys held by the bank to the credit of the judgment debtor at the African branches, they cannot be made the subject of a garnishee order, for they are not a debt recoverable within the jurisdiction. I add this : If the judgment creditor is right, then upon service of the order *nisi* the bank became custodian for the Court of the whole of the funds attached, *i.e.*, of all amounts to the credit of the judgment debtor at all the branches of the bank, and could not except at its peril part with any of the funds in any part of the world (*Rogers v. Whiteley*, 8 *The Times* L.R., 418 ; [1892] A.C., 118), and the burden upon the bank cannot be to communicate with all its branches in all parts of the world.

If I am wrong in the view I have taken the question will still remain whether the order *nisi* ought to be made absolute. It ought not, if payment under it will not be a good discharge in the Courts of Kenya Colony and Tanganyika. Mr. Lawrence Tooth (an expert on the laws of those countries) is clearly of opinion that it will not be a good discharge. It is suggested by Mr. Herbert Bown (formerly Crown counsel in Kenya) that if the order were registered in Kenya under the Judgments Extension Ordinance of that colony, payments under it by the Kenya (or Tanganyika) branch would also be a good discharge. It does not, however, seem clear that the bank could register the order, and the judgment creditor, if she gets the order here, will enforce a payment here and will not go to the trouble of registering and enforcing the order abroad. In this state of the law abroad it would not be equitable to make the order.

It is satisfactory to learn from the affidavits that the judgment creditor is not without a remedy. She can register in Kenya and Tanganyika the order of this Court for £182 10s. 2d. and then enforce it there by execution. The appeal is dismissed, with costs.

[Solicitors—Messrs. Gordon, Dadds, and Co. ; Messrs. Sanderson, Lee, and Co.]

Court of Appeal. (Bankes, Atkin, and Lawrence, L.JJ.) 1927. May 31.

R. F. BROWN AND CO., LIMITED v. T. AND J. HARRISON.*

Contract—Carriage by sea—Responsibility of carrier—Fault of his agents or servants—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV., r. 2 (*q*).

By Art. IV., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

the navigation or in the management of the ship. . . . (*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

The plaintiffs shipped a case of cotton goods on the defendants' steamer at Liverpool for carriage to Tampico and delivery there. Without the fault or privity of the defendants, and in spite of the vigilance of the ship's officers, the goods were stolen by the servants of the stevedores, who were employed by the ship's agents to discharge the cargo at Vera Cruz, where the ship called before going to Tampico. In an action for non-delivery,

Held, that the stealing of the cargo was not an act in the management of the ship, and therefore the defendants were not protected by rule 2 (*a*); and that in rule 2 (*q*) the words "or without" must be read as "and without," and therefore, although the defendants themselves were free from blame, yet, since the servants of the stevedores were the defendants' agents, and since the defendants, in order to succeed, had to prove that both they themselves and their servants or agents were free from blame, the plaintiffs were entitled to recover.

Decision of MacKinnon, J. (43 *The Times* L.R., 394), affirmed.

This was an appeal by the defendants from a judgment of Mr. Justice MacKinnon (43 *The Times* L.R., 394) in an action brought by the plaintiffs to recover damages for the non-delivery by the defendants of goods consigned from Liverpool to Mexican ports on a steamship managed by the defendants.

The same points were raised in another appeal, and the appeals were heard together.

In January, 1925, the plaintiffs, Messrs. R. F. Brown and Company, Limited, shipped a case of cotton goods at Liverpool on the defendants' steamer Spectator under a bill of lading dated January 15, 1925, issued by the defendants and acknowledging the receipt of the goods in good order and condition and agreeing to carry them to Tampico, Mexico, and there deliver them. When delivered the case was found to have been broken into and the goods had disappeared. Alternatively, the plaintiffs said that the defendants had received the goods to carry them for reward and had negligently lost them.

The facts in the other case were similar.

The defendants put in a general denial and pleaded, further, that the goods, if lost in fact, were lost owing to theft and/or pilferage on the part of Mexican labourers at Tampico without the fault, privity, or neglect of the defendants, their servants or agents, and that the loss was, therefore, covered by an exceptions clause in the bill of lading which relieved the defendants from liability for "loss . . . caused by or arising from . . . robbers, thieves of whatever kind, whether on land or afloat or in the service of the carriers or not."

The defendants also pleaded that they were not liable because the plaintiffs had not given notice in writing of the loss as required by Article III., rule 6, of the Schedule to the Carriage of Goods by Sea Act, 1924. They also relied on the provisions of Article IV., rule 2 (*a*) to (*q*), of that Schedule.

By Article IV., rule 2:—

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . .

"(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Mr. Justice MacKinnon found that the goods were stolen by the servants of the stevedores who were employed by the ship's agents to discharge the cargo at Vera Cruz, where the ship called before going to Tampico; and he held that the shipowners were not protected by the exceptions in Article IV., rule 2 (*a*) and (*q*), and gave judgment for the plaintiffs.

The defendants appealed.

Mr. Clement Davies, K.C., and Mr. Procter appeared for the appellants; and Mr. Miller, K.C., and Sir Robert Aske for the respondents.

The Court did not call on counsel for the respondents.

Lord Justice Bankes.—This is an appeal—or rather there are two appeals—from a judgment of Mr. Justice MacKinnon, and they undoubtedly raise a matter of great importance to the shipping community under existing conditions.

The matter arises in this way. The dispute in each case is between a bill of lading holder and shipowners. The bill of lading holder is complaining of the loss of certain goods during a voyage. The fact, as proved before the learned Judge, was that in the case of both vessels goods had been consigned by the bill of lading holder from this country to ports in Mexico, and at one port the cargo, or portions of the cargo, had been stolen by the men employed by the stevedores in the discharge of the goods, and the shipowners contended that under the terms of the bills of lading they were exempt from liability. The bills of lading incorporated the articles contained in the Schedule to the Carriage of Goods by Sea Act, 1924, and the question which the learned Judge had to decide was whether or not the theft of these goods by the servants of the stevedores employed by the ship in the discharge of the cargo came within the exceptions contained in Article IV. of the Schedule to the Carriage of Goods by Sea Act, 1924, so as to exonerate the shipowners from liability.

Mr. Clement Davies, who has brought to our attention every point which could be raised, has relied on three points. He has said, first of all, that the loss of these goods occurred in the management of the ship. That was his first point. His second point was, that upon the true construction of paragraph (*q*) of Rule 2 of Article IV. of the Schedule to the Act of 1924, inasmuch as the loss of these goods occurred without the actual fault or privity of the carrier, he came within the exception contained in paragraph (*q*). His third point was that even assuming that he was wrong on the first two points,

in this particular case, the theft having been by the servants of the stevedores employed by the shipowners to carry out the discharge, the servants acting in that capacity were not his agents within the meaning of the article. Every one of these points is of course of extreme importance nowadays, because shipowners are bound by the terms of these articles and cannot contract themselves out of the obligations imposed upon them by the statute.

The first material article which we have to consider is Article III., rule 2, which imposes a statutory obligation upon the shipowner in reference to the carriage of the goods—and when I say "the carriage of the goods" I include, what the second rule includes, not only the carriage, but the loading, handling, stowing, carrying, keeping, caring for, and discharge of the goods carried.

In construing these articles which form part of the statute, I think one must begin by realizing that here the Legislature has imposed this distinct statutory obligation in reference to the goods which the carrier undertakes to carry. The statute then proceeds to set up what under former practice would have been the exceptions agreed upon between the parties, and these are the exceptions cutting down the statutory obligation which is imposed by rule 2 of Article III. The first of these, which is in Article IV., rule 2, paragraph (*a*), is the one in reference to which the main and most important point raised in this argument arises. The material words are these: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship"; and the first question raised which the learned Judge had to decide, and which we have to decide, is what is included in these words "management of the ship." Can it be said that the act of these stevedores' servants in raiding the cargo and stealing these goods, within the meaning of this paragraph, is an act which occurred in the management of the ship? Mr. Justice MacKinnon has said that it cannot, and I agree with him, whether you consider the question upon the language of the statute by itself, or whether you consider the language in reference to the decisions to which we have been referred and of which there are a number, not only decisions of this Court, but one decision in particular in the Supreme Court of the United States. Speaking first of all in reference to the language of this statute itself, I think that, as an ordinary rule of construction of this language, when you find in the first place the Legislature imposing this particular statutory duty upon the shipowner in reference, amongst other things, to the discharge of the goods carried, and when it comes to enumerate the exceptions there is no exception dealing specifically with the goods, but there is an exception dealing with the ship and the management of the ship as it may affect the goods, then in order to bring any particular matter within the exception it must be something which can be said to be in the management of the ship. Therefore I should say, apart altogether from authority, that if all that the shipowners can prove is an act which has relation to the goods, and the goods alone, and has no relation to the ship itself, an act which is independent of the ship itself—namely, the taking of the goods out of the ship and discharging them from the ship, it does not come within the exception.

Now, so far as the authorities are concerned, I should like to begin with the test which Lord Justice Bowen, I notice, laid down in the case of *Canada Shipping Company v. British Shipowners' Mutual Protection Association* (5 *The Times* L.R., 700; 23 Q.B.D., 342). There the question was whether the act in question could be said to come within the expression "improper navigation," and Lord Justice Bowen addresses himself to the point in this way. He says (23 Q.B.D., at p. 344): "The question is whether the damage in this case was caused by 'improper navigation,' and depends on the meaning of that expression. I should have thought it clear that 'damage caused by improper navigation' was equivalent to damage caused by navigation of an improper kind, and consequently that damage, caused by something which was not navigation at all, was not caused by improper navigation." I should like to apply these words to the point that we have to decide, and to apply them to "management of the ship" instead of "navigation of the ship"; and I ask myself: Can it properly be said that this particular damage was caused by mismanagement of the ship? My answer is, No, because it was not management of the ship at all. Now, is there any support for that view, that this particular act of these men cannot be said to come within the term "management of the ship"? I think the more one looks into the authorities the more authority one finds for the proposition that such an act as this, a mere discharging of the cargo, cannot properly be said to come within the expression "management of the ship," as used in Article IV. of the Schedule to the Carriage of Goods by Sea Act, 1924, or in the Harter Act.

There are three cases to which I should like to refer. There is first of all *The Ferro* ([1893] P., 38). That was decided in the year 1892. Before that case was decided there had been a number of cases before the Courts in which the exception had been confined to matters arising in the navigation of the vessel, and cases in which the exceptions had not included the word "management." A number of decisions had been given in reference to matters which, on the one hand, were said to come within the expression "in the navigation of the vessel," and, on the other hand, were said not to do so. Some were clear cases: for instance, the case of *Good and Others v. London Steamship Owners' Mutual Protecting Association* (L.R. 6 C.P., 563), where damage was done by the leaving open of a seacock, and there Mr. Justice Willes held that that was clearly improper navigation, because it was something improperly done with the ship or part of the ship in the course of the voyage. Then in *Carmichael and Co. v. Liverpool Sailing Ship Owners' Mutual Indemnity Association* (3 *The Times* L.R., 636; 19 Q.B.D., 242) a further difficulty arose, because there the damage was done owing to leaving a port open, and the damage was done before the vessel commenced her voyage. The Court got over the difficulty by holding that it was improper navigation because if the vessel had proceeded on her voyage it would have been an act of improper navigation to leave the port open. But difficulties such as those that were raised in the case of *Carmichael and Co. v. Liverpool Sailing Ship Owners' Mutual Indemnity Association* (*supra*) are got over when the section includes not only "improper navigation" but "improper management of the ship," and I think the first of the cases in which there was a discussion as to the meaning of the word "management" is the case of *The Ferro* (*supra*). There the point was whether improper stowage constituted mismanagement of a ship. There had been previously a *dictum* by Mr. Justice Charles in the *Canada Shipping Company* case (5 *The Times* L.R.,

447 ; 22 Q.B.D., 727), in which he said, confining his language to the facts of that case, that in that particular case he thought the improper stowage was an act of mismanagement of the ship ; and, when the facts are looked into, it is quite plain that when he used that language he was referring to the state of the holds, as having been improperly and insufficiently cleaned and prepared before the cargo was put on board ; and attention is called to that in some of the later cases. But in *The Ferro* (*supra*) both the President (Sir Francis Jeune) and Mr. Justice Gorell Barnes state their view very clearly that such an act of damage, done merely in the stowing of the cargo, and apart altogether from anything done in reference to the ship, is not mismanagement of the ship. Mr. Justice Gorell Barnes in emphatic language, on page 46, says : "It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of the cargo" ; and it seems to me on principle that it is quite impossible to draw a distinction between mere stowage and mere discharge, and that if the facts in that case had been in reference to the discharge of cargo instead of the stowage of cargo, Mr. Justice Gorell Barnes's language would have been just as emphatic. Then in *The Glenochil* ([1896] P., 10) again one finds, as it seems to me, equally emphatic language, and language which I think points quite clearly to the line which is to be drawn between acts which can properly be said to be acts done in the course of the management or mismanagement of a vessel and acts which cannot come within that expression ; and in this case of *The Glenochil* (*supra*, at p. 16) the President said this : "This Court had before it the same sort of question in the case of *The Ferro* (*supra*), and I adhere to what I said then, that mere stowage is an altogether different matter from the management of the vessel. It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one ; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo." It seems to me that in that short sentence the President very happily draws the distinction between cases which do and do not fall within the protection of an exception which contains the words "management of the ship." Mr. Justice Gorell Barnes, in the same case (*supra*, at p. 18) says : "Here we have a case in which there is an act of mismanagement which it might, perhaps, be said is not strictly navigation. I do not think it is now necessary to decide whether it is or is not ; but it certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself. In the course of the argument two principal points seem to me to have been taken. It is said that the word 'management,' having regard to the other sections of the Act, cannot mean management of the vessel which may affect the cargo by letting water into the ship. But I think if those sections are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself ; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connexion with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" The last case to which I should like to refer is the case of *Rowson v. Atlantic Transport Company* (19 *The Times* L.R., 67 ; [1903] 1 K.B., 114), where Mr. Justice Kennedy, in giving his judgment, at p. 117 concludes his judgment in these terms : "This seems to be in accordance with the language of Mr. Justice Gorell Barnes in *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112, at p. 117), where he says : 'I think that the words "faults or errors in the management of the vessel" include improper handling of the ship, as a ship, which affects the safety of the cargo'"—bringing out again, as it seems to me, the line of distinction that has been referred to by the President in the case to which I have already referred. When you come to what Lord Justice Vaughan Williams said in the Court of Appeal in the same case (19 *The Times* L.R., 668 ; [1903] 2 K.B., 666), the way he expresses it, at page 676, is this : "Though it is not necessary for me to construe sections 1 and 2, yet I do construe them to this extent : it is the contrast between the dealing with the stowage of the cargo, and the dealing with the vessel itself, that leads me to say, when I come to section 3, that 'management of the vessel' means management of the vessel *qua* ship—not *qua* navigation, but *qua* ship." It is in that case that Lord Justice Stirling goes into the authorities at very considerable length, and he draws from them the same principle and the same distinction that I have been trying to draw between a dealing or damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself.

So much for the English authorities, the whole bearing of which I think is conclusive against the argument which Mr. Clement Davies has pressed upon us. Reference has been made to a decision in the Supreme Court of the United States in which Mr. Justice Holmes delivered the opinion of the Court—*The Germanic* (196 U.S. Rep., 589)—and I think it is satisfactory to find that the law as interpreted in this country in reference originally to exceptions in bills of lading and then in reference to the Harter Act and now in reference to our own Carriage of Goods by Sea Act, 1924, so exactly corresponds with the view of the law as expressed by Mr. Justice Holmes in reference to the Harter Act in this American decision. The facts of that case were interesting from this point of view, and the facts brought the case very nearly to the line of distinction between the one class of case and the other, because the question there arose in reference to the shifting of the cargo, and it was said that the shifting of the cargo was done for the purpose of securing the safety of the ship. On the other hand it was said : No, it may incidentally have had an effect in reference to the trimming of the vessel, but the act which caused the damage was primarily an act of discharge of cargo and therefore it cannot be said to be an act done in the management of the ship, although it might have been said to be an act in reference to the management of the ship if it could have been established that the dealing with the cargo was a dealing for the purpose of trimming the vessel or securing the greater safety of the vessel. Mr. Justice Holmes deals with that matter and says that in the Supreme Court they must proceed upon the finding of the Court below that the dealing with the cargo was a dealing with the cargo in the course of the discharge, and that the matter must be regarded

from that point of view. I will read a passage from his judgment which seems to me to put the case very clearly and very admirably, if I may say so. I am reading from 196 U.S. Rep., at p. 596. Mr. Justice Holmes says : "The petitioner contends that any dealing with the ship or cargo which affects the fitness of the ship to carry her cargo is 'management of the vessel,' within the meaning of section 3"—of course, he is referring to the Harter Act. "To support this contention the case of *The Glenochil* (*supra*) is cited." Then he goes into the facts of that case, and then he refers to the case of *The Silvia* (171 U.S. Rep., 462). "We see no reason," he goes on, "to criticize this decision, and therefore lay on one side at once the fact that the vessel had come to the end of her voyage and was in dock. We assume further that the captain retained authority over his ship, so that it was his power and perhaps his duty to intervene in any case that needed his control. On these assumptions the argument is that cargo has also a function as ballast, that if, for instance, the loss is caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so far as the change affects the fitness of the ship as a carrier, it is management of the vessel within the Act. The thing done is the same and the name of the object cannot affect the result. Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the Court in *The Glenochil* (*supra*) and sanctioned by this Court in *Knott v. Botany Mills* (179 U.S. Rep., 69, 73, 74), to faults 'primarily connected with the navigation or the management of the vessel and not with the cargo.' In the case supposed the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

I think, therefore, both upon the construction of the statute taken by itself and on applying the ordinary meaning to the word "management," it cannot be said that the acts of these stevedores' men in pillaging the cargo in the way they did can come within such an expression as acts done in the management of the ship. Apart from that, I think both by English law and decisions of these Courts, and by the decision of the Court of the United States of America, authority is practically unanimous against the view contended for by Mr. Clement Davies and in support of the view taken by the learned Judge. I think, therefore, whatever the consequences may be, it does seem to me clear that the particular acts of this class, acts done in the course of the discharge and in the course of the discharge merely, cannot be held to come within the exception, which is applied to acts which, though they may affect the cargo, are acts done in the course of the management of the ship.

The next point taken was this. It was said that, even assuming that the defendants were wrong on that point, yet they were entitled to the benefit of the exception contained in paragraph (*q*) of rule 2 of Article IV. of the Schedule to the Act of 1924. That paragraph must be read in order to indicate the point and the answer to the point. The paragraph is in these terms—it is the last exception : "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." Now the structure of this exception is, first, to indicate what the exception is, and next to establish what is the necessary proof which brings the person seeking the benefit of the exception within it, and it lays the onus of proof upon the person claiming the benefit of the exception. So far as the burden of proof is concerned, it is plain that the obligation is laid upon the person seeking the benefit of the exception to establish not only that the loss has been without his actual fault or privity, but also that it has been without the fault or neglect of his agents or servants ; and that, one would think, is reasonable and natural, because to contend that the statute has conferred an exception from liability upon a carrier who deliberately incites a man to steal the goods and then claims exemption from his act because his servants or agents had been guilty of no fault or neglect, is to attempt to impose an obligation upon the Court which it would be extremely loth to accept unless it was absolutely compelled to do so. Now Mr. Clement Davies says that the Court must put that construction upon the statute because of the opening words which define the exception and which, as he says, draw a distinction between the act of the carrier and the act of his servant, and that it is sufficient to bring the carrier within the exception if he proves either that the loss was without his actual fault or privity or that it was without the fault or neglect of his agents or servants, and he lays the whole stress of his argument upon the fact that the clause is drafted in this form : "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants," and he says that the word "or" before "without" is there to be read disjunctively, and that you cannot read it otherwise, except by assuming that the draftsman has made a mistake or that it is competent for the Court to alter "or" into "and." But, with great respect, it is doing no injustice either to the draftsman or to the language to read the word "or" conjunctively and not disjunctively. There is abundant authority for doing that. It seems to me that it is quite imperative upon the Court to do so in this case, first, because it is only by doing so that you can bring the two branches of the subsection into agreement, and, secondly, because unless you do so you adopt a construction of the exception which it seems to me inconceivable that the Legislature should ever have contemplated for a moment. I think therefore that that point fails.

The last point is that the servants of the stevedores in this particular case being employed by the stevedores, and the stevedores being employed as independent contractors by the shipowners to carry out the discharge, the servants of the stevedores are not agents of the carriers within the meaning of this exception clause (*q*). I think Mr. Clement Davies has answered that point himself, because he pointed

out that in a case which he referred to for another purpose, the case of *Machu v. London and South-Western Railway Company* (2 Ex., 415), a very similar case, the Court held that, for the purpose of construing an Act of Parliament in terms somewhat similar to this statute, the servants of the independent contractor would be the agents of the railway company ; and so here it seems to me impossible to put any reasonable construction upon this statute except by regarding the servants of the persons who are employed by the shipowners in order to fulfil their statutory obligation to discharge the vessel as being their agents for that purpose.

On all points, therefore, I think that the judgment of the learned Judge was right and that the appeal must be dismissed with costs.

Lord Justice Atkin.—I agree. This case raises an important point upon the construction of the rules which are scheduled to the Carriage of Goods by Sea Act, 1924, and the particular rule is in the nature of a statutory exception [Article IV., rule 2 (*a*)] : "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." These are words which were found, and no doubt are still found, in old bill of lading and charterparty exceptions, and they are words which are found in legislation which preceded this Act and upon which this Act was founded, and especially, it is to be noted, are to be found in the Harter Act, which was the forerunner of all Acts of this kind, in relation to the carriage of goods by sea. I think it is very important in commercial interests that there should be uniformity of construction adopted by the Courts as to words in statutes dealing with the same subject-matter, and it is a matter of great satisfaction to me to find that the decisions of these Courts seem to correspond with the decisions given by the Courts of the highest authority in the United States.

I do not propose to add anything at length to what has been said by my Lord, with whose judgment I entirely agree, but I think perhaps one might point out this, that in this statute it is plain that a very clear distinction is drawn between dealings with goods and dealings with ships, and that "ship" is defined in the Act. "Ship" is defined as being "any vessel used for the carriage of goods by sea," and it is quite plain that what is meant by "ship," when the word is used, is the actual vessel, the *res*, the actual thing itself. One will find in Article IV., rule 1, that "Neither the carrier nor the ship shall be liable for loss," and in rule 2, that "Neither the carrier nor the ship shall be responsible for loss" : that means that the ship as a *res* shall not be responsible for loss ; and while it is quite true that, in general language, in another context, "management of the ship" might be construed as meaning management of the business of carrying goods by ship, it seems to me plain that that is not the meaning here, but that there is a clear distinction drawn between goods and ship, and when the Act uses the word "ship" it means the management of the ship, and does not mean the general carrying on of the business of transporting goods by sea. The effect of it is that, in the words of Mr. Justice Gorell Barnes, as he then was, in *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112, at p. 117), "'Faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo," and that construction merely follows, I think, and was intended by the learned Judge to follow, his decision in *The Glenochil* ([1896] P., 10), and the decision of Sir Francis Jeune and Mr. Justice Gorell Barnes in both these cases of *The Glenochil* (*supra*) and *The Rodney* (*supra*) is supported in terms by Lord Justice Stirling in the case of *Rowson v. Atlantic Transport Company* (19 *The Times* L.R., 668 ; [1903] 2 K.B., 666, at p. 680), to which my Lord has referred, and I think that those statements of the meaning of the word "management" must be taken, so far as this Court is concerned, as being authoritative.

I do not quite agree with what was said by the learned Judge as to the impossibility of defining the words "management of the ship" in this context. I agree that a definition which is made before a full and complete observation of the different phenomena to which you are to apply the definition is unsatisfactory, but it may very well be that the time has not yet come to attempt a complete definition of the word. On the other hand, it is impossible for a reasoning and logical tribunal to try to construe the word without forming for itself some idea of what it means, and we may say how far the definition goes so far as the observed facts are at the present moment, and clearly the partial definition given by Mr. Justice Gorell Barnes in the words that I have cited amounts to something which binds the Court and which affords a guide to construction. Therefore we are dealing with the question of management of the ship and not of management of the business of the ship.

The only other thing that I want to deal with is this. In the case which was cited of *Rowson v. Atlantic Transport Company* (*supra*) the members of the Court of Appeal, without deciding the matter, suggest, I think all of them, some doubt as to whether or not a defect in the management of the apparatus in the ship could be said to be a defect in the management of the ship if that apparatus applied solely to the cargo or was introduced into the ship for the mere purpose of protecting the cargo. I wish to guard myself at the present moment against being supposed to accept that definition or that view of the construction. It was not necessary for the Court of Appeal in that case to lay down an actual decision on the matter, and it is unnecessary for us to do so. I merely wish to point out this, that at the present day a part of the proper equipment of cargo-carrying ships is very largely concerned with appliances for the safe carrying of the cargo, appliances that have nothing to do with the navigation of the ship but have everything to do with the safety of the cargo, and among other things one would mention in particular the refrigerating machinery which was the subject of discussion in *Rowson's* case (*supra*), and other appliances dealing with ventilation, fans, pumps—a great many pumps on board a ship have the sole object of dealing with the cargo—the pumps of an oil tanker and things of that kind, and winches and derricks and so forth, which have nothing to do with the navigation of the ship, but which are part of the structure of the ship and without which the ship would clearly not be seaworthy either if they were not fitted at all or if they were not in a proper condition when the ship started. For my part, at the present moment, I have a difficulty in seeing, if there was a defect in the management of those appliances in the ship which are an essential part of the ship, that that would not be a defect in the management of the ship. This case clearly is not and could not be brought within the definition mentioned by Mr. Justice Gorell Barnes. It appears to me that here we are not dealing with anything which is or can be said to be part of the

ship as a ship. The stevedores brought in were employed by the ship for the purpose of discharging the cargo, and that which was done was not a defect in the ship or a defect in the management of the ship as defined, but merely a default of a person dealing with the cargo, and in my view it is clearly not within the meaning of the words "management of the ship" as defined by the authorities.

The other question is the question of the construction of the words in the exception (*q*) in the second rule of Article IV. I do not propose to say more about that than that I think, upon the whole, the point that has been taken in that matter is the worst point that has ever been taken in the Court of Appeal in my time. It is a most hopeless proposition—not that it has not been very well argued by Mr. Clement Davies. Again, I disagree with the learned Judge in his view that the word "or" can never have a conjunctive sense. I think it quite commonly and grammatically can have a conjunctive sense. It is generally disjunctive, but it may be plain from the collocation of the words that it is meant in a conjunctive sense, and certainly where the use of the word as a disjunctive leads to repugnance or absurdity it is quite right within the ordinary principles of construction adopted by the Court to give the word a conjunctive use. Here it is quite plain that the use of the word as a disjunctive leads to an absurdity, because the contention put forward by the shipowners in this matter amounts to this, that if a shipowner himself breaks open a case and steals the contents of it, he is exempted from liability under this section if none of his servants stole the contents of the case or broke it open. That seems to me to be a plain absurdity. In addition to that, there is a repugnancy, because to use the word in a disjunctive sense is plainly repugnant to the second part of the section. Therefore I say no more about that.

The other question is whether or not the servants of the master stevedores at Vera Cruz can be said to be, within the meaning of the clause, the agents or servants of the ship. Mr. Clement Davies did not dispute that the master stevedores were to be considered agents of the ship, and I think he was quite right in that. There was a statutory obligation on the ship to discharge, and that duty was performed by entering into a contract with the master stevedores, who for that purpose were agents in performing the ship's statutory duty, and, to my mind, that in itself would be sufficient to support the matter, because it is plain that the master stevedores, according to our law, would be responsible for the tortious acts of their servants done in the scope of their employment; but quite apart from that I think that the servants of the stevedores for this purpose are also the agents of the ship, and I think that is made plain by the reasoning of the Court in the case that my Lord has referred to, *Machu v. London and South Western Railway Company* (2 Ex., 415), where the Court had to deal with words which were narrower in their meaning; where they had to deal with the word "servants," and where the Court held that the servants of the sub-contractor of the carrier were, within the meaning of the Carriers Act, servants of the carrier; and I think that that is sound and applies to this case.

For these reasons it appears to me that the shipowners have not discharged themselves from their liability, and that the judgment of the learned Judge was quite right and that this appeal should be dismissed, with costs.

LORD JUSTICE LAWRENCE.—I entirely agree with the judgments which have just been delivered by my Lords, and I do not think that I could usefully add anything.

The appeals were accordingly dismissed.

[Solicitors—Messrs. Pritchard, Englefield, and Co., for Messrs. Simpson, North, Harley, and Co., Liverpool; Messrs. Thain Davidson and Co.]

Court of Appeal, (Bankes, Atkin, and Lawrence, L.JJ.) 1927. June 1.

IMPORTERS COMPANY, LIMITED v. WESTMINSTER BANK, LIMITED.*

Bills of Exchange—Cheque—Crossed cheque—"Account payee only"—Forgery of indorsement—Non-liability of collecting bank—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 82.

By section 82 of the Bills of Exchange Act 1882, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title . . , the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The plaintiffs, who were merchants in London, bought paper from German manufacturers through S., their buying agent in Germany, and sent him a crossed cheque, marked "account payee only," drawn on the National Provincial Bank in London, and payable to the vendors. S. indorsed the cheque by forging the name of the vendors and added his own name, and he then paid it into his own bank at Dresden. The Dresden bank collected the money from their English agents, the defendant bank, and the latter collected the amount from the National Provincial Bank. In an action for wrongful conversion of the cheque the defendants relied on s. 82 of the Bills of Exchange Act, 1882.

Held, (1) that since, even if the defendants had scrutinized the cheques, there was nothing which would have put them on inquiry, the defendants had not been negligent; (2) that the word "customer" in the section included the bank with which the defendants were dealing; and (3) that, although the defendants were acting as a collecting bank, they "received payment" within the meaning of the section; and therefore that the action failed.

Decision of MacKinnon, J. (43 *The Times* L.R., 325; [1927] 1 K.B., 869), affirmed.

This was an appeal by the plaintiffs, the Importers Company, Limited, from the judgment of Mr. Justice MacKinnon (43 *The Times* L.R., 325; [1927] 1 K.B., 869) in an action brought by them claiming to recover from the defendants, the Westminster Bank, Limited,

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

the sum of £1,905 15s. 11d. as damages for the alleged wrongful conversion of a number of cheques.

The plaintiffs, who were merchants in London, bought from time to time in the course of their business large quantities of paper from manufacturers in Germany. In 1924 they appointed one Schultze as their buying agent in Germany. When they bought paper through him their practice was to send a cheque to him to be handed over by him to the particular manufacturers. The cheque was drawn on the plaintiffs' bank in London, the National Provincial Bank, Limited, made payable to the manufacturers, and crossed and marked "account payee only."

After a time Schultze began a series of frauds. He endorsed cheques by forging the names of the manufacturers to whom the money was payable, disguising the handwriting for the purpose, and added his own name underneath. He then paid the cheques into his own bank, the Oscar Heilmann Bank, Dresden. That bank then collected the money from their English agents, the defendants in this case, and the defendants in due course collected the amount from the National Provincial Bank.

Schultze had now become bankrupt, and the Oscar Heilmann Bank had also become insolvent. The plaintiffs, being still liable to the German manufacturers, sued to recover the amount from the defendants.

The defendants put in a general denial and pleaded that the Oscar Heilmann Bank was their customer and that they had acted in good faith and without negligence in receiving payment for such customer and sending him the proceeds. They relied on section 82 of the Bills of Exchange Act, 1882, which provided that

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title . . . the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Alternatively, they pleaded that the words "account payee only" were only a direction to the receiving bank concerned and did not in any way affect a collecting bank. They said that the cheques in question were always payable to payees abroad and in the ordinary course of business would always have to be presented by a foreign bank through an English collecting bank and the words "account payee only" did not amount to a direction to the defendants as to the disposal of the proceeds of the cheques.

They also pleaded that they had remitted the amounts to the Oscar Heilmann Bank before they received notice of the plaintiffs' claim.

Mr. Justice MacKinnon held that the defendants, the Westminster Bank, Limited, were entitled to rely on section 82 of the Bills of Exchange Act, 1882, and he accordingly entered judgment for the defendants.

The plaintiffs appealed.

Mr. Pritt, K.C., appeared for the appellants; Mr. Rayner Goddard, K.C., and Mr. D. B. Somervell for the respondents.

Lord Justice Bankes.—We need not trouble you, Mr. Rayner Goddard. This is an appeal from a judgment of Mr. Justice MacKinnon, and the case for the appellants has been very fully put before us by Mr. Pritt; but in my opinion the judgment of the learned Judge was quite right. The circumstances under which the action was brought are these. The plaintiffs are an English company carrying on business in England, having, or having had, customers in Germany. They employed an agent in Germany, a man named Schultze, and the course of business as between the plaintiffs and their German customers was that, with reference to payments to those customers for goods supplied, the plaintiffs drew cheques in favour of the different customers, those cheques were sent to Schultze, and his business was to have handed the cheques to the persons in whose favour they were drawn. What Schultze did was to act dishonestly, and instead of handing the cheques to the customers he kept them himself. He indorsed them by forging the names of the customers to the cheques, and then paid them into an account which he had with a firm of bankers called Heilmann, who carried on business at Dresden. Heilmann employed the Westminster Bank, the defendants in the action, to clear the cheques for them, and they did clear them. I think there were 14 altogether in number. These cheques were drawn in favour of four of the plaintiffs' German customers, who appear to have carried on business either in the name of an individual or in the name of persons trading in partnership, or possibly in one case in the name of an individual carrying on business under a trade name. Those cheques in due course were passed on, if that is the correct expression, to the bank upon which they were drawn, which was the National Provincial Bank, through the Clearing House, and in due course the defendants received through the Clearing House the proceeds of those cheques. The plaintiffs' cause of action was that the defendants by so doing, and so receiving the proceeds of the cheques, had converted them, and that they were bound to pay over the proceeds of the cheques to the plaintiffs by way of damages for that conversion. The defendants' case was this: "We, as bankers, are protected by section 82 of the Bills of Exchange Act, 1882; in that we acted in good faith, which was not disputed; in that we acted without negligence, which was disputed; in that we received a payment for a customer, which again was disputed"; and the question which the learned Judge had to decide was whether, on those three matters, the defendants had brought themselves within the protection of the section. The cheques were all crossed cheques—and this is the principal point, I think, of the appellants' argument—and they were all drawn on account of "Payee only," and the contention of the appellants is that that indorsement amounts to a direction to anyone who is dealing with those cheques, that they are only to be dealt with in such a way that the proceeds of the cheques must pass into the account of the payee, and that anybody who disregards that direction is acting contrary to the express direction on the face of the cheque, and, if the direction is disregarded, he must be taken to be acting negligently, and, if a bank, to be without the protection given to bankers by section 82.

Now, as I understand the argument, the respondents' answer to that contention is this: "True it may be that that form of crossing is a direction to some bankers—and it is a direction to the banker who is the banker of the person in whose favour the cheque is drawn—but it has no application to our case at all, because we are merely clearing bankers, and it is not in our power to comply with the direction, because the cheque comes into our possession, and is passed on by us, in pursuance of a mandate under which it comes into our possession, under such circumstances that we cannot control the ultimate destination of the money, and therefore we cannot act upon the direction. It has no application to us." Again, as I understand the argument, Mr. Pritt says:

"It is all very well to say that, but it does not avail you. If you choose to take a cheque in this form, as collecting banker, if it comes to you, you must do one of two things: you must either refuse to do the business at all because you cannot comply with the direction or, if you do the business, you must do it knowing that you are doing something which is irregular and disregarding the direction, and you therefore, as a matter of business, and as wise people, ought only to undertake the business in cases where, knowing it is irregular, the person for whom you are doing the business is of sufficient standing to indemnify you if any trouble arises." Now, with great submission to that answer to the defendants' case, if I have put the case on the one side and on the other correctly, that contention, it seems to me, renders this class of business altogether impossible. If what Lord Macnaghten said in *Capital and Counties Bank v. Gordon* (19 *The Times* L.R., 462; [1903] A.C., 240), that bankers may fairly be said to bring themselves within the provisions of section 82 if they are only doing the particular form of business in the ordinary course in which such business is done, is not applicable to every case of this class—and I do not pretend to say that it is—at any rate it is an indication that, in the view of Lord Macnaghten, a very fair test, not necessarily a conclusive test, but a very fair test, of whether a banker can bring himself within the protection of section 82 is to see whether he is carrying on a particular class of business in the way in which the business is invariably done, business of this importance and magnitude, and business done by the class of persons who necessarily are the only persons who can conduct this particular class of business.

The evidence given on behalf of the Westminster Bank was given by people of high quality, whose evidence was not contradicted, and who spoke to what, according to their view, was the universal way of doing this particular class of business. Whether they expressed themselves in a way in which they would have done had the cheques been in a somewhat different form I am not sure, and I am not prepared to say that they did not possibly put their case higher than it ought to be put in reference to cheques which are not in this particular form; but for a reason which I will give in a moment, it seems to me to be immaterial in this case to consider whether they did not put the case for collecting bankers higher than, under certain circumstances, they might be able to justify. What in substance they said, dealing in the first instance with these cheques, but going a little farther in cross-examination, without possibly having considered all the consequences, was: "We are collecting bankers merely, and therefore we concern ourselves merely with considering whether our mandate to collect is sufficient, and we satisfy ourselves about that by looking at the indorsement, which is to us our mandate, and we do not concern ourselves with either the form of the cheque or anything else that is upon the cheque." Whether they went too far in saying that, and whether they could justify that under all circumstances, I am not prepared to say; but I do say that it is immaterial in this case because, assuming for the moment that their duty might be to scrutinize the cheque, at any rate to see whether or not it was not on its face in proper form, if they had done that in this case, in my opinion there is nothing upon either the face or the back of the cheque that would have put them upon inquiry. Therefore, upon the assumption that I am right in thinking that the learned Judge was correct when he came to the conclusion that the disregarding of the particular form of indorsement in this case by the defendant bank, having regard to the position they occupied as a collecting bank merely, was not in itself negligent, and assuming that he was right also in holding, as I think he was, that even if the bank had a duty at any rate to scrutinize the cheques sufficiently to show that there was nothing either on the face of them or on the back of them, or anywhere, to put them on inquiry, then I think that the bank did discharge the onus which lay upon them of showing that they acted in this particular matter without negligence.

I do not propose to go through the authorities to which our attention has been drawn. No doubt there are passages in them which are relevant upon the broad principles that one should apply to cases of this class. But there is no case which deals with this particular point as to how far a collecting bank is under any duty to regard the direction contained in a cheque crossed in this form, "Account Payee," and, if I am not repeating myself, I say that in my opinion the view that the learned Judge took was quite right both upon that point and upon the point that there was nothing in the indorsements upon the backs of the cheques themselves that ought to have put the bank upon inquiry, assuming that it was their duty at any rate to pay sufficient attention, to what appeared upon the cheque itself, to satisfy themselves that there was nothing apparently wrong.

The point taken in reference to the last matter by Mr. Pritt, as I understand it, is that these indorsements should have put the bank upon inquiry because of the way in which Schultze's name appears on them. In every case the indorsement took this form. The indorsement, first of all, was an indorsement in the name either of the person or of the firm, or of the person trading under a firm name, in whose favour the cheque was drawn. In every case that name appeared first. In one case it is true that the name was written in indelible pencil, but the learned Judge paid no attention to that, and I think that he was quite right in so doing. What followed in every case was that Schultze wrote his own name under that of the drawee, and it is said: "That ought to have put the bank upon inquiry, because there was nothing that indicated that Schultze, or whoever he was, was signing *per pro,* or in what capacity he was signing." But, with submission to that argument, I cannot see the force of it, because there was nothing to indicate that the original drawee had not in the first instance indorsed the cheque in blank; then it would have been passed on and indorsed again by Schultze in blank. There is nothing on the face of the cheque to indicate that the indorsement of the drawee might not be put on it by someone acting as an agent or servant, and I myself fail to appreciate the force of the argument that there was anything in the form of the indorsement which ought to have put the bank upon inquiry. That disposes of the contention that the bank failed to establish that they acted without negligence.

Then it is said: "But at any rate they were not receiving payment for a customer, because they must establish that as a matter of fact, and there was very little evidence given, and in those circumstances the Judge ought not to have drawn the inference he did in their favour." Now with reference to that we must remember that we are sitting here as a Court of Appeal—as a Court of Appeal from a Judge who tried this action without a jury—and we should only reverse the learned Judge if we were quite satisfied that in this particular matter he had drawn an inference which was quite unwarranted by the facts.

It is true that the whole history with reference to the transactions between the parties was not sifted to the bottom, but the whole case was fought upon the footing that the ordinary bank practice in such matters as these is at any rate common knowledge in the Commercial Court and to a learned Judge such as the learned Judge who tried this action, and it seems to me impossible to condemn with success the inference which the learned Judge drew from the facts, and from what is common knowledge about banking practice, that in this particular case this bank was receiving payment for a customer in the sense that at any rate it was not receiving payment for itself. I think, therefore, that on that point the appeal fails. But then it is said: "At any rate they were not receiving payment for a customer even if they were not receiving payment for themselves," and it was said that in this particular matter Heilmann was not the customer. Now, what does the expression "Customer of a bank" cover? The most ordinary meaning, I suppose, that one would attach to the expression "Customer of a bank" is, a person who keeps an account at the bank. He is obviously a customer of the bank. But banks do various kinds of business, and in all those various kinds of business either the individuals or the companies with which they do the business may properly be called customers, and they can properly be called customers whether they are individuals or whether they are banks, and in this particular case this class of business of collecting cheques is done between bank and bank, and it seems to me to be impossible to contend, as a matter of law, that the bank for which the defendants in this particular case were doing this particular class of business was not, in reference to that piece of business, their customer. Again, with submission, I fail to appreciate the force of the argument that in this particular case Messrs. Heilmann were not the customers of the bank. On all the points, therefore, I find that the learned Judge was right, and that this appeal fails and must be dismissed, with costs.

Lord Justice Atkin.—I agree with the judgment that was delivered by the learned Judge and with the judgment which has just been delivered by my Lord. I really have nothing to say, I think, in addition to what has already been said, but in deference to the sustained and interesting argument of Mr. Pritt, I will add a few words giving my own reasons for the dismissal of this appeal.

This is a case where the plaintiffs drew cheques in favour of the foreign sellers to them of goods, and they sent the cheques over to their own agent, a man named Schultze, with instructions to hand the cheques to the foreign sellers. There can be no doubt that Schultze stole the cheques and forged the foreign sellers' indorsements and paid them into an account with a German bank for his own benefit and when those cheques came forward they were collected by the defendant bank for the German bank, and there can be no doubt therefore that the defendant bank converted the cheques, which were in fact the property of the plaintiffs.

The only question is, whether or not the defendants bring themselves within the protection of section 82 of the Act. The onus of bringing themselves within the section in that particular I think rests upon them, and they have to show that they, in good faith and without negligence, received payment of a crossed cheque for a customer. Now that, of course, must depend partly upon the facts, and the facts in this case are partly admitted and partly proved by evidence. Some of the evidence is the evidence of officials of the defendant bank and other bank officials, and, as not uncommonly happens, the bank officials were, I think, fairly easy victims in cross-examination. I have hardly ever known a bank case in which a bank official has not voluntarily gone a good way towards giving away the case of his principal, but I do not think that they succeeded in doing it altogether in this case, though Mr. Pritt urges upon us that perhaps they did.

The first question was whether or not the defendants received this money, because that is one of the essentials in the section. Mr. Pritt succeeded in inducing the principal official of the defendant bank to concede that there was a difference between a collecting bank and a receiving bank and that the defendants were not the receiving bank. Therefore, says Mr. Pritt, I have proved out of your mouth that you did not receive this money; but I think he was too successful there; I think that the witness was using a phrase with a mere view of distinguishing between the bank which initially receives the cheque and the bank which, in fact, puts it forward, and notwithstanding that distinction that it cannot be disputed that this bank, the Westminster Bank, received the money from the paying bank; they received it in the course of collecting, and I think quite clearly received it.

The other question that was raised was this. It is said: "You have not shown that in this case you received the money without negligence." Mr. Pritt says that there are two ways in which the bank failed to acquit themselves of negligence. He says, in the first place, that these cheques were drawn payable to the account of the payee only and the defendant bank paid no attention to that matter and did not investigate the question whether they were collecting merely for the account of the payee, and in reference to that he also refers to the indorsement, which it is said ought to have drawn their attention to the fact that they were not collecting the money for the account of the payee. Now, what is the meaning of a cheque to the account of the "payee only"? I do not know any better statement of it than the statement made by Mr. Justice Bigham, a very great authority on questions of commercial practice, and particularly banking practice, in *Akrokerri (Atlantic) Mines, Limited v. Economic Bank, Limited, and Nobbs* (20 *The Times* L.R., 564; [1904] 2 K.B., 465), that the paying bank have nothing to do with the application of the money if it has once been paid to the proper receiving banker. The words "Account payee" are a mere direction to the receiving banker as to how the account is to be dealt with after receipt. In this case it appears to me that when you are considering the question of negligence, you have to consider the particular facts of the case and the parties upon whom the duty to take care is imposed. I think it is desirable to point out that the Bills of Exchange Act, 1882, first of all, expressly provides that a crossed cheque can only be paid by the bank on which it is drawn, and, if crossed specially, to the banker to whom it is crossed; and it also expressly contemplates that where a banker receives a crossed cheque, that banker may cross it to another for collection. Therefore, the position of a banker who receives a cheque in the ordinary course of business is well recognized by the Legislature. By section 77 (5) it is provided that "Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection"; and

section 79 provides, as to the duties of the banker on whom it is drawn : "Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker," he is responsible ; and the same provisions are made in section 80.

Now, everybody knows that in the ordinary course of practice, in England at any rate, crossed cheques. certainly in the metropolis, are cleared through the Clearing House, and there are only a certain limited number of banks—I think the number given in evidence was ten—which are what are called clearing banks. It follows that all the other banks in the country, if they desire to clear crossed cheques, have to send those crossed cheques to a clearing bank, the very persons contemplated in the Bills of Exchange Act, 1882, as the agents for collection. In those circumstances, it was proved in evidence that the clearing bankers—and the defendants are clearing bankers—received thousands of cheques in a day for clearance through the Clearing House. That being the state of business, which everybody must contemplate, it seems impossible in those circumstances that you could expect a very close and accurate survey of all the circumstances connected with each cheque from the clearing banker, whom I am treating now as the agent for collection. But Mr. Pritt got the representatives of the defendant bank to say that they were under no obligation to look at the cheques at all, except to see whether there was an indorsement on them, and that that was in order. I do not think it is necessary to accept that view. For my part, I think also they have to bear in mind that though the clearing bankers have to deal with a considerable number of cheques, still they are dealing with very valuable negotiable instruments representing enormous sums of money and that they have some responsibility at any rate to the person whose property those negotiable instruments really are, and if anything was noticed and it was such that it ought to be noticed, and the cheque came into the hands of the clearing banker without there being any indorsement which would confer a right upon anybody to part with it, in the case of a bill drawn to order, without any indorsement at all, I think it might very well be that the clearing banker might find himself in a difficulty if he sought to establish that he had no duty to look at the back of the bill at all except to see whether there was an indorsement to him. But that is not this case, and when you look at the cheques in this case you find that there is a complete set of indorsements, and the position, it seems to me, of the clearing bank in respect of a cheque which is marked "Account payee" may very well be this : as long as there are indorsements upon the cheque which are consistent with the bank which is sending it forward holding the cheque so that it can comply with the direction, that is sufficient. I do not propose at the present moment to deal with the question, which has not been argued, as to what is meant in those circumstances by "account payee only," or by collection for a customer, which is a different point and which I will deal with so far as it is necessary a little later. All that it is necessary to say on this particular point is that the documents are such that it seems to me that it was quite possible, and indeed probable, that the official who scrutinized these indorsements would pass them if satisfied that the bank with which he was dealing was in fact going to account for the proceeds to the payee mentioned on the face of the document. That seems to me to be sufficient. It is said that the collecting bank must be satisfied that their principal, the bank which sent it forward, must hold the proceeds for the account of the payee. I am not satisfied even that that is true, because one knows very well that cheques are drawn occasionally "on account of payee" and sent to a person who has not a banking account. I do not agree that those cheques are cheques which are of no value to that person. I see no reason at all why such a person cannot request somebody who has a banking account to present the cheque for him and get it cleared for him. I do agree that there is a duty upon the bank which takes a cheque in those circumstances to see that, in fact, it is collecting the money for the account of the payee and that the proceeds, when it has received them, will go to the payee. But that seems to me to be entirely a different matter. Therefore I think in this case there is no evidence of negligence on that point.

Then it was also suggested that there was evidence of negligence because the indorsements in themselves, if looked at, would have attracted suspicion. I think it is unnecessary to say anything further in respect of that, except to say that if you look at the indorsements on these cheques, there is really nothing to attract the attention of a person who, as I say, has only the duty of doing that which is proper on the part of a bank which has to collect thousands of cheques in the course of a day.

The other point is this. It is said that these cheques were not collected for a customer. It is said that from the evidence you must infer that the bank was a holder for value of the cheque, and did not collect for a customer, the German firm of Oscar Heilmann. The evidence on that point seems to me to be this, that Oscar Heilmann had what appears to be an ordinary drawing account with the Westminster Bank. They may call it by a different name because Oscar Heilmann is, in fact, a bank, but it was an account in which Oscar Heilmann sent cheques for collection, and they were credited to the account of Oscar Heilmann, as a bank drawing upon the account, by the defendants, and in every respect it seems to me that there was an ordinary account. If there is an ordinary account and nothing more and crossed cheques are sent to the bank, with a request to credit them to the account, *prima facie* the bank who receives those cheques and does collect them collects them for the customer and does not become a holder of them for value, and if it is sought to show that the ordinary position which you would infer from that set of circumstances has in some way been altered, I think that the plaintiffs ought to prove what they seek to infer. There is, in my opinion, no evidence in this case from which it can be inferred that the Westminster Bank were holders for value of the cheques and collected them at all in that capacity.

The only other point was that the firm of Heilmann, in any case, was not a customer, because it was a bank. First of all, I think that, so far as I can see on the evidence, it was a customer in every sense of the word. It had a drawing account with the Westminster Bank. But if it was not and if it was in a different position, it seems to me that if a non-clearing bank regularly employs a clearing bank to clear its cheques, in the ordinary relation that exists in banks between those two persons the principal non-clearing bank is a customer of the clearing bank. There is a further point which I think may well arise

on the section, inasmuch as one knows that a bank which is a customer in the ordinary sense, as Mr. Pritt said, a lay customer, can and must employ a clearing bank as its agent for collection if the cheque is to be cleared through the Clearing House. I think it may very well be that the agent for collection collects for a customer when the cheque is collected for the benefit of the customer of the non-clearing bank. But that is a point which has not been argued and which it is not necessary to decide. I think there are analogous cases, some such cases as we dealt with the other day when we dealt with the question of the servants of a carrier, and there was authority for saying that the servants of the sub-contractor might yet be the servants of the carrier, which would justify that argument. However, it is unnecessary to decide that. It seems to me that the evidence supports the finding of the learned Judge in this case in every respect, and, therefore, I agree that this appeal should be dismissed with costs.

Lord Justice Lawrence.—I agree, and have nothing to add.

[Solicitors—Messrs. Buckeridge and Braune; Messrs. Travers Smith, Braithwaite, and Co.]

Prob., Divorce, and Adm. Div. (Hill, J.) 1927. May 27.

THE BACKWORTH.*

Ship — Collision — Navigation round points or sharp bends—Port of London River By-Laws, 1914-1926, By-law 36.

By-law 36 of the Port of London River By-Laws, 1914-1926, provides :—"Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

Held, that the by-law imposes on the vessel navigating against the tide two duties, (*a*) to ease her speed, and (*b*), if necessary, to stop her engines and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her. The question whether it is necessary to stop and wait is one of seamanship, and depends upon the particular facts of each case.

This was an action which arose out of a collision off Blackwall Point, River Thames, between the plaintiffs' steamship Sentry and the defendants' steamship Backworth, and raised an interesting point as to the construction of By-law 36 of the Port of London River By-Laws, 1914-1926, which provides :—

"Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

* Reported by A. W. Grant, Esq., Barrister-at-Law.

The collision occurred in daylight on the evening of September 16, 1926, when the Sentry, a steamship of 1,354 tons gross, was bound down river on a voyage from Shadwell to Manchester with general cargo, and the Backworth, a steamship of 2,481 tons gross, was bound up river on a voyage from Stettin to Millwall with a cargo of coal. The tide at the time was flood, of the force of about 1½ knot, and the Sentry was, therefore, navigating against the tide and the Backworth with it. Each vessel was navigating on her own proper side of mid-channel and the Sentry had slowed down when approaching the point.

The Court found that there would have been no danger of collision if both vessels had continued on their courses to pass port side to port side. As the Sentry neared the point under port helm, however, she was compelled to stop her engines and to steady her helm owing to the manœuvres of two motor-boats which endeavoured to cross her bows from port to starboard. With the tide on her starboard bow the Sentry, when she stopped her engines and steadied her helm, began to pay off to port, and her bows, as the Court found, got to the north of mid-channel and the collision with the Backworth occurred. It was contended by the defendants (*inter alia*) that the Sentry was to blame for a breach of By-law 36 by failing to stop her engines and wait above Blackwall Point until the Backworth had passed clear of her.

Mr. D. Stephens, K.C., and Mr. H. C. S. Dumas appeared for the plaintiffs; Mr. G. P. Langton, K.C., and Mr. A. T. Bucknill for the defendants.

Mr. Justice Hill.—The ships involved in this case are the Sentry, a vessel of 1,354 tons gross, 230ft. long, with a draught, according to the log, of 13.7 forward and 16.8 aft. The Backworth is a steamship of 2,481 tons gross, 303ft. long, drawing 19.10 aft, even keel, in charge of a pilot. The Sentry was bound down the Thames, and the Backworth was bound up, and they met in collision off Blackwall Point. The time was about 6.55 p.m., British Summer Time, on September 16, 1926. It was therefore daylight and it was fine and clear. The tide was flood, of the force of a knot and a half. High water at London Bridge was at 7.58 p.m. As to the precise place, there is no very great dispute. At any rate, it was about off Green's Upper Dry Dock. It is difficult to fix the position precisely, but that is about the place. The difference in the evidence is not of much importance, for the place was certainly not below Blackwall Point. It was not in Bugsby's Reach, neither was it in Blackwall Reach. As to the position as regards mid-river there is the usual dispute. I find that it was a little north of mid-river. These are some of the considerations which lead me so to find. Before anything happened the Sentry was proceeding down south of mid-river. As to the Backworth, I find that she was coming up in about mid-river—not south of mid-river. There was not much other traffic in the neighbourhood. No vessels were entering or leaving the docks, nor any sailing craft. Two tugs with craft were coming up, both nearer the north shore than the Backworth. The Backworth had overtaken and passed one, and was overtaking the other. There were also two petrol motor-boats, the one towing the other, coming up. They were further up river than the Backworth, and when first seen by the Sentry were south of mid-channel, but shaping to pass to the north side of mid-channel. That was all the traffic, except that the Sentry was being followed down by the steamship Ardgarroch. The Sentry and Backworth came into collision, each

striking with the stem or close to the stem. The angle is in dispute, differing as much as two points (which is the plaintiffs' case) and seven points (which is the defendants' case). The only surveyor called was called by the plaintiffs, and gave a reason for thinking that it was two points. The master of the Ardgarroch, called by the plaintiffs, drew a picture showing nearly four points. The damage looks like more than two points. The final angle may well have been greater than the initial angle. I cannot determine this question with any precision. The angle is not of much importance, unless it proves that the Sentry starboarded. On the evidence as a whole I am satisfied that the Sentry did not starboard, and that whatever angle she got to the north shore was by reason of her stopping her engines and ceasing to port, as I shall presently describe, and getting the stronger tide on her starboard bow. Undoubtedly the effect of that was to give her an angle to the north shore and to bring her to a position in which some part of her, at any rate, was to the north of mid-river.

Prima facie, the Sentry, proceeding down and found with her bows to the north of mid-river, in collision with the Backworth, proceeding up, and being at the time of collision to the north of mid-river, is in the wrong. Her case is that she could not help herself, and in this she has much support from witnesses called by the defendants. In Blackwall Reach the Sentry was proceeding down to the south of mid-river in her proper water. She had been at slow, and had increased to half her speed for a short time, and again reduced to slow, when a little above Blackwall Tunnel. She was now approaching Blackwall Point at a speed of about four knots. Being at slow, she saw the Backworth approaching the Point from the opposite direction. Her witnesses said that the Backworth was to the south of mid-river, but that I have not accepted ; the Backworth was in mid-river. The Sentry had also seen the two motor-boats, which were to the south of mid-river, but were shaping to cross to the north of mid-river and pass the Sentry port to port. There was nothing likely to cause any difficulty, if every one acted on the rule of passing port to port. The motor-boats did in fact draw on to the port bow of the Sentry and were in a position to pass port to port. The helm of the Sentry was ordered hard-a-port for the bend, and, as her master said, also for the Backworth, and there would have been no difficulty in the Sentry rounding the bend on the south side of the river, while the Backworth went round the bend on the north side of the river. The motor-boats, however, altered their course to recross to the Sentry's starboard bow, thus creating a position of danger, and in this attempt the tow-rope parted and the Sentry was then in great danger of collision with the second motor-boat. The other, after attempts to get hold of the second, which failed, got away to the southward. The second was left helpless. The Sentry stopped her engines and steadied her helm. The effect of this, coupled with the tide, was that she got a cant to port. She thereby escaped collision with the second motor-boat, which passed her starboard bow at close distance. The Sentry then ported and let go her starboard anchor and put her engines full astern. But she could not prevent herself from getting partly athwart and partly to the north of mid-river, and so her stem struck the Backworth. The plaintiffs' witnesses say that there was nothing else that she could do, when confronted with the difficulty created by the improper navigation of the motor-boats and the breaking adrift of the second motor-boat. Witnesses called by the defendants agree with that view. The Elder Brethren agree. I also agree. So far, then, the collision was not due to any negligence on the part of those on board the Sentry. It is, however, contended that it was due to negligence antecedent to the time when the motor-boats created the position of difficulty by starboarding across the bows of the Sentry. I will consider that when I have considered the case made against the Backworth. I have already found that the Backworth was not proceeding up to the south of mid-river. The only fault that could be suggested is that she did not reverse soon enough. She did reverse. Was there any delay ? The Sentry pleaded that she gave a signal of four short blasts once, when the motor-boats parted. The defendants pleaded that they heard a signal of four short blasts twice. It turned out in evidence that the Sentry did give the signal twice, once when the motor-boats were seen to be starboarding across the bows of the Sentry, and the Sentry's engines were stopped and the helm was steadied, and a second time when the tow-rope parted. The log of the Sentry apparently recorded both signals and the stop as after the parting of the tow-rope. The record is not clear, and I find that one signal preceded and the other followed the parting ; but the interval between the two signals was very short. The Backworth put her engines astern after the second signal. There was no real delay. Moreover, the first signal would not inform the Backworth that the Sentry was coming across to the north of mid-river. The first signal was upon the stop and steady, and it was the stop and steady which caused the Sentry to cant. I can find no fault in the navigation of the Backworth. So far, then, the collision happened without negligence on the part of either ship.

That leaves for consideration the charge made against the Sentry, based upon Rule 36 of the Thames Rules, 1914-1926. It is alleged thus in the defendants' charges : "They failed to ease their speed on approaching Blackwall Point, and stop and wait before rounding, so as to allow the Backworth to round and pass clear." The duty of a steamship approaching a point in the Thames against the tide when other vessels are approaching the same point with the tide has been the subject of a rule for many years past. But the rule has not always been expressed in the same terms. Rule 23 of the Rules of 1880 was thus expressed : "Steam vessels navigating against the tide shall, before rounding" (certain named points, which included Blackwall Point), "ease their engines and wait until any other vessels rounding the point with the tide have passed clear." That rule was interpreted, and, as interpreted, was made the basis of the decision in *The Libra* (6 P.D., 139) and in *The Margaret—Cayzer, Irvine and Co. v. Carron Company* (9 App. Cas., 873). Rule 47 of the Rules of 1898 was thus expressed : "Steam vessels navigating against the tide shall, before rounding" (certain named points, which included Blackwall Point), "wait until any other vessels rounding the point with the tide have passed clear." That rule was interpreted, and, as interpreted, was made the basis of the decision in *The Ovingdean Grange* ([1902] P., 208). The object of both rules was stated to be to prevent vessels meeting on the point, and the duty of the ship navigating against the tide was that she should "so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there," and to "wait until the other has passed her," *per* Lord Justice Brett in *The Libra* (*supra*). Rule 36 of 1914-1926 is not limited to certain named points, but applies to all points or sharp bends. It is in the following terms : "Every steam vessel navigating against the

tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her." The rule was the subject of discussion in the Court of Appeal and the House of Lords in *The Hontestroom* (42 *The Times* L.R., 741 ; [1927] A.C., 37), but the majority of the House of Lords decided that, as there was no tide at the time in question, the rule did not apply. The minority (Lord Phillimore and Lord Blanesburgh) held that it did apply, but further held that the collision was caused not by the Hontestroom neglecting to wait, but by the starboarding of the Hontestroom. There was therefore no actual decision based upon a breach of the rule. At the same time the judgments both in the Court of Appeal and in the House of Lords throw much light upon the meaning of the rule.

I need not consider what bends are included in the words "points or sharp bends." Undoubtedly the bend at Blackwall Point is a sharp bend. Nor need I consider what precisely is meant by "ease her speed." The Sentry on approaching Blackwall Point, namely, when about off the Thames Tunnel, did reduce her speed to slow. She was about where the Hontestroom was when the Hontestroom put her engines at slow, as found by the President ; and, with regard to that, Lord Phillimore said : "Under the Thames Rule No. 36 a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the Hontestroom did" (42 *The Times* L.R., at p. 742 ; [1927] A.C., at p. 55). What I have to consider is whether it was the duty of the Sentry to stop and wait above the point until the up-coming vessels had rounded the bend and passed clear of her. If it was her duty so to hold back, she did not do it. If she had done it, she would not have reached the place of collision and the case would be very similar to that of *The Ovingdean Grange* (*supra*), where the Forsete, which did not wait, found herself hampered by a barge and it was said that she was unable to extricate herself from a position where she should not have been. So in *The Hontestroom* (*supra*) Lord Sumner said : "The point" (*i.e.*, whether there was any tide) "is crucial, for it is surely plain that, if the Hontestroom was bound to comply with the rule and had fully done so, there would have been no collision, for she would have been waiting above the point well clear of the Sagaporack at the material time" (42 *The Times* L.R., at p. 742 ; [1927] A.C., at p. 51). The argument for the defendants is, in effect, that the present rule means the same thing as the former rules, and that the steamship meeting the tide must so regulate her speed, by easing and, if necessary, stopping, that the vessels do not meet on the point. The plaintiffs' construction of the rule is that she must in any case ease her speed, and, if the circumstances make it necessary, she must stop and wait until the up-coming vessels have rounded the point and passed clear.

First of all, in my opinion, the words "so as to allow," &c., are not to be read with the words "ease her speed." If "so as to allow" is to be read with "ease her speed" there was no need to provide for anything else. If the ship was bound to ease in such a way that she did not meet the other on the point, that obligation would without question oblige her to stop, if that was necessary to prevent her meeting on the point. I read the rule as imposing two duties: (1) "Ease her speed." (2) "If necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear." Again, in support of that view, I quote Lord Phillimore : "Under the Thames Rule No. 36 a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the Hontestroom did. She should also, if necessary, stop and wait before rounding so as to allow any vessel navigating with the tide . . . to pass clear. This the Hontestroom did not do" (42 *The Times* L.R., at p. 742 ; [1927] A.C., at p. 55).

The next question is as to the meaning of the words "if necessary." The plaintiffs say that they mean "if necessary in order to allow the other vessel to round and pass clear." If that be the meaning, it is ill expressed by the phrase "so as to allow." I do not think that that is the meaning. I think "if necessary" means "if necessary in order to avoid risk of collision." And, in that view, I am strengthened by what was said in *The Hontestroom* (*supra*) both in the Court of Appeal and in the House of Lords. The Court of Appeal asked their assessors this question : "Having regard to (*a*) Rule 36 of the Thames Rules ; (*b*) the presence of the Corfe Castle and the Durham Castle at the north side of the channel ; and (*c*) the sailing barge crossing from north to south, were those in charge of the Hontestroom guilty of a want of care and proper seamanship : (1) in starboarding for the barge, and (2) in not stopping and allowing the Sagaporack to pass clear ?" When they so asked the second question the Court of Appeal cannot have thought that, in all circumstances, the Hontestroom was bound to stop and wait until the Sagaporack had rounded. They treat it as a question of seamanship depending on the state of traffic at the time. Similarly in the House of Lords Lord Sumner said that the rule "adapts the action (if action there is to be) *to the circumstances of the moment* by distinguishing between obligatory easing of speed and stopping only if there is also necessity" (42 *The Times* L.R., at p. 742 ; [1927] A.C., at p. 52). And Lord Phillimore said that the object of the rule was "to prevent the simultaneous passing of a point . . . *if such simultaneous passing be dangerous*" (42 *The Times* L.R., at p. 743 ; [1927] A.C., at p. 55). It is true that if in the opinion of the majority there had been any tide the House of Lords would with one voice have held the Hontestroom to blame—but the circumstances have to be remembered. It was night. The Hontestroom was light. She had ahead of her the Durham Castle (of more than 8,000 tons), which backed out of the East India Dock Basin and straightened down a little north of mid-channel, the Corfe Castle just below the basin waiting to enter, the Sagaporack, of over 5,000 tons, coming up Bugsby's Reach, and a sailing barge crossing the bows of the Hontestroom. The position was very different from the position in the present case. Here it was daylight, and fine and clear, there was no traffic out of or into the dock, there was no sailing barge ; both the Sentry and the Backworth were of moderate size, the tugs and craft proceeding up near the north shore were in nobody's way ; the Backworth was not south of mid-river, and the two motor-boats, though they were south of mid-river, were shaping to pass to their proper side and on to the port bow of the Sentry, as indeed they did. Such being the circumstances of the moment, the Elder Brethren are of opinion that there was no want of due care or seamanship in the Sentry continuing at slow speed, and that there was nothing to make it dangerous or risky for her to pass the point at the same time as the Backworth. The risk of collision was created by the faulty manœuvre of the motor-boats. I am entirely of that opinion.

I hold that the Sentry was not guilty of any breach of Rule 36, and the claim and counterclaim will be dismissed, with no order as to costs.

[Solicitors—Messrs. Parker, Garrett and Co., for the plaintiffs; Messrs. Botterell and Roche, for the defendants.]

K.B. Div. (Acton and Talbot, JJ.) 1927. June 2.

CROSSINGHAM v. PARK.*

Moneylenders — Reopening transaction — Application by borrower — In "any Court in which proceedings might be taken for the recovery of money lent by a moneylender"— Jurisdiction of County Court—Moneylenders Act, 1900 (63 and 64 Vict., c. 51), s. 1 (2).

A County Court has jurisdiction under s. 1 (2) of the Moneylenders Act, 1900, to entertain an application by a borrower from a registered moneylender to reopen a moneylending transaction only when the amount of the money lent, whether repayable by instalments or otherwise, without the addition of any claims arising under any agreement to pay interest or an amount charged for "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," is within the jurisdiction of the County Court.

If, however, this condition is fulfilled, the Court may entertain the application although the moneylender has not taken any proceedings to recover the money lent and although the time has not come for taking such proceedings.

This was an appeal from a decision of Judge Harington at Wandsworth County Court in a case which raised the question in what circumstances a borrower from a registered moneylender might have recourse to the County Court by an application for relief under section 1 (2) of the Moneylenders Act, 1900.

In February, 1924, the plaintiff, Mr. Lawrence Thomas Jubilee Crossingham, a builder, of Blackfriars-road, S.E., borrowed £250 from the defendant, Mr. Gilbert Park, a registered moneylender, trading as the Temperance Loan Fund, and he gave as security a bill of sale on certain furniture and utensils. In January, 1927, he had paid £372 10s. to the defendant in repayment of principal and in payment of interest, but the defendant alleged that there was still money due to him from the plaintiff in respect of the transaction.

The plaintiff accordingly issued a summons in the Wandsworth County Court by which he claimed under section 1 (2) of the Moneylenders Act, 1900, a declaration that the transaction was harsh and unconscionable, and that the interest charged was excessive, and he asked that the Court might reopen the transaction.

It was admitted for the plaintiff before the County Court Judge that, under the terms of the contract between the parties, more than £100 was alleged by the defendant to be owing to him by the plaintiff, but it was contended that, as that contract provided for repayment of the loan by monthly instalments of £15, the defendant could have sued for the payment of an instalment in the County Court, and that it thereby acquired jurisdiction to deal with the matter then before it.

Judge Harington, however, held that he had no jurisdiction, as the amount claimed to be due to the moneylender was more than £100.

The plaintiff appealed.

Section 1 (2) of the Moneylenders Act, 1900, provides:—

"Any Court in which proceedings might be taken for the recovery of money lent by a moneylender . . . may, at the instance of the borrower [reopen a transaction which appears to be harsh and unconscionable], and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower . . . notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived."

Mr. S. P. Kerr appeared for the appellant; Mr. Charles Bray for the respondent.

The Court reserved judgment.

Mr. Justice Acton read the judgment of the Court as follows:—The question in this case is in what circumstances a borrower from a registered moneylender may have recourse to the County Court by an application for relief under subsection (2) of section 1 of the Moneylenders Act, 1900.

To ascertain the meaning of this subsection it is, in our opinion, necessary to read it along with subsection (1) and to compare the two subsections with some care. Section 1 (1) begins with the words, "Where proceedings are taken in any Court by a moneylender . . ." and subsection (2) with the words "Any Court in which proceedings might be taken . . . by a moneylender. . . ." The first question is, What is the meaning of the words "might be taken" in this latter phrase? In our opinion, the true meaning of this phrase is "Any Court in which (so far as amount is concerned) it would be competent for a moneylender to take proceedings, if he were minded so to do." The insertion of the parenthesized words is due to a consideration of the concluding words of the subsection, viz., "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived," the effect of which is discussed later.

The next point to be observed is as follows:—Subsection (1) deals with "proceedings" of more than one kind, viz.: (*a*) "for the recovery of any money lent" or (*b*) "the enforcement of any agreement or security made or taken . . . in respect of money lent." Subsection (2) deals with "proceedings" of one kind only, viz., "for the recovery of money lent," and there it stops. Now the claim of a registered moneylender is commonly upon some negotiable instrument, such as a bill, note, or I.O.U., but, whether it be so or not, it is always analysable into (*a*) a claim for "money lent," and (*b*) a claim or claims arising under an agreement, or agreements, to pay interest on or in respect of the amount of the loan, or other sums for "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," to employ the words of the Act of 1900. This analysis is familiar in the practice in the King's Bench Division under Order XIV. since the decision in *Lazarus v. Smith* (24 *The Times* L.R., 592; [1908] 2 K.B., 266), the result of which is that in a registered moneylender's action, if it appears that the whole or some part of the money "actually advanced" by the moneylender is still

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

owing by the borrower, after crediting him with every payment made by him to the moneylender, irrespectively of whether it purported to be in payment of principal or interest or charges, the plaintiff is entitled to judgment for that amount as "the principal sum admitted to be due" (per Lord Cozens-Hardy, M.R.), or as "a debt which is admitted, quite irrespective of any matter with which that Act has to deal" (per Lord Justice Kennedy). "The Moneylenders Act," says the Lord Justice, "only relates to transactions which can be reopened and modified under its provisions, and what would be reopened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus or interest, or of bonus or interest consolidated with principal."

In the light of this decision and what is therein involved, consideration now reverts to the meaning of section 1 (2) of the Act of 1900. It can hardly be suggested that the difference in the wording of the two subsections to which attention has already been drawn—viz., that subsection (1) deals with proceedings for the recovery of money lent and also with other claims of different kinds, whereas subsection (2) deals only with proceedings for the recovery of money lent and there stops—is without its significance. In our opinion, this gives the clue to the correct meaning of subsection (2). We think that the test whether a Court is a Court in which it would be competent for a "moneylender" (that is, for any particular moneylender) to take "proceedings for the recovery of *money lent*" is a test to be applied with reference to the strict meaning of the two italicized words. If the whole amount of the "money lent," whether repayable in instalments or otherwise, without the addition of any claims arising under an agreement or agreements to pay interest or "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," is within the jurisdiction of the County Court, then in every such case, even though the moneylender has not taken any proceedings and though the time has not come for taking proceedings, the borrower may make application under the Act to the County Court, but not otherwise.

This interpretation gives their ordinary and simple meaning to the words "money lent" and is applicable to every case. The fact is that a claim by a moneylender is often loosely regarded as a claim for "money lent" without more, whereas it is, practically always, not merely a claim for money lent, but such a claim in combination with claims of a different nature, although they are of course incident to the transaction of borrowing the money lent.

It remains to be added that the concluding words of subsection (2) seem to be intended to show that the test is the amount of "money lent," and not the time at which any payment under the contract between lender and borrower becomes due and payable. It would otherwise seem very difficult to reconcile the words "any Court in which proceedings might be taken for the recovery of money lent" with the later words "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived." This difficulty impressed itself upon us in the course of the argument. It ceases, however, to be a difficulty if the earlier words are construed as relating solely to the amount of "money lent," irrespectively of whether it is then wholly or in part due and payable, and we have not heard suggested, nor are we able to suggest, any more satisfactory reconciliation between these apparently inconsistent phrases occurring in the same subsection. It is for these reasons that we have construed the words "any Court in which proceedings might be taken" as limited by the addition of the words "so far as amount is concerned."

We think that the learned County Court Judge was right in holding that this action was one under the Moneylenders Act, 1900, and not under section 67 of the County Courts Act, 1888. The jurisdiction given by the Act of 1900 is a new jurisdiction of a special kind (see *Samuel v. Newbold*, 22 *The Times* L.R., 703; [1906] A.C., 461). In our opinion, the only test to be applied in an action such as this, to determine whether the County Court has or has not jurisdiction to entertain an application by the borrower under section 1 (2) of the Act of 1900, is that which is provided by the Act itself. We think, therefore, that Mr. Kerr's contention that he may have recourse to section 67 of the County Courts Act, 1888, and rely upon some more or less dubious claim for redemption of the bill of sale granted by his client, as being a mortgage of personal chattels, is a contention which cannot prevail, even if there were no other grounds for rejecting it. Whether there are other grounds it therefore becomes unnecessary and inexpedient further to consider. His contention involves, however, the substitution of an inquiry whether the Court is one in which the *borrower* might take proceedings for the inquiry whether it is one in which the *lender* might take proceedings, and it is the latter inquiry only which the Act of 1900 indicates as relevant and essential.

As the amount actually advanced in the present case was £250, this appeal must be dismissed with costs.

Leave to appeal was given.

[Solicitors—Messrs. Piper, Smith and Piper; Messrs. Webster Butcher and Sons.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. June 2.

IN RE MUSGROVE DECEASED—DAVIS v. MAYHEW.*

Will—Probate—Non-discovery for 20 years—Possession by executrix—Discovery after death of executrix—Suspicion from fact that executrix did not put will forward—No suspicion attaching to document itself—Onus of proof as to revocation—Judgment pronouncing for will.

By a will which was made in 1890, and in which the attestation clause was in order, the testatrix appointed E. M. D. executrix, the sole beneficiary under the will being A. M. D., an illegitimate daughter of E. M. D. In 1900 the plaintiff married A. M. D. In 1905 the testatrix died, and, the will not having come to light, letters of administration as on an intestacy were granted to her brother. Although by 1908 E. M. D. knew of the testatrix's death, she did not propound the will. In April, 1924, E. M. D. died. In July, 1924, the testatrix's brother died, leaving a will making the defendant his sole legatee, and in 1925 the defendant, in the month of March, was appointed administratrix *de bonis*

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

non. Also in 1925, more than a year after the death of E. M. D., the plaintiff discovered the will of 1890 in a desk that had belonged to E. M. D. In October, 1925, the plaintiff's wife died. The plaintiff then propounded the will of 1890 as the personal representative of his deceased wife, and he asked for a revocation of the grant of administration *de bonis non.* The defendant put the plaintiff to the proof of the testatrix's knowledge and approval of the contents of the will and claimed that the grant of letters of administration *de bonis non* be handed out to her (the defendant).

Held, that although from the conduct of E. M. D. in not putting the will forward there might be a suspicion that there must have been some condition subsequent under which the will, though in itself a valid testamentary document, ceased to be effective, yet, as no suspicion attached to the will itself or to its terms, and therefore the fact of execution was sufficient proof of the testatrix's knowledge and approval of its contents, and as the burden of proving revocation was on the defendant and had not been discharged, there must be judgment pronouncing for the will and revoking the grant of administration *de bonis non.*

This was an appeal from a decision of Mr. Justice Hill refusing to grant probate of a document dated September 9, 1890, propounded as the will of Miss Lavinia Musgrove, who died on March 16, 1905. The will was discovered in 1925 in an old desk in the possession of the plaintiff, the husband of the woman named as residuary legatee therein.

The plaintiff, Mr. William George Davis, a mantle maker, of 69, Mildmay-grove, N., propounded the will of September 9, 1890, as the personal representative of his late wife, Agnes Maria Davis, who was named as the sole beneficiary under the will and who had died on October 16, 1925. The plaintiff also asked for the revocation of a grant of administration *de bonis non* made on March 13, 1925, to the defendant, Miss Lily Mayhew, of Redholme, Preston-road, Withdean, Brighton.

The defendant put the plaintiff to the proof of the due execution of the will and the testatrix's knowledge and approval of its contents, and claimed that the Court should pronounce against the will of September, 1890, and that the grant of letters of administration *de bonis non* be handed out to the defendant on the ground that she was the sole legatee of Miss Lavinia Musgrove's brother, Alfred Musgrove, who was granted letters of administration of his sister's estate on her death intestate in 1905 and who died on July 31, 1924. The estate was between £6,000 and £7,000.

Mr. Justice Hill found the following facts :—The document propounded was a printed will form. It was expressed to be the last will of "me, Lavinia Musgrove, of 204, High-street, Deptford," appointing Emma Mercy Dunmall, of Wall Hill, Chelsfield, Kent, executrix. It bequeathed to "Agnes Maria Dunmall all my property real and personal of which I may be possessed for her own use absolutely." The signature had been proved to be in the hand of the deceased woman, but he had been unable to satisfy himself whether or not the body of the will was written in by Miss Musgrove. There were resemblances to and differences from contemporary writings of hers. The signatures of the two attesting witnesses had also been proved. Emma Mercy Dunmall was a cousin of Lavinia Musgrove, and Agnes Maria Dunmall, who was a child in 1890, was the former's illegitimate daughter. Emma Mercy Dunmall died in April, 1924, aged 78, having outlived Lavinia Musgrove 19 years. Emma Mercy Dunmall knew of the death of Lavinia Musgrove in 1908. More than a year after Emma Mercy Dunmall's death a desk of hers containing papers was opened by the plaintiff (who had married Agnes Maria Dunmall in 1900) and in it was found the document in question. It was clear that neither of them knew of its previous existence.

His Lordship pronounced against the will on the grounds that the testatrix had entirely forgotten that she ever had executed it and it did not represent her testamentary wishes at the time of her death. He thought that it was a very suspicious circumstance that Emma Dunmall, though she knew of the death of the testatrix in 1908, did not propound the will.

The plaintiff appealed.

Mr. G. C. Tyndale and Mr. R. Wavell-Paxton appeared for the appellant; Mr. Cotes-Preedy, K.C., and Mr. Noel Middleton for the respondent.

The Master of the Rolls, in the course of his considered judgment, recited the facts, and said that the mere statement of the dates and facts was sufficient to prove that it was surprising and curious that the will of Lavinia Musgrove was not brought to light until more than 20 years after she died and 17 years after those interested knew of her death. He had carefully considered the judgment of Mr. Justice Hill and had accepted the facts found by him, but he was unable, though not without diffidence, to agree with his decision on the law applicable to those facts.

Lavinia Musgrove was a good business woman. Her will, beginning in bold type, "This is the last will and testament," was found duly signed and attested, and there could be no doubt that the testatrix intended that document to be her last will. It was made in the lifetime of her father, at a time when her estate was not so large as it afterwards became, in favour of a cousin's illegitimate daughter, then ten years old, who might not unjustly be the object of womanly sympathy and charity.

No suspicion attached to the will itself or its terms and if it had been produced immediately on Lavinia Musgrove's death in 1905 no exception could have been taken to it. The suspicion referred to by the Judge was suspicion as to the conduct of Emma Mercy Dunmall and her forbearance to put the will forward. But if there was once a good will it could not be disposed of except in one of the authorized ways of revocation (Wills Act, 1837, sections 18, 19, 20). If it was once a will and, as such, was handed over to the custody of the executrix—and no more effective act could be taken by a testatrix in support of it—it remained the will of the testatrix, and no mere conduct of the executrix would stop its effect. Forgetfulness might explain her inaction, but to import more into that inaction appeared to be acting upon a presumption arising from conjecture only.

It was necessary to consider the authorities which had been cited to the Court and the rules which had been laid down. It was clear that the onus of proving a will lay on the party propounding it and that he must satisfy the Court that the instrument so propounded was the last will of a free and capable testator who knew and approved of the instrument as

his testament and intended it to be such (*per* Baron Parke in *Barry v. Butlin*, 2 Moore, P.C., 480).

In *Burgoyne v. Showler* (1 Robertson, 5) Dr. Lushington said, at page 10 :—

"Upon what principle ought the Court to consider a case of this description where the will upon the face of it appears to be duly executed—where there is an attestation clause, though not quite in the strict form? I apprehend in the first place the presumption is *omnia rite esse acta*. If a party is put on proof of a will, he must examine the attesting witnesses. On the present occasion there are two subscribed witnesses ; if these persons were dead, the law would presume the will to be duly executed ; if they were utterly forgetful of all the facts, the presumption of law would be the same."

In that case the Judge pronounced for the will in spite of the evidence of the attesting witnesses.

The presumption carried the will to probate, although there were alterations and obliterations in the body of it. In *Lloyd v. Roberts* (12 Moore, P.C., 158) the same course was followed. In *Vinnicombe v. Butler* (3 Sw. and Tr., 580) the presumption was held to prevail in a case where there was an incomplete attestation clause and three out of the four attesting witnesses remembered nothing about the matter. In that case Sir James Wilde said that the presumption applied with more or less force according to the circumstances of each case. In *Guardhouse v. Blackburn* (L.R., 1 P. and D., 109) Sir James Wilde declared certain propositions as rules which ought to govern the action of the Court in respect of a duly executed paper. The first two were applicable to the present case :—

"The Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that, except in certain cases where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents."

In *Wright v. Sanderson* (9 P.D., 149) the principle of *Burgoyne v. Showler* (*supra*) and *Lloyd v. Roberts* (*supra*) was adopted and followed in the Court of Appeal by Lord Selborne and Lord Justices Cotton and Fry. Other illustrations to the same effect were *Woodhouse v. Balfour* (13 P.D., 2) and *In re Peverett* ([1902] P., 205). The latter was a startling decision, for there was no attestation clause whatever ; it was distinguished in *In re Strong—Strong v. Hadden* (31 *The Times* L.R., 256 ; [1915] P., 211).

The facts in the present case appeared to establish that this business woman must have signed the instrument in the form in which it was for the purpose of making her will ; the attestation clause was in order ; and the contents appeared from the writing and ink used to be an original part of the instrument and in accordance with the rules and reasoning in the cases above set out. The suspicion was not such as attached to the document itself. In *Tyrrell v. Painton* ([1894] P., 151) Lord Justice Lindley gave a wide definition of suspicion, saying that it extended to all cases in which circumstances existed which excited the suspicion of the Court. Those words appeared to have been used in reference to the preparation of the will, its intrinsic terms, and the circumstances surrounding its preparation and execution.

Here the suspicion was that there must have been some condition subsequent under which a valid testamentary document ceased to be effective. The onus of proof of that lay on the opponent of the grant of probate ; for, when once the will had been proved to have been duly executed, the burden of proving that it was revoked lay on those who set up its revocation. In the absence of evidence proving it, revocation would not be presumed. That was laid down by Lord Penzance in *Benson v. Benson* (L.R., 2 P. and D., 172). The facts of the present case presented sufficient internal evidence of knowledge and approval of the will when executed. The suspicion arose at a later date, when the will had begun to run its course as an effective instrument. In his (his Lordship's) judgment, the maxim operated in favour of the will, after the proof given of its execution and attestation, to establish that the testatrix knew and approved of its contents. The appeal must be allowed and judgment given pronouncing for the will and revoking the grant of administration *de bonis non*.

Lord Justice Sargant.—In this case the plaintiff has succeeded in proving to the satisfaction of the Court the signature of the alleged testatrix and of the two alleged witnesses to the document propounded by him as a will. Furthermore the document is prominently described on its face as a will and purports to have been signed and witnessed in the manner prescribed by the statute as essential for the purpose of constituting a will. Accordingly on the principles established in earlier cases and summarized in the leading case of *Wright v. Rogers* (L.R., 1 P. and D., 678) the plaintiff has satisfied the onus *prima facie* resting on him, and the presumption is that, apart from countervailing circumstances, the document is in fact the will of the alleged testatrix, Lavinia Musgrove.

Further there is nothing, in my opinion, in the circumstances in which the document was discovered or in the dispositions made by it, to cast any suspicion on its authenticity. To confide a will to the sole executrix who was also the mother of the universal legatee thereunder, an infant of some ten years of age, was a very natural act. And I see no improbability at all in a gift of the testatrix's property in favour of an infant who was illegitimate but had been recognized as a relative by the testatrix. The unfortunate position of the infant, especially in view of her mother's recurrent impecuniosity, may well have evoked the testatrix's compassion.

Mr. Middleton, for the defendant, urged that at the date of the alleged will the testatrix was living with her father and brother at Deptford, and that at that time she had only a comparatively small property of her own, not exceeding £2,000 ; and these facts, though not actually proved, were accepted by Mr. Tyndale for the appellant, and no doubt had been common ground at the trial. But so far as these facts are relevant at all (and I attach little importance to them) they seem to tell rather in favour of the appellant than against him. For the smallness of her then property would make it more natural for Miss Musgrove to give the whole of it to the infant. And the argument that the gift to the infant of the much larger sum which Miss Musgrove possessed at her death would probably not have represented her wishes at her death, though much relied on by Mr. Cotes-Preedy, seems to me of no importance and was rightly rejected by the learned Judge. The only date at which her testamentary intentions are to be regarded is, of course, the date on which the document was executed.

The sole ground on which the learned Judge has pronounced against the will is the suspicion excited in his mind by the circumstance that the executrix, realizing (as she must have done) the effect of the will, knowing by the year 1908 at latest of the death of Miss Musgrove three years before, and being on good terms with her daughter, did nothing during the

remaining sixteen years of her own life to secure these benefits for her daughter. And he deduces from this that the executrix must have known something about the document which prevented her from putting it forward as a genuine will of Miss Musgrove—that is, something which either prevented the document from expressing the real mind of the testatrix or which affected the due execution of the document as a will. In these circumstances he considers that the plaintiff has at least to bring further affirmative evidence to prove the facts of due execution and of expression of real intention ; and as this is impossible he pronounces against the alleged will. In so holding he relies on the principles of *Tyrrell v. Painton* ([1894] P., 151), summarizing and following certain earlier cases to the same effect, though he recognizes that there are differences between those cases and the present.

With great respect to the learned Judge I am of opinion that the principle of the cases in question does not apply in the circumstances of the present case. That principle is most neatly expressed in the judgment of Lord Justice Davey, which is not in any way inconsistent with that of Lord Justice Lindley and Lord Justice A. L. Smith, but has the advantage of incorporating a little more definitely all the conditions of the problem which the Court was solving. He says at page 159 : "It must not be supposed that the principle in *Barry v. Butlin* (2 Moore, P.C., 480) is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion ; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed." Now here there is nothing in the preparation or contents of the will to raise a suspicion that it did not express the mind of the testatrix. The sole peculiarity is the subsequent fact that for many years after knowledge of the death of the testatrix the executrix did not take any steps to prove a will which gave large benefits to her daughter. I cannot think that this fact is analogous to the facts in *Tyrrell v. Painton* (*supra*) or the previous similar cases, or that it justifies such an inference as was drawn there.

The learned Judge in attributing the inaction of the executrix to knowledge of some defect in the document was, in my judgment, conjecturing only. And I do not think it difficult to suggest a good many reasons for her inaction which are at least as probable as that adopted by the learned Judge and would not invalidate the will. The executrix may have been told by the testatrix at the time of her will, or have thought, that her intention was only to benefit the legatee if she was a minor, or was unprovided for, at the death of the testatrix. But any such intention, even if communicated, would not in law invalidate or affect the will. Or the executrix may, like the testatrix, have forgotten altogether the existence of the will. Or on the occasion of the marriage of the legatee the testatrix may have communicated to the executrix an intention to revoke the will, but this again would be quite ineffective. And even if the executrix thought that there had been some informality in the execution or attestation of the will, as for instance, if she had forgotten altogether that she had witnessed the will, there are several cases to show that this would not be sufficient to rebut the presumption arising from the form in which the will was witnessed (*Wright v. Sanderson,* 9 P.D., 149 ; *Lloyd v. Roberts,* 12 Moore, P.C., 158).

The executrix must be regarded for this purpose as merely a witness. The beneficial interest under the will was not that of her daughter.

In my judgment, therefore, the appeal should be allowed and the will pronounced for, with such costs here and below as are appropriate in a poor person's case.

Lord Justice Lawrence.—The question which falls to be determined on this appeal is whether in the special circumstances of this case the presumption *omnia rite esse acta* ought, or ought not, to prevail. If the presumption is held not to prevail the will cannot be admitted to probate, as both the attesting witnesses are dead and the only available evidence has been given.

The will was made on a printed form which contained not only a regular attestation clause, but also precise instructions as to the manner in which it ought to be executed so as to comply with the requirements of the Wills Act, 1837.

The signatures of the testatrix and of the attesting witnesses have been duly proved.

The testatrix was a business woman. There is some doubt whether she actually filled in the form herself ; but, even if she did not, there is nothing to suggest that she did not understand and approve of the contents, which are short and perfectly simple. Nor is there any reason to suppose that she did not read the instructions and make herself acquainted with the proper method of executing the will. Moreover, there is no suggestion of fraud or undue influence. The sole beneficiary named in the will was Agnes Maria Dunmall, the ten-year-old illegitimate daughter of the testatrix's cousin, Emma Mercy Dunmall. The testatrix, who was living at home with her father and brother (both of whom were well off), had some property of her own, which we are told was given to her by her father. She was on friendly terms with her cousin, who was in humble circumstances, and it is quite natural that she should have become attached to her cousin's daughter and have determined to make a will in her favour.

Had the will been found in the possession of the testatrix at her death and had the attesting witnesses been then dead, it is not disputed that on proof of the signatures of the testatrix and of the attesting witnesses the presumption *omnia rite esse acta* would have applied and the will would have been admitted to probate without any further evidence.

It is contended, however, that as the will was not discovered until 20 years after the death of the testatrix and as it was then found in a desk which had belonged to Emma Mercy Dunmall, the presumption ought to be held to be inapplicable. Mr. Justice Hill has accepted this contention and has withheld probate.

The grounds upon which the learned Judge has arrived at this conclusion are that the will was not produced from proper custody, and that Emma Mercy Dunmall, in whose custody it was, did not disclose it when she heard of the testatrix's death. The learned Judge held that these circumstances were of such a nature as to raise in his mind a strong suspiciton that Emma Mercy Dunmall knew that there was something about the document which prevented her from putting it forward as genuinely the will of the testatrix, and consequently that it could not be admitted to probate without strict proof of its due execution.

Of the cases cited during the argument, those in which the sole question was whether the presumption *omnia rite esse acta* ought to prevail in the face of evidence given by the attesting witnesses, tending to

show that the formalities required for the due execution of the will had not in fact been observed, do not, in my opinion, afford much assistance in solving the question which has arisen in the present case, except perhaps as showing the weight which the Court attaches to the presumption.

On the other hand, in every case in which the Court has had to consider whether, apart from the evidence as to the formal execution of the will, the circumstances were of such a nature as to arouse a well-grounded suspicion that the alleged will did not in fact represent the testamentary wishes of the testator at the time when the document was signed, the suspicious circumstances have been circumstances existing at the time of and surrounding the preparation and execution of the will; one of the most common circumstances being that the person benefiting by the will has prepared it and has prevented its execution. Although Lord Justice Lindley in *Tyrrell v. Painton* ([1894] P. 151, at p. 157) points out that the rule, that the onus of proving that the testator knew and approved of the contents of the will lies upon the party propounding the will, is not confined to such a case as I have last mentioned, but extends to all cases in which circumstances exist which excite the suspicion of the Court, yet, in my opinion, the circumstances which the learned Lord Justice had in mind were primarily circumstances existing at the time when the alleged will was executed and having a direct bearing on the question whether the testator then knew and approved of its contents.

In the present case the matters which have excited the suspicion of the learned Judge are matters which occurred only after the execution of the will. Subsequent events may in some cases no doubt give rise to a suspicion that the will was not properly executed or that the testator did not know or approve of the contents, but in the present case the facts relied upon by the learned Judge are not, in my opinion, of such a nature as to form a good ground for any such suspicion.

Having regard to the fact that Emma Mercy Dunmall was the executrix named in the will and the mother and natural guardian of the sole beneficiary, I do not consider it at all unnatural that she should have been entrusted by the testatrix with the custody of her will, especially if, as is not improbable, the testatrix did not want her father or brother to know that she had made it.

The reasons which induced Emma Mercy Dunmall not to tell her daughter of the will and not to put it forward on the death of the testatrix are less easy to conjecture, but I do not agree with the learned Judge that, in the circumstances of this case, this secrecy and non-disclosure on the part of Emma Mercy Dunmall created a suspicion that the will was not duly executed or that the testatrix did not know or approve of its contents when she signed it.

It is possible, although not very likely, that Emma Mercy Dunmall may have forgotten the will. Assuming that she had not forgotten it, it is possible that the will was handed to her by the testatrix under a pledge of secrecy and on a condition that it was to become inoperative and not to be put forward by her unless the testatrix died within a given time or before the happening of some event, such as the coming of age or the marriage of the infant beneficiary. If this be the true explanation it would also account for the statement made by the testatrix to her brother in the year 1905 that it was time that he and she were thinking of making their wills. It may well be that neither the testatrix nor Emma Mercy Dunmall realized that, unless duly revoked in accordance with the provisions of the Wills Act, 1837, the will would remain effectual.

Be that as it may, however, and bearing in mind that there is nothing on the face of the will to suggest that it was otherwise than regularly executed and that neither its contents nor the known circumstances surrounding its preparation and execution give rise to any suspicion of fraud or undue influence, I am of the opinion that the mere absence of evidence explaining why the testatrix handed her will to Emma Mercy Dunmall and why the latter did not disclose it at the proper time, does not furnish an adequate ground for suspecting that the will was not properly executed or that it did not represent the testamentary wishes of the testatrix at the time when it was made.

In these circumstances I have come to the conclusion that in the present case the presumption *omnia rite esse acta* has not been rebutted and ought to prevail. I therefore agree that the appeal succeeds and that the Court should pronounce for the will.

[Solicitors—Messrs. Scott, Bell, and Co.; Mr. E. F. Hunt, for Messrs. Farrington and Winterton, Brighton.]

K.B. Div. (Swift, J.) } 1927. June 2.

ALBEMARLE SUPPLY COMPANY, LIMITED v. HIND AND CO.*

Lien — Hire-purchase agreement — Taxicabs — Repairs — No authority to hirer to pledge owner's credit — Possession parted with for limited and specific purpose — "Repairs" or "Maintenance"—Appropriation of payments on general account—Creditor's right to leave balance owing for repairs.

The plaintiffs let out three taxicabs to B. on hire-purchase agreements which provided that B. should not have any authority to pledge the credit of the plaintiffs for repairs to any of the vehicles or to create a lien on them in respect of repairs. For a considerable time before May 1, 1925, the cabs, with the knowledge and consent of the plaintiffs, had been garaged at the defendants' garage and B. owed the defendants £94 as the balance of a general account for garage rent, goods supplied, and washing, cleaning, and repairing the cabs. On May 1, 1925, the plaintiffs terminated the hiring agreements as B. was in arrear with his payments to them thereunder, but the defendants refused to hand them the cabs, asserting that they had a lien over them for the cost of the repairs which they had done to them. In an action by the plaintiffs for the delivery-up of the cabs and damages for their detention,

Held: (*a*) That the defendants were entitled "up to the very last moment" to appropriate the payments made to them by B. from time to time generally on account so as to leave a balance owing for repairs in respect of each cab on which to base their claim to a lien.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

Dictum of Lord Macnaghten in *The Mecca* (13 *The Times* L.R., 339 ; [1897] A.C., 286) applied.

(*b*) That the defendants were entitled to a lien on the cabs although at the time when they claimed to retain them they had not ascertained the amount due in respect of each of them, the question of such amount not having been raised by either party until after action brought.

(*c*) That the defendants' lien might attach notwithstanding the provision in the hire-purchase agreements that B. should not have any authority to pledge the plaintiffs' credit, or to create a lien on the cabs, in respect of repairs.

(*d*) That the defendants' lien might attach although they did not have continuous possession of the cabs, since, in letting B. take them out from time to time to ply for hire, they parted with possession only for a limited and specific purpose and without any intention to abandon any rights which they might have in respect of them, including the right of lien.

North-Western Bank, Limited v. Poynter ([1895] A.C., 56) applied.

(*e*) That the defendants' lien was not prevented from attaching on the ground that the work done on the cabs was work of maintenance and not of improvement or real repair.

Hatton v. Car Maintenance Company, Limited (30 *The Times* L.R., 275 ; [1915] 1 Ch., 621) distinguished.

The plaintiffs, the Albemarle Supply Company, Limited, claimed from the defendants, Messrs. Hind and Co., the delivery-up of three motor-taxicabs which, they alleged, were their property, or the value of the cabs, and damages for their detention.

The defendants denied that they had detained the cabs from the plaintiffs and said, alternatively, that, if they had detained them, they had done so under a lien to which they were entitled.

Mr. Cave, K.C., and Mr. A. E. Woodgate appeared for the plaintiffs ; Serjeant Sullivan, K.C., and Mr. Martin O'Connor for the defendants.

His Lordship read the following considered judgment :—In this case the plaintiffs claim a return of three taxicabs or their value and damages for their detention, and the defendants allege that those taxicabs were detained by them under a lien to which they were entitled and allege that they were justified in detaining the same under such lien. Before the trial an order was made for the delivery of the taxicabs to the plaintiffs on their paying the sum of £113 18s. 3d. into Court. That was done and the real question now is : Who are entitled to have that £113 18s. 3d. paid out to them ?

The action came on to be tried before me with a common jury, but the facts as opened by counsel for the plaintiffs were stated by counsel for the defendants not to be in dispute and it was agreed that there was no question for the jury, and it was further agreed that, if, during the course of the case, any issue of fact did arise which it was necessary should be determined, I should decide it, and the jury were accordingly discharged.

The plaintiff company were a company which, among other things, let out taxicabs on the hire-purchase system, and on May 3, 1921, September 13, 1922, and May 5, 1923, they let the three cabs which are the subject of this action to one John Botfield upon hire-purchase agreements. Each of the agreements was in the same terms and provided for the payment of hire and for the purchase of the vehicle when a certain sum had been paid by the hirer to the plaintiffs. At the commencement of May, 1925, the hirer was in arrears in the rent which was due from him in respect of each of these hire-purchase agreements and the plaintiffs terminated the hiring agreements by a letter of May 1 of that year. At that time the cabs were garaged at the garage of the defendants, Messrs. Hind and Co., and they had been garaged there with the knowledge and consent of the plaintiffs for a considerable time. Botfield had from May 9, 1924, to May 5, 1925, become indebted to the defendants in sums amounting to £1,222 7s. 10½d. for garage rent, goods, washing and cleaning, and repairs, and he had made payments generally on account amounting to £1,127 16s. 9½d., leaving a balance of £94 11s. 1d.

The items debited for repairs of the three taxis amounted to £219 5s. 7½d., made up of £56 15s. 10d. for the first cab, £89 16s. 9½d. for the second, and £72 13s. for the third. When the plaintiffs desired to take possession of the three cabs on the termination of the agreements with Botfield the cabs were in the defendants' garage, and the defendants asserted that they had a lien over them for the cost of the repairs which they had done to them and they refused to hand them over unless and until those charges were paid. This action was accordingly commenced. At first the defendants do not seem to have ascertained how much they alleged was owing in respect of each cab, or what sum was required to satisfy their lien, but by a letter dated May 12, 1927, from the defendants' solicitors they claimed to appropriate the payments made by Botfield generally on account in such a way that £124 14s. 6½d. was left after payment of all items other than repairs debited against Botfield. This £124 14s. 6½d. they appropriated to the repairs items, thus leaving a balance of £94 11s. 1d. due to them in respect of repairs with regard to all the cabs. They appropriated £31 10s. 4d. to each cab, thus leaving £25 5s. 6d. due in respect of the first cab, £58 6s. 5½d. due in respect of the second cab, and £41 2s. 8d. due in respect of the third cab.

The first dispute between the parties arises on this letter appropriating the payments made by Botfield and leaving these balances owing for repairs in respect of each cab. Mr. Cave, for the plaintiffs, contended that it was not competent for the defendants to take a general account and so to appropriate payments made on it to particular items as to have a debt owing for repairs on the specific cabs. He said that what was being claimed by the defendants was not a lien for repairs at all, but was a lien for a balance of a general account allocated between three cabs by the simple process of dividing the total balance of the general account by three. Serjeant Sullivan, for the defendants, dissociated himself from any intention or desire to claim a lien on these cabs for the balance of a general account for rent, cleaning, and goods supplied as well as for repairs, but he contended that the defendants were entitled to appropriate the payments made by Botfield "up to the very last moment," and he relied upon the authority of *The Mecca* (13 *The Times* L.R., 339 ; [1897] A.C., 286). In that case Lord Macnaghten said ([1897] A.C., at p. 293) : "Now, my Lords,

there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor. In 1816, when *Clayton's* case (1 Mer., 585, at p. 608) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or, at any rate, within a reasonable time, whatever that expression in such a connexion may be taken to mean. But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention, expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of the civil law, reasonable as it is, that if the debts are equal the payment received is to be attributed to the debt first contracted." I think that the contention of Serjeant Sullivan is right and, if that be so, there was due and owing from Botfield in respect of each of these cabs for repairs, and repairs only, the respective sums which I have set out above.

It was contended that the defendants could not have a lien for the cost of these repairs because at the time when they claimed to retain the cabs they had not ascertained and could not tell the plaintiffs the amount due in respect of each cab. I do not think, however, that this contention is sound. It is the duty of the person claiming goods over which a lien is alleged to exist to tender the proper amount. It may be that the person alleging the lien may by his conduct make it impossible for the claimant to make a tender, so as to show either that the lien is waived or that the tender is waived, but the mere fact that an excessive amount is claimed, or that an indefinite amount is claimed, does not of itself, in my opinion, prove that. See *Scarfe v. Morgan* (4 M. and W., 270). In this case the question of the amount claimed in respect of each cab never was a question considered by either party until litigation had started. The plaintiffs said, "Hand us over the cabs." The defendants said, "No, we have a lien on them." And the action was then started. I do not see anything in that to justify the inference that the defendants so embarrassed the plaintiffs that their conduct amounted to a waiver of their right to have the sum really due tendered to them.

There being, in my opinion, specific sums due in respect of each of these cabs for repairs and the defendants having, in my view, done nothing to lose their lien, if one existed at the time when the plaintiffs claimed the vehicles, it remains to be considered whether such lien did at that time exist.

Mr. Cave contended that there was no lien, first, because it was excluded by the agreements made between the plaintiffs and Botfield; secondly, because the defendants had not had continuous possession of the cabs but had let Botfield take them out from time to time to ply for hire; and, thirdly, because the repairs done were maintenance only and not for the improvement of the cabs.

With regard to the first of these contentions: By clause 5 of each agreement it is provided that "the hirer shall not have or be deemed to have any authority to pledge the credit of the owners for repairs to the vehicle or to create a lien upon the same in respect of such repairs." In the case of *Albemarle Supply Company, Limited v. Hind and Co.* (unreported) (another dispute between these same parties), Mr. Justice Rowlatt held on May 2, 1927, that the lien of a repairer attached notwithstanding the agreement between the owner and the hirer. Having regard to the fact that this exact point arising between these same two parties has been decided by a Judge of this Court, I do not think it right to express any opinion of my own. The cases of *Keene v. Thomas* (21 *The Times* L.R., 2; [1905] 1 K.B., 136) and *Pennington v. Reliance Motor Works, Limited* (38 *The Times* L.R., 670; [1923] 1 K.B., 127) were cited to me and I have considered them, and I have also considered the authorities upon which they are based. Mr. Justice Rowlatt has held that a lien attaches, and no suggestion was in any way made to me that the facts in the case which I am trying differed in any way, so far as this point is concerned, from the facts in the case that he tried, and no evidence was opened to me of circumstances to show that it did not in every detail coincide—so far as this point is concerned—with the case with which he was dealing. I do not, therefore, investigate channels which might be very illuminating as to the defendants' knowledge of the relationship between the plaintiffs and Botfield, nor do I express an opinion upon the authorities which have been cited or referred to. As between these two parties on exactly similar facts there has been a judgment, and I accept it and hold that a lien may attach notwithstanding the proviso in clause 5 of the agreements under consideration.

That brings me to the consideration of Mr. Cave's second contention, namely, that no lien attaches in this particular case because the defendants did not have continuous possession of the cabs, but had let Botfield take them out from time to time to ply for hire. It was conceded by Serjeant Sullivan in effect that the law laid down in Erskine's Institutes is true as a general proposition, namely, that "In a pledge of moveables the creditor who quits possession of the subject loses the real right he had upon it" and that a lien entails continuance of possession, but he contended that delivery of the article subject to the lien for a limited and specific purpose and with the intention of maintaining the lien was not such an interruption of possession as to destroy the bailee's rights. I am of opinion that this view of the law is correct. [See hereon *North Western Bank Limited v. Poynter* ([1895] A.C., 56).]

It therefore became necessary for me to determine as a fact in what circumstances the defendants parted with the possession of these cabs to Botfield and whether such parting was an abandonment of their lien. On this part of the case I had the evidence of Mr. Hind, and I am satisfied, and I find as a fact, that after Botfield had become indebted to the defendants he was allowed to take the cabs out only for the purpose of earning money, part of which was to discharge his indebtedness; that he was allowed to take the cabs out only on his promise to return them to the defendants' garage each night; that the cabs were to be deemed "in pawn" to the defendants; and that the defendants had no intention of abandon-

ing any right of any kind—including lien—which they might have dependent upon the physical custody of the cabs. Upon this finding of fact I hold that the defendants did not cease to have continuous possession so as to destroy their lien over these cabs.

That brings me to the last of Mr. Cave's contentions, viz., that the work done on these cabs was work of maintenance and not of improvement or real repair and was not the subject of lien. In support of this contention he cited the case of *Hatton v. Car Maintenance Company, Limited* (30 *The Times* L.R., 275 ; [1915] 1 Ch., 621). In that case a fixed yearly sum was paid for the hire, equipment, and maintenance of a car—such maintenance to include necessary repairs. It was held by Mr. Justice Sargant that such an agreement did not give a repairer's lien. If I may very respectfully say so, I entirely agree—and if the facts in this case were the same as in that I should consider myself bound by it and should follow it. But the facts in this case are very different. Here the work done by the defendants for which they claim their lien was repair work quite apart from maintenance—there was no fixed price—and the artificer's lien arises in this case just as much, in my view, as though the cabs had been taken for repair to some outside engineering firm who had nothing whatever to do with garaging, equipping, or maintaining them.

For these reasons I think that, holding as I do on the authority of Mr. Justice Rowlatt that a lien may arise in this case, the defendants have done nothing to prevent them from exercising it ; that a lien has arisen ; that they have lawfully asserted it ; and that there must be judgment for them with costs and, subject to any application, an order that the money in Court should be paid out to them.

[Solicitors—Messrs. Amery Parkes and Co. ; Messrs. Edmond O'Connor and Co.]

Chan. Div. } 1927.
(Russell, J.) } June 15.

McLEOD v. DOWLING.*

Partnership — Dissolution — Notice by one partner to determine partnership — Death of that partner before receipt of notice by other partner — Whether partnership dissolved by notice or by death — Partnership Act, 1890 (53 and 54 Vict., c. 39), ss. 32, 33 (1).

By section 32 of the Partnership Act, 1890, " Subject to any agreement between the partners a partnership is dissolved . . . (*c*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership. In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is mentioned, as from the date of the communication of the notice."

By section 33 (1), " Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

Held, that where a partner sends by post a notice to the other partner to determine the partnership as from the date of the notice and dies before the other partner receives the notice, the partnership is dissolved not by the notice but by the death of the partner sending it, inasmuch as the statutory dissolution by notice is not brought about until receipt of the notice. In such a case, therefore, the surviving partner has the rights which by the terms of the partnership he is to have on the death of a partner during the partnership.

The plaintiffs in this action, Messrs. Roderick and Donald McLeod, were the executors of the will of Mr. Llewellyn Wynn McLeod. The defendant, Mr. Henry Barré Dowling, and Mr. Llewellyn Wynn McLeod, entered into partnership on April 13, 1913. The articles of partnership provided that they should carry on in partnership the profession of solicitors for seven years under the name of McLeod, Eyre, Dowling and Co., at No. 6, New-square, Lincoln's Inn. If either partner died during the term of the partnership, the surviving partner was to be exclusively entitled to the business and goodwill of the partnership, the surviving partner to pay for three years to the executors of the deceased partner one-third of the profit costs derived from the business of the deceased partner's clients. The defendant said that this provision was only to apply during the term of the seven years.

After the partnership had expired without any new agreement being made the partnership was still carried on at No. 6, and later at No. 1, New-square.

By a notice in writing dated February 23, 1927, Mr. L. W. McLeod gave notice to the defendant to determine the partnership on April 20, 1927. Later, by a notice dated March 23, 1927, he gave notice to the defendant to determine the partnership as from that date—namely, March 23. The notice was posted at Surbiton between 3 and 4 p.m. on March 23, and was received by the defendant on March 24 at 10 a.m.

Mr. L. W. McLeod died on March 24, 1927, at 3.15 a.m. The plaintiffs contended that the partnership was determined by the notice as from March 23, 1927. The defendant submitted that it was determined by the death of Mr. L. W. McLeod on March 24, 1927, and that he (the defendant) was exclusively entitled to the business and goodwill. The defendant circularized his late partner's clients and informed them that he proposed to carry on the business under the name of McLeod, Eyre, Dowling and Co.

On April 5, 1927, the defendant was appointed receiver of the partnership business until the trial of the action. The plaintiffs asked for a declaration that the partnership was dissolved as from March 23, 1927 ; that the provisions in the articles relating to the death of either party had no application ; and that the affairs of the partnership be wound up and adjusted with proper accounts and inquiries.

Mr. Vaisey, K.C., and Mr. J. G. Joseph appeared for the plaintiffs ; Mr. Owen Thompson, K.C., and Mr. Danckwerts for the defendant.

Mr. Justice Russell, in the course of his judgment, said that the question was whether the notice of March 23 was effectual to dissolve the partnership so that the assets and goodwill must be realized and the proceeds divided between the partners in equal shares, or whether it was dissolved by the death of the partner. This depended on the true construction of sections 32 and 33 of the Partnership Act, 1890.

* Reported by J. B. B. MacMahon, Esq., Barrister-at-Law.

Section 32 provided :—"Subject to any agreement between the partners a partnership is dissolved . . .

"(*c*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

"In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice."

Section 33 (1) provided :—

"Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

In his view section 32 dealt with two things—first, dissolution ; and, secondly, the date from which the dissolution should run. The enacting part of the section which brought about the statutory dissolution was the first part and it provided that a partnership was dissolved by any partner giving notice to the other. In his opinion that statutory dissolution was not brought about until notice had been given by partner A to partner B—*i.e.*, until partner B, or his authorized agent, had received the notice. Section 32 did not come into operation as to subhead (*c*) until notice had been received by the defendant. By that time the partnership had been dissolved by the death of Mr. McLeod.

It was said that the provision in the articles that the surviving partner should pay over one-third of the profits derived from his deceased partner's clients only applied during the term of the partnership—*i.e.*, during the seven years. But the law was that after a partnership had expired and, without any new agreement, was carried on as a partnership at will, such articles of the old partnership as were not inconsistent applied to the new partnership. In his opinion the agreement to pay over the one-third of the profits was quite consistent with the partnership at will.

[Solicitors—Messrs. Glynn Barton and Pocock ; Messrs. Markby, Stewart, and Wadesons.]

K.B. Div. (Rowlatt, J.) } 1927. June 16.

ATTORNEY-GENERAL v. METROPOLITAN WATER BOARD.*

Revenue — Income-tax — Water authority—Interest on stock and debentures—Deduction and retention of tax—Whether interest paid out of profits not brought into charge—Liability to account for tax—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), All Schedules Rules, Rules 19, 21.

The profits of the Metropolitan Water Board are assessable under Schedule A, No. III., Rule 3, of the Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. The accounts of the Board for the year ending March 31, 1922, showed a loss, and therefore no assessment was made on the Board under Schedule A, No. III., for the year ending April 5, 1923. The accounts for the year ending March 31, 1923, showed a profit of over two millions, out of which the Board paid over one million interest on water stock and debentures, deducting and retaining the income-tax thereon. On an information claiming that under Rule 21 of the All Schedules Rules the Board was liable to account to the Commissioners of Inland Revenue for the amount of the tax so deducted, the Board contended that the interest paid for the year 1922-23 was payable out of profits brought into charge for 1922-23 within Rule 19 of the All Schedules Rules and was in fact paid out of the profits for 1922-23, and that, although the income-tax for 1922-23 was to be measured by the profits of the preceding year, the profits for 1922-23 had been brought into charge, and Rule 21 did not apply.

Held, that as the Board had been assessed at zero under Schedule A for 1922-23, the interest had not been paid out of profits brought into charge, and the Crown was entitled to succeed.

This was an information in which the Attorney-General claimed £409,000 odd from the Metropolitan Water Board, being the amount of tax on interest paid on water stock and on other annual payments made in the year ending April 5, 1923. The amount of the payments was £1,668,351, and the sum claimed represented income-tax at the rate of 5s. in the pound, the rate in force at the time when the interest was paid, less £8,027 odd, tax on profits and gains otherwise brought into charge.

For the year ending April 5, 1923, the interest payable by the Board on water stock issued by them or on redeemable Debentures in respect of which they had assumed liability and certain other annual payments due from them amounted to £1,730,751 16s. 10d. Part of that sum was paid without deduction of income-tax, but from the remainder—£1,668,351—£435,617 3s. was deducted and retained as representing the tax thereon at the rate or rates in force during the period through which the interest and other annual payments of which the sum of £1,668,351 0s. 7d. was composed was accruing due. Income-tax on £1,668,351 0s. 7d., at the rate of 5s. in the pound, being the rate in force during the year ending April 5, 1923, amounted to £417,087 15s. 2d.

The profits of the Board were assessable under Schedule A in accordance with Schedule A, No. III., Rule 3, of the Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. For the year to March 31, 1923, the Board's accounts relating to the undertaking showed (after adjustment for income-tax purposes) a profit of £2,481,085, out of which the Board paid the interest referred to. That figure formed the basis for an assessment under Schedule A, No. III., made upon the Board for the year ending April 5, 1924, against the amount of which assessment an allowance (including sums carried forward from previous years) in respect of wear and tear of plant and machinery fell to be made to the amount of £798,328, leaving a net figure of £1,682,757 for that year.

The accounts relating to the undertaking of the Board for the year to March 31, 1922, disclosed (after adjustment for income-tax purposes) a loss of £57,366 3s. 2d., and therefore no assessment was due to be made or was made upon the Board under Schedule A, No. III., for the year ending April 5,

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

1923. The increase in the profit made in the year to March 31, 1923, was due to the fact that the Board was enabled to raise its charges to the public in consequence of the passing of the Metropolitan Water Board (Charges) Act, 1921, which came into force on April 1, 1922.

The Board for the year ending March 31, 1923, paid income-tax or suffered tax by deduction in respect of other income to the extent of £8,027 12s. 3d., on the amount of £32,110 9s. 0d., made up as follows :—

	Amount.	Tax paid or deducted.
	£ s. d.	£ s. d.
Rent receivable (Sch. A)	7,293 3 1	1,823 5 9
Property owned and occupied by the Board (Sch. A)	11,849 14 0	2,962 8 6
Interest on Investments (excluding investments of accumulating Redemption Fund) ..	12,967 11 11	3,241 18 0
	£32,110 9 0	£8,027 12 3

The Board also suffered tax by deduction for the year on £5,019 interest on investments of an accumulating redemption fund, but for the purposes of this case it was agreed that that interest was not to be taken into account, and except as aforesaid the Board did not become liable to pay by deduction or otherwise any income-tax in the year ending March 31, 1923.

The Attorney-General contended that for the year ending April 5, 1923, the Board was liable to account to the Commissioners of Inland Revenue under Rule 21 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, for the sum of £409,060 2s. 11d., made up as follows :—

Tax at the rate of 5s. in the £ in respect of interest and annual payments		£417,087 15 2
Less tax on taxed income,	£32,110 9s. 0d.	£8,027 12 3
		£409,060 2 11

The Board contended that the interest on the water stock and on the redeemable debentures and the annual payments referred to paid by the Board for the year 1922-23 were payable wholly out of profits or gains brought into charge to tax within Rule 19 of the said Rules ; that the profits or gains of the Board brought into charge to tax for the year 1922-23 were the profits of the Board of that year (namely, the said £2,481,085), though the liability to income-tax for that year was to be measured by the amount of the profits of the preceding year, and that was so whether there were profits of the preceding year or not ; that the profits or gains of the Board brought into charge to tax for the year 1922-23 were sufficient in amount to meet the interest and annual payments payable for that year, and the interest was in fact paid and the annual payments were in fact made out of these profits or gains ; that the fact that no assessment was or could be made on the Board for the year 1922-23 was irrelevant ; that the Board was entitled, under Rule 19 of the Rules, to retain for itself the income-tax deducted on payment of the interest and annual payments ; and that Rule 21 of the Rules had no application to this case.

Mr. R. P. Hills appeared for the Crown ; Mr. Latter, K.C., and Mr. Cyril King for the Board.

Mr. Justice Rowlatt, in giving judgment, said that the question for him to decide was whether the interest and payment in question had been paid by the Board out of "profits or gains brought into charge to tax" within Rule 19. What was brought into charge in any income-tax year of assessment was the profit of that year, which might be calculated or estimated by reference to some other year, or to a series of years, or to anything that the Legislature might choose to set up as a standard of calculation. But the subject-matter of the charge was the profits and gains of the year of charge.

Were the interest and payments in the present case, which were paid in the year ending April 5, 1923, paid out of the profits or gains brought into charge, not necessarily in that year, because if the Board had profits and gains brought into charge in previous years and had carried them forward and used them to liquidate the interest and other payments, they would be none the less profits or gains brought into charge ? He had not, however, heard of any amount being carried forward from previous years. All the profits or gains brought into charge of which he had heard were those brought in at the figure of zero. The Board could not pay £1,600,000 odd out of nothing. But Mr. Latter had said that, while zero was the figure at which the Board had been assessed, the profit of the year was really £2,481,085, and that the interest and other payments had been paid out of that money. He (his Lordship) knew nothing of that figure. The only figure which he could regard was that which appeared as profits and gains in the assessment relating to the year in question.

The Crown were entitled to succeed, and there would be judgment accordingly for the amount claimed, with costs.

A stay of execution was granted.

[Solicitors—The Solicitor of Inland Revenue ; Mr. C. A. Hunt.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1927. June 14.

WILLIS v. WILLIS.*

Divorce — Restitution of conjugal rights — Judicial separation — Settlement of suit — Deed of separation—Agreement to execute—Term as to custody of child — Refusal by agreed custodian—Whether settlement prevented from being carried into effect.

The Court held that where the parties to a matrimonial suit had agreed to settle it upon certain terms, and a deed of separation had been approved to give effect to such settlement, the refusal of the husband's brother to undertake the custody of one of the children, as nominee of the husband, which custody had been agreed on between the husband and wife as one of the terms of the deed, was not a failure of such a vital term as to prevent the settlement from being carried into effect.

This was an appeal from a decision of Mr. Justice Bateson, who had refused to order the petitioner, the

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

husband, to execute a deed of separation, the heads of which had been agreed on by the parties, and had restored the cause to the list on the ground that, owing to the husband's brother having refused to accept the custody of a child of the marriage, the agreement could not be carried into effect.

The husband, Commander A. U. Willis, presented a petition for restitution of conjugal rights on February 18, 1926. The wife, Mrs. Olive Christine Willis, pleaded just cause and prayed for judicial separation and for the custody of the two children of the marriage, Mary, born in December, 1917, and Joan, born in July, 1920. In November, 1926, the petitioner obtained an order that the children should go and stay with his brother and sister-in-law Mr. and Mrs. H. J. Willis, during his (the petitioner's) Christmas leave.

The suit came on for hearing on February 10, 1927, before Mr. Justice Hill, who thought that the case was one which ought to be settled. On February 11 the parties ultimately agreed to certain terms of settlement which were put into writing and signed by them. It was provided that the terms should be filed and made a rule of Court and any dispute as to the terms of the deed of separation was to be settled by counsel, Mr. C. Talbot-Ponsonby, on behalf of both parties.

A separation deed was drafted and settled on behalf of the parties by Mr. Talbot-Ponsonby. The terms of the deed were embodied in ten items. On May 12 the petitioner's solicitors wrote stating that their client refused to execute the deed as drawn, on the ground that an essential term could not be carried into effect.

One of the terms agreed on was that the legal custody of the elder child, Mary, should be entrusted to the petitioner's brother, Mr. H. J. Willis, though she was to continue to live with her mother. Mr. H. J. Willis refused to undertake the custody of the child under those conditions. He said that he had been asked to undertake certain duties and responsibilities which he was unable to fulfil unless he was given the actual custody of the child and the right of access to her and was made a party to the deed. Thereupon a summons was taken out by the wife asking that the husband should be ordered to execute the deed. The husband took out a summons to have the case restored to the list for hearing.

Mr. Justice Bateson, before whom the summonses came, made no order on the first, but on the second summons ordered the case to be restored to the list. He gave leave to appeal on each summons. The wife appealed.

Mr. Willis, K.C., and the Hon. Victor Russell appeared for the appellant; Mr. Cotes-Preedy, K.C., and Mr. T. Bucknill for the husband. Mr. J. M. Tucker held a watching brief for the husband's brother, Mr. H. J. Willis.

The Master of the Rolls, in the course of his judgment, said that the case raised an important question not only for the parties, but possibly for many other persons in a similar position. His Lordship stated the facts, and proceeded:—One of the terms of the deed of separation was that the custody of the elder child should be given to the petitioner's brother, Mr. H. J. Willis. The term "custody" did not mean actual physical custody, but the right to control. Having regard to charges which had been made by the wife against the husband, partly with regard to the children, which charges, however, had been withdrawn, it was important that custody should be carefully provided for.

There were a number of points in the deed which counsel who settled it had to attend to, including the question whether the money paid for maintenance and education of the children should be paid free of income-tax or not. His Lordship then read the letter from Messrs. Martyns and Gane, solicitors for Mr. H. J. Willis. When that letter was sent it was taken to mean that Mr. H. J. Willis had refused to accept the deed as drawn and that his refusal went to the essence of the settlement and prevented its terms from being carried into effect. The basis of Mr. Justice Bateson's decision was this: He accepted the argument that, as Mr. H. J. Willis had refused to accede to the terms of the settlement, the whole fabric of the settlement had fallen to the ground. In taking that view he followed the principle laid down in *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited* (32 *The Times* L.R., 677; [1916] 2 A.C., 397), where Lord Loreburn (at p. 403) said:—

"But a Court can and ought to examine the contract and the circumstances in which it was made, not, of course, to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract."

Mr. Justice Bateson took the view that Mr. H. J. Willis's refusal upset the whole of the contract. He (the Master of the Rolls) did not share that view. It did not appear to him that the settlement fell to the ground. It was necessary to consider the facts. The primary issue between the parties, one of whom was petitioning for restitution of conjugal rights, the other for separation, was separation or no separation. They agreed to execute a deed of separation with all the usual covenants and that all charges should be withdrawn.

The importance of an agreement was not to be measured by the length of time taken in reading it. There were a number of clauses in the agreement about which no difficulty arose at all, the only real difficulty being as to the custody of the child, Mary. It would be quite wrong to suppose that that difficulty brought the agreement to an end. The agreement as to its general terms remained a valid and operative agreement between the parties. The Court, therefore, must allow the wife's appeal and discharge the order restoring the cause to the list for hearing.

The Court thought that the Judge was wrong in refusing to make any order, but they would remit the case to him to consider, without defining exactly what order he ought to make. It had been represented to the Court by counsel on both sides that the case presented great difficulties and he could well believe it, but the difficulties were not such as to upset the settlement. The best opinion of conveyancers was that Mr. H. J. Willis ought not to be a party to the separation deed. He (his Lordship) would only add that he hoped that an effort would be made on both sides finally to settle the case not only in the parties' own interests, but in those of the children, and he would remind them of the old saying: "Where there's a will, there's a way."

Lord Justice Sargant and Lord Justice Lawrence delivered judgment to the same effect.

[Solicitors—Mr. Bertram Sturt; Messrs. Brown, Turner, Compton, Carr, and Co.; Messrs. Martyns and Gane.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. June 21.

IN RE THE PETITION OF CLAYTON.*

Legitimation — Procedure — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 188, 226 ; Sched. VI.— Legitimation Act, 1926 (16 and 17 Geo. V., c. 60), s. 2 (1).

This was a summons adjourned into Court in which an application was made for his Lordship's directions with regard to a proposed petition by a woman for a declaration of legitimacy of her three children under the Legitimacy Declaration Act, 1858, as amended by the Supreme Court of Judicature (Consolidation) Act, 1925, and the Legitimacy Act, 1926.

Mr. H. Durley Grazebrook said that no question of any claim to inherit specific property arose, and a direction was sought as to the procedure to be followed for a declaration of legitimation under the Act of 1926, which provided by section 1 (1) that "where the parents of an illegitimate person marry or have married one another . . . the marriage shall . . . render that person if living legitimate from the commencement of this Act, or from the date of marriage, whichever last happens."

Counsel pointed out that section 2 (1) of the Act provided for a petition to be presented under the Legitimacy Declaration Act, 1858, by the person seeking to be legitimated, but the draughtsman had not observed that the whole of that Act, except for two and a half lines, had been repealed and re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, sections 188 and 226, and Schedule VI.

The President.—Until it is authoritatively decided to the contrary I shall be ready to proceed on the footing that this is a manifest slip on the part of the draughtsman. But the effect of the re-enactment is clear. The party to be legitimated must be the actual claimant. His Lordship recalled that the infant claimant in *Slingsby v. Attorney-General* (33 *The Times* L.R., 120) proceeded through his guardian.

Mr. Grazebrook said that here two of the children were of age and could proceed by themselves, and that the third was under age. He submitted that three persons might join in one petition.

The President.—Each of the children is a competent suitor and if each presents a separate petition the proper procedure would be to hear them together with one set of affidavits and one body of evidence. As regards the question of a comprehensive petition, on some future occasion an ingenious person might wish to complicate an application by advancing a plea on behalf of all the claimants which applied only to one or more of them and not to all of them. I give leave to proceed in this case on one body of evidence and three petitions. Before filing the petitions notice should be given to the Attorney-General of the application in the three cases and the Court will direct the petitions to be filed within one month of the notice to the Attorney-General.

Mr. Grazebrook pointed out that in the County Court rules on this subject it was provided that the petition itself should be served on the Attorney-General.

The President.—What I have indicated to you is an effectual mode of dealing with the matter in this Court. Your difficulty will be that you will have to deal with the position of interested parties. You must take care that everybody is before the Court whose interests may be affected, including possibly the next-of-kin of the putative father.

[Solicitors—Messrs. T. W. Hall and Sons.]

* Reported by William Latey, Esq., Barrister-at-Law.

K.B. Div. (Rowlatt, J.) } 1927. May 31.

PICKFORD v. QUIRKE.
PICKFORD v. INLAND REVENUE COMMISSIONERS.*

Revenue — Income-tax — Carrying on trade— Successive adventures—Additional assessment —When made—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 125 (2).

During the Lancashire cotton "boom" of 1919, the appellant, in company with other persons, engaged in the operation known as "turning over" a cotton mill, *i.e.*, acquiring a controlling interest in the mill, organizing its administration and finances and re-selling it. The operation was successful, and the appellant was asked to join, and did join, several further syndicates engaged in "turning over" other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923 ; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923.

Held, that though each adventure of "turning over" a mill was not a trade, the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade by him.

Held, also, that the assessment was in time, having been made by the Additional Commissioners within the three years allowed by s. 125 (2) of the Income Tax Act, 1918. The subsequent steps need not be within that time.

This was a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

G. Pickford (the appellant) appealed against an assessment to income-tax (Schedule D) in the sum of £15,000 for the year ending April 5, 1920, made upon him in respect of promotion profits by the Additional Commissioners for the division of Middleton in the County of Lancaster under the provisions of the Income Tax Acts.

The assessment was an estimated assessment made in the absence of a return. The book of assessment in which this assessment was included was signed by the Additional Commissioners on March 24, 1923, but was not delivered to the General Commissioners until April 18, 1923. Notice of the assessment was not

* Reported by J. W. Hall, Esq., Barrister-at-Law.

sent to the appellant until May 5, 1923, and the assessment was not signed by the General Commissioners until September 5, 1923.

In the year 1919 there was a boom in the Lancashire cotton spinning trade. Many spinning mills were being sold by their old proprietors or were passing from one set of shareholders to another. When the shares in a spinning company changed hands it often happened that the old mill-manager was dismissed by the new Board of Directors and a new one was engaged who was personally known to the group of men who had obtained control of the business. As a consequence of this the position of mill-managers in 1919 tended to become insecure and their future prospects were uncertain.

In 1919 John William Wroe was manager of the Commercial Mills Spinning Company, Limited (the old company), which owned a spinning mill in Oldham. It was within his knowledge that many mills in the neighbourhood were passing to new proprietors and that another local spinning company had been considering the desirability of purchasing the shares in the old company with a view to working the two mills with one manager. These things made Mr. Wroe anxious about his position, foreseeing as he did that if the Commercial Mill passed under the control of men who were strangers to him he would very likely lose his situation. He approached Mr. Charles Henry Pickford, the chairman of the directors of the old company, and put the position before him. Mr. C. H. Pickford, who was about 70 years old and was prepared to sell his shares and to retire from business, appreciated Mr. Wroe's position and suggested to him that he might join forces with his son, Mr. George Pickford (the appellant) and buy out the shareholders of the old company. Mr. George Pickford was manager of one spinning company in the neighbourhood and was director of another, and his father was desirous that in the event of a change in the proprietorship of the old company his son should have a chance of succeeding him.

Mr. Wroe then sought out the appellant and enlisted his support for the enterprise. They were joined by Mr. Thomas Norcliffe, one of the directors of the old company, who wanted to remain on the Board, even if the shares in the old company changed hands. The combined resources of these three, G. Pickford (the appellant), J. W. Wroe, and T. Norcliffe, proving insufficient for a transaction of the size contemplated, they decided to invite two other men engaged in the cotton trade to join with them. These were Mr. J. S. Higham, proprietor of a cotton mill in Oldham, and Mr. Frank Partington, manager and director of another company owning a mill in the same locality. Those five persons were able between them to command sufficient funds or credit to undertake the purchase of all the shares in the old company.

Negotiations were opened with the old company, with the result that Messrs. G. Pickford (the appellant), J. S. Higham, T. Norcliffe, F. Partington, and J. W. Wroe (the five associated persons) bought, in August, 1919, all the shares in the old company for the sum of £118,770, which included a sum of £6,600 paid to the directors of the old company for loss of office. They then determined to liquidate the old company and to form a new company to be named "Commercial Mills Spinning Company (1919), Limited" (the new company), which should buy from the liquidator all the assets and liabilities of the old company at a net price of £150,000. They also determined that the capital of the new company should be £150,000, divided into 150,000 ordinary shares of £1 each, and that 10s. only per share should be paid up upon allotment. The five associated persons anticipated that upon the issue of the shares in the new company the said shares would be saleable at a price in excess of the 10s. per share which was to be paid on allotment.

The appellant and J. S. Higham, acting for the five associated persons, then entered into an agreement dated November 10, 1919, with an agent on behalf of the proposed new company, which, after reciting (*a*) that the appellant and J. S. Higham had purchased all the shares in the old company; (*b*) that the new company was to be formed to buy, for a net sum of £150,000, all the assets of the old company subject to the liabilities of the old company; and (*c*) that it was anticipated that the shares in the new company would immediately after issue be bought and sold at a premium, provided, *inter alia*, as follow:—

"(1) The said George Pickford and John Samuel Higham shall keep and retain for their own benefit and without being liable to account therefor to anybody whomsoever all profit which they may have made or may make by reason of their purchase of the shares in the old company and the said sale to the new company.

"(2) The directors of the new company may allot the shares in the new company at par to any person or persons whomsoever, including themselves, notwithstanding that a premium may be obtainable therefor, and if any of them shall make any profit by selling the said shares at a premium he shall not be liable to account therefor to the new company or to anybody whomsoever."

The old company went into voluntary liquidation, the new company was duly incorporated on November 13, 1919, the five associated persons being the directors of the new company, and the agreement referred to was adopted by the new company on December 8, 1919. The five associated persons received £150,000 from the liquidator of the old company in their capacities as shareholders in the old company, and they allotted to themselves all the shares (150,000 of £1 each, 10s. paid up) in the new company. Having been allotted all the shares in the new company the five associated persons retained 2,000 shares each as directors' qualification shares and sold the remainder at the price of 12s. 6d a share. At no material time had any further call been made upon the said shares.

For the purposes of these transactions a bank account was opened in the joint names of the five associated persons into which was paid the amount received from the liquidator of the old company and the amounts which they received on the sale of the shares in the new company, and out of which was paid (with the help of a loan from the bank when necessary) the amount which they paid for the purchase of the shares in the old company and the amount which they paid to take up the shares in the new company. The balance of this account represented their total profit on the whole transaction, and this was divided into five equal parts and distributed among the five associated persons, who immediately placed their respective shares of profit on loan with the new company.

Transactions of this nature (which were known locally as "turning over a mill") were very common in Lancashire at that time. Before the proceedings in connexion with "turning over" the Commercial Mill had been formally completed, the appellant was approached by a Mr. Ogden, who was then manager of the Glodwick Mill, with the suggestion that he

would perform a similar operation in connexion with the Glodwick Mill.

The case set out in detail the facts relating to the "turning over" by the appellant of the Glodwick Mill and of two other mills called the Lime Mill and the Olive Mill. He declined to be concerned in a large number of others.

Evidence was given by the appellant to the effect that he had been engaged in the cotton trade in Oldham from his youth up; that his object in the above-mentioned transactions was to improve his position in that trade by becoming a director of cotton spinning companies; and that at the time when he and the persons associated with him were selling the shares in the four companies concerned to the public at 2s. 6d. a share premium the state of the trade and of the cotton share market was such that they would have had no difficulty in obtaining a much larger premium.

At the time of the hearing of the appeal the appellant was still a director of the four new companies formed in connexion with the aforesaid transactions, holding shares in those companies and having money on loan with those companies.

It was contended for the appellant:—(*a*) That the signing of the assessment by the Additional Commissioners did not constitute the making of an assessment and that the assessment appealed against was therefore invalid as not having been "made" within three years after the expiration of the year of assessment; (*b*) that the appellant was not in these transactions carrying on a trade the profits of which were assessable under Case I. of Schedule D of the Income Tax Act, 1918; (*c*) that the profits arising to the appellant from these transactions were not assessable under Case VI. of Schedule D; and (*d*) that the assessment should be discharged.

For the Crown it was contended:—(1) (*a*) That it was not competent for the appellant to raise, or for the Special Commissioners to decide, in proceedings by way of appeal against an assessment, the question whether in making that assessment the procedure prescribed by the Income Tax Acts had been strictly followed, and that, therefore, no evidence as to the dates upon which the assessment in question was signed should be received by the Special Commissioners; alternatively, (*b*) that the assessment was "made" when it was signed by the Additional Commissioners and that, therefore, it was made within the time limited by law.

(2) That the profits arising to the appellant from the four transactions in question were assessable under Case I. of Schedule D, as being profits of a trade, manufacture, adventure, or concern in the nature of trade.

(3) That, alternatively, the profits so made were assessable under Case VI. of Schedule D.

The Special Commissioners who heard the appeal, having taken time to consider their finding, held on the appellant's first contention (being of opinion that they had power to decide the matter) that the assessment was "made" when it was signed by the Additional Commissioners before April 5, 1923, and was therefore made in due time. On the appellant's other contentions they gave their decision in principle in the following terms:—

"The present is one of a series of appeals which have been brought before us arising out of the conditions prevalent during the Lancashire cotton boom of 1919-20. The appellant has entered into four transactions involving in each case the purchase by himself and others of the shares of a company owning a spinning mill, the liquidation of the company, and the formation of a new company. This was known locally as 'turning over a mill.'

"The result of these transactions is that the appellant has been able to accomplish what was upon the evidence his main object in them, that is to say, to establish himself in a position of power as a director of the new companies. We accept the evidence that this was the primary object which he had in mind when entering into these transactions.

"In the circumstances obtaining at the time in the cotton trade it was possible for the appellant so to arrange matters that each transaction should, when it was concluded, leave a profit in his hands. It was, moreover, necessary, if the appellant's ambition to become a director of several companies was to be achieved, that the transactions should be successful as measured in terms of money, for the appellant was without the means or credit to carry through more than one or two transactions at most without such success, and if the first transaction had resulted in a loss the others would probably not have followed.

"In our view the transactions considered separately are capital transactions, and the first transaction, considered by itself, would not have constituted a trade nor would it have attracted liability to income-tax under Case VI. of Schedule D. As, however, there was more than one transaction we have to ask ourselves whether, when all the four transactions are regarded together, the appellant can be said to have entered 'habitually' into profitable contracts in such a sense as to constitute the four transactions, into which he did enter, a trade; in other words, stating the matter in the language of the day, 'did he make a business of "turning mills over"?'

"In deciding this question we have to remember that the appellant did not try to make as much immediate profit as he might quite easily have made out of the transactions, and declined to enter into many other similar transactions which were offered to him, and cannot, apart from these transactions be regarded as a dealer in shares or securities. We are also asked to have regard to the case of *Stott v. Hoddinott* (7 Tax Cas., 85). On the other hand the appellant did in fact make a profit on the four transactions in which he took part, and the fact that many other similar transactions were offered to him may be used to show that he was known in the trade to be engaged in transactions of this kind and to be prepared to consider similar offers on their merits.

"The question, as we have stated it, is we think a question of degree. In two other appeals which we heard at the same time as the present appeal the appellants had been concerned in a much larger number of these transactions during the cotton boom, eleven in one case and sixteen in the other, and in those cases we have held that the appellants were making a business of 'turning mills over' and were therefore carrying on a trade within the meaning of the income-tax and excess profits duty Acts. Can we come to a different conclusion in this case because the present appellant had an ambition more modest than theirs and was content with a less commanding position; because, in other words, he did the same things for the same motive in the same way but not so often? Are we to say that he drew back before he reached the point where 'turning mills over' becomes a business? We think, after carefully weighing all the facts that we must decide the question against him, and that the true view is that what he did was done in the course of what must be called a business of turning to his advantage the very peculiar conditions of the period during which the transactions took place.

"We hold accordingly that he is liable to excess profits duty and income-tax, and we must ask the two sides to agree figures to include his total profits from the transactions."

On the basis of this decision the liability to income-tax (Schedule D) was agreed by the parties to the appeal to be £9,667, and the Special Commissioners accordingly reduced the assessment to that figure. No question arose as to the amount of the assessment, which was agreed.

A second case was stated on the same facts with regard to an assessment to excess profits duty.

Mr. Latter, K.C., and Mr. Edwardes Jones, K.C., appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

At the conclusion of Mr. Latter's argument on behalf of the appellant,

Mr. Justice Rowlatt, in giving judgment, said:—I do not think I need trouble you, Mr. Attorney, not out of want of respect for Mr. Latter's argument but really because he has put it so fully and completely that I think I am already clear that his points fail.

His first point is that this matter is concluded by a previous decision. The case stands thus: This gentleman associated himself with other gentlemen, in different combinations, in what is called turning over four cotton mills; that is to say, he acquired them and disposed of them to a new company in a way that showed a balance in his favour. He did that, as I say, in four cases, in each case in combination with other gentlemen and not always the same gentlemen. In each of these four cases it was held that his action was not the carrying on of a trade. Now he has been assessed in respect of the result to himself of the four adventures or four transactions combined into one, and it has been decided by the Special Commissioners that in that respect he was carrying on an adventure in the nature of trade. Now, of course, it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader, and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in the trade as a whole; of course losses being set against profits, and all then being combined into one trade. Now I do not understand how it can be said that the first decision concludes the second. The second depends upon an issue which never arose and was never dealt with, either by decision or by admission or by assumption in the first case; it never came into it at all. It was held that the individual transactions were not adventures in the nature of trade and were not taxable. So be it. But consistently with that, and consistently with every element in that view, it can be held that as a whole these transactions, so far as the appellant took part in them, were a trade, adventure, or concern on his part. That really is the end of it. If he had not had any associates and it was held that he alone was not trading in respect of such transactions as these taken separately, it could still have been held that when they are all taken together he was carrying on a trade. I do not think there is any difficulty about that at all.

The second point that was taken was this. It was said that if he was to be assessed at all he must be assessed together with the persons with whom he was associated in these transactions. That is the same point again. He was assessed in respect of something different. The assessment on the overriding adventure in the nature of a trade which resulted from his participation in these transactions is not an assessment upon the transactions themselves. It is the same point over again, and I think it fails.

I ought to mention the case of *Birt, Potter, and Hughes, Limited v. Commissioners of Inland Revenue* (6 Annotated Tax Cases, 237). There the question was whether two forms of activity, each of them adventures in the nature of trade, could be combined for the purpose of being assessed together to excess profits duty. The Commissioners there found as a fact that there were two independent trades, and this was an end of it in the view which the Court of Appeal took. Here the Special Commissioners have found as regards the independent transactions one by one that there was no trade, but that in respect of this gentleman's participation there was a trade. I cannot see how that case bears upon this one at all; it seems to me to be in an entirely different region.

The third point was a point of time. The assessment on this unfortunate gentleman is an additional first assessment, which may be made within three years of the expiration of the year of assessment under section 125 of the Income Tax Act, 1918. The three years expired on April 6, 1923. In March, 1923, the Additional Commissioners made this additional first assessment. When I say they made it, I do not want to beg the question. The Additional Commissioners at that time entered this assessment and signed it; it was not until after April 6, 1923, that they sent it on to the General Commissioners; of course it was long afterwards that the General Commissioners signed and allowed it and it was necessarily after that sending to the General Commissioners that the subject had notice of it. Now it is said that there was no additional first assessment made within section 125 (2) before April 6, 1923; in a word, that it was not made by the Additional Commissioners when they entered it in their book and signed it. Now the Act of Parliament here is imposing a time limit and it can make the time limit apply to any step in the proceedings that it chooses. It is perfectly true that what the Additional Commissioners did in March, 1923, did not impose upon the subject a liability to pay. That is quite clear from Lord Wrenbury's decision in *Kensington Income Tax Commissioners v. Aramayo* (31 *The Times* L.R., 606; [1916] 1 A.C., 215), and it is clear from the decision of Mr. Justice Bankes (as he then was) in the action that was brought for wrongful distress in the case of *Berry v. Farrow* (30 *The Times* L.R., 129; [1914] 1 K.B., 632), because there the distress was made and until the subject was liable the distress could not properly be made. That is perfectly true. It is also perfectly true that, when section 32 of the Finance (No. 2) Act, 1915, which was passed to remedy the difficulty disclosed in the *Aramayo* case in the Court of Appeal (30 *The Times* L.R., 574; [1914] 3 K.B., 429), used the word "charge," it was referring to the allowance by the General Commissioners when the subject first becomes liable. That is all perfectly true, but I have simply to look at section 125 (2) of the Act of 1918 and to see what is the step that must be taken within the three years. That is all that I have got to see. Whatever that step may be in its effect, what is the step that the subsection is mentioning? It says "An additional first assessment may be made." What does that mean? I go to the part of the section which creates the thing that is being alluded to. Here it is; at the very end of section 125 (1) it says this: "Where the tax is chargeable under Schedule D, the Additional Commissioners shall make an assessment on

the person chargeable, in an additional first assessment . . . and any such assessment shall be subject to objection by the surveyor, and to appeal." Now what is subject to objection by the surveyor and to appeal, is of course what the Additional Commissioners do before it becomes an effective charge upon the subject. But here, what the Additional Commissioners did was to make an assessment in an additional first assessment, and when the next subsection says that an additional first assessment may be made I really cannot see how it can be said that reference is not being made to the making of an assessment in an additional first assessment mentioned at the end of section 125, and that is the act of the Additional Commissioners. Now I think it is quite clear (and section 52 (2) of the Taxes Management Act of 1880, which this section replaces, makes it quite obvious) that before this Act the result was as I have described, because there it says : "The Additional Commissioners shall at any time after the said first assessments have been signed and allowed, but within four months after the expiration of the year to which such first assessments relate make an assessment on any such person in an additional first assessment." Therefore the whole thing is grouped under one verb, the act and the time limit as well. But apart from that, even within section 125 I think there is something which throws light upon it because, speaking of Schedules A, B, and E, it says : "(*a*) If the first assessments have not been signed and allowed, the surveyor shall amend the assessments," *i.e.*, if he finds something which has escaped him. Now it is the surveyor who does it. Nobody could ever say that the General Commissioners are amending or anything of that sort. The surveyor is doing the act of amendment, and subsection (2) requires that it is that act of amendment that shall be done within the period of three years. Therefore it seems to me that one has not read into subsection (2) a reference to the imposition of an exigible liability upon the subject but a reference to this indubitable preliminary act upon the part of the surveyor in the case of amendment and upon the part of the Additional Commissioners in the case of an additional first assessment ; and so that act in this case (subject to a point which I will mention) was done within the time. But it is said, secondly, that although the making referred to here does not refer to the imposition of an effective charge by allowance but refers to what is done by the Additional Commissioners, still even so the making is not complete until notification to the subject, or first of all until delivery to the General Commissioners, or, failing that, at any rate until notice to the subject which comes after delivery to the General Commissioners. I cannot find anything to bear that out. Under section 122 what the Additional Commissioners are to do is this. As their assessments are completed they are to cause to be made out and entered in books provided for the purpose certificates of assessment, and they are to be signed by the Additional Commissioners and to be delivered from time to time to the General Commissioners. But surely when the Additional Commissioners have signed the assessment they have made it ; and when one turns to the form which is in the sixth Schedule, Form 2, headed "Additional Commissioners' Certificate of First Assessments," it begins : "Assessments of income-tax, under Schedule D, made upon the several persons chargeable with the said tax" and so on, "by the Commissioners whose names are signed at the end hereof." Now what is made ? It is the assessment referred to in the Additional Commissioners' certificate of first assessments. That is what is made. Then there follow the particulars of assessment : "We, the undersigned Additional Commissioners of Income Tax . . . do hereby certify the foregoing first assessments under Schedule D," and they sign it. The certificate is signed by the Additional Commissioners ; and then a certificate of allowance is given and signed by the General Commissioners at the end of the document. It seems to me that the assessments are made before delivery to the General Commissioners by the Additional Commissioners when the latter make them in the book and write them and sign the form to which I have drawn attention.

The next point taken was that the assessment was not made until there was notice to the subject, and Mr. Justice Bankes' decision in *Berry v. Farrow* (*supra*) was referred to. But the Act does not say so ; I cannot read it in. Mr. Justice Bankes of course uses the expression "no valid assessment was made" because what he was looking for was an assessment in the sense of a liability that was exigible, since the question was whether the distress was lawful. But I cannot find that subsection (2), referring to the making of the additional first assessment by the Additional Commissioners, imports the limitation that it is not to be made until notice of it is given. It is curious that notice to the subject does not seem to be expressly enjoined by the Act, but of course notice must be given before the assessment is signed and allowed by the General Commissioners, because that is not done until the time for appeals against assessments has expired and of course that does not expire until the subject has had notice.

I think, therefore, all these points fail, and the appeal must be dismissed with costs.

[Solicitors—Messrs. Field, Roscoe and Co., for Messrs. Wrigley, Claydon, and Fripp, Oldham ; the Solicitor of Inland Revenue.]

K.B. Div. (Rowlatt, J.) } 1927. May 24.

WILLIAMS v. SANDERS.*

Revenue—Income-tax—Schedule A—House let in apartments — Weekly tenancies — Basis of assessment—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule A, No. VII., Rule 8.

Where a house is let in a number of apartments or tenements on weekly tenancies, the correct method of arriving at the annual value of the entire house or tenement for the purpose of charging the landlord to income-tax under No. VII., Rule 8, of Schedule A of the Income Tax Act, 1918, is to ascertain what the value of each of the separate tenements would be if they were let by the year and to add the values together, making the permitted deductions from the total. It is not allowable either (*a*) to estimate what a hypothetical tenant would give for the whole house on the basis that he could re-let it in tenements at weekly rents, nor (*b*) to add together the weekly rents and multiply by 52 and then allow a discount for contingencies.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

This was a case stated by the Commissioners for the General Purposes of Income Tax acting for the division of Roborough, South Devon.

Mr. Arthur Lawrence Williams, of 47, York-street, Regent's Park, London (hereinafter called "the appellant"), appealed against an assessment to income-tax, Schedule A, in the sum of £50 gross, made upon him for the year of assessment ending April 5, 1924, in respect of a messuage and premises known as No. 39, Admiralty-street East, Stonehouse, Plymouth, Devon.

The premises consisted of a house or building owned and let by the appellant in four different apartments or tenements under separate weekly tenancies, each terminable upon one week's notice by either landlord or tenant. The four different apartments were occupied by four distinct tenants and their families, with the use in common of the passages, stairs, washhouse, w.c., and front and back entrances. The tenants belonged to the poorer classes and paid for the said apartments the respective weekly rents of 10s. 6d., 7s., 3s. 9d., and 6s., making a weekly aggregate rental of 27s. 3d., the landlord paying all the rates, water rates, and inhabited house duty payable in respect of the said premises. All the said rents were fixed by agreements which commenced within the period of seven years preceding the 5th day of April next before the time of making the assessment appealed against.

The appellant by his representative, Mr. Arthur Body, a rating surveyor, put in evidence the following estimate of the annual value of the said premises, which had been prepared by him in respect of the year ending April 5, 1923, namely :—

Gross income from four weekly tenants if fully occupied—27s. 3d. × 52				£70	17	0
Deduct to convert from four weekly tenements into annual value in one letting of the whole house—20 per cent.				14	3	0
				£56	14	0
Deduct :—						
Inhabited house duty £36 at 3d.		9	0			
Rates on estimated rateable value £29 at 13s. 2d. ..	19	1	10			
Water rate £36 at 4 per cent.	1	3	2			
				20	14	0
Rack rental value ..				£36	0	0
Deduct statutory allowance for repairs one-fourth ..	9	0	0			
Conventionary rent ..	1	12	0			
				10	12	0
Net				£25	8	0

Mr. Body said in support of this estimate that in arriving at the figures therein contained he assumed that for the purposes of income-tax annual value must be understood to be the rack rent at which the premises were worth to be let by the year and that such rent was to be estimated by considering what a single intending tenant by the year of the whole of such premises so occupied and used would pay the landlord as rent if such tenant bore the usual tenant's rates and taxes ; that to compute such rent it was necessary to consider a hypothetical tenant and the rent which he would give having due regard to what he was able to obtain from actual or hypothetical sub-tenants and the profit which he would expect in recompense for his time and trouble in management ; that in considering the rent such tenant would have regard, and consequently regard should be had by the Commissioners, to the probability of some part of the premises or the whole remaining unlet and on his hands for part of his own period of tenancy ; that the hypothetical tenant of the whole of such premises would not be of the same class of persons as those tenanting mere apartments or tenements in such premises nor moved to acquire the tenancy by the same objects ; and that in consequence the actual rents paid for the separate tenements must be regarded as only a factor or element to be taken into account and not a starting point or basis of calculation in computing the rack rent at which the house or building was worth to be let by the year.

It was not suggested by Mr. Body that the rents actually payable for the separate tenements were capable of increase or decrease, nor that a single tenant of the whole premises could be obtained save for the purpose of farming out these premises at rents corresponding to those actually payable.

It was given in evidence that considerable sums of rent were in arrear ; that the chance of recovery of these arrears was small, and that losses due to sickness, unemployment, poverty, and dishonesty were invariably attendant on this class of tenancy and type of tenant.

The assessment of the property for 1922-23 for poor rate purposes was £28 gross, £22 rateable, and the actual rates paid in that year were £15 18s. 2d. It was argued that it was a common practice for rating authorities to ascertain new assessments for Schedule A and if the annual value under Schedule A was increased to raise the annual value for rating purposes.

It was argued that the rates payable would have been estimated by an intending tenant on the basis of the rent which he agreed to pay, and on that footing the rates would probably be at least £20 5s. 0d. and would have been estimated as at least that amount by an intending tenant at all material times, and the appellant contended that in estimating the rack rent which would be payable by an intending tenant of the whole (such tenant as herein mentioned) this increase should be taken into account by the Commissioners, as it would be by the intending tenant in estimating the rent which he would pay.

Mr. Body stated that his estimate was based also upon his experience in connexion with this property and similar properties in the locality, on a consideration of the rent that one person would, as tenant of the entire house or holding, be prepared to pay on a letting by the year, as contrasted with the amounts payable or expected to be paid by several weekly tenants of the four distinct apartments or tenements into which that house or building was divided.

It was contended on behalf of the appellant :—

(*a*) That Rule No. I. (1) of Schedule A for estimating the annual value of lands, tenements, hereditaments or heritages did not apply. This rule provided : "In the case of all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II. and No. III. of this Schedule), the annual value shall be understood to be : (1) The amount of the rent by the year at which they are let, if they are let at rack rent and the amount of that rent has been fixed by agreement commencing within the period of seven years pre-

ceding the 5th day of April next before the time of making the assessment."

(*b*) That the direction in Rule 8 (*c*) of No. VII. of the Rules applicable to Schedule A, to assess and charge such premises as one entire house or tenement, involved, in the circumstances hereinbefore mentioned, the application to them of Rule No. 1 (2) of Schedule A and thus introduced all the considerations mentioned above.

(*c*) That Schedule A, No. IV., Rules 1, 2, 7, and 10, and Schedule A, No. V., Rule 8, referred to an owner or tenant of the unit of assessment and not to tenants of apartments or tenements, and that Schedule A, No. VII., Rule 4, did not give exemption to, nor give power to income-tax authorities to remit tax on, unoccupied parts of a house.

The appellant cited the case of *Stevens v. Bishop* (4 *The Times* L.R., 325 ; 20 Q.B.D., 442), and argued that the cases of *Tennant v. Smith* (8 *The Times* L.R., 434 ; [1892] A.C., 150), *Attorney-General v. London County Council* (23 *The Times* L.R., 390 ; [1907] A.C., 131), *Russell v. Coutts* (1 Tax Cas., 469), and *Grinter v. Fleming* ([1900] 2 Q.B., 735) did not apply.

The respondent, the inspector of taxes, on behalf of the Crown contended that the assessment should be made in the sum of £51 10s. 0d. gross, and in support of this contention he put in as evidence the following schedule, namely :—

Gross rental of No. 39, Admiralty-street, Stonehouse		£70	17 0
Deduct rates	£15 18 2		
„ inhabited house duty	12 6		
„ 1/26 gross rents ..	2 14 6		
		19	5 2
		£51	11 10

Say £51 10s. 0d.

The respondent cited the following cases : *Biddle v. Morris* (40 *The Times* L.R., 791 ; [1924] 2 K.B., 490), *Russell v. Coutts* (*supra*), *Grant v. Langston* (16 *The Times* L.R., 415 ; [1900] A.C., 383), *Farmer v. Cotton's Trustees* (31 *The Times* L.R., 478 ; [1915] A.C., 922), and *Turner v. Carlton* ([1909] 1 K.B., 932).

On July 15, 1924, the Commissioners gave their decision in the following terms :—

"We take the view that in the case of properties let at a weekly rent or let to more than one tenant the gross rents, less the rates paid by the owner, less a contingency balance of 1/26th of the net rents at the time of making the assessment, represent the rack rent, and therefore we make the assessment of 39, Admiralty-street East, Stonehouse, £48."

Mr. Hawke, K.C., and Mr. Hugh E. Kingdon appeared for the appellant ; Mr. R. P. Hills (with him the Attorney-General, Sir Douglas Hogg, K.C.), for the Crown.

Mr. Justice Rowlatt.—The contest between the parties here, as revealed by the case and as argued by counsel, is this. In dealing with this property, which is a house or building divided up and let in working-class tenements weekly at so many shillings, with the common use of the stairs and certain accessories, what is the effect of the legislation with regard to such a property ?

It was contended by Mr. Hawke for the appellant that an assessment was made in respect of this building upon the landlord by virtue of No. VII., Rule 8, of the Rules of Schedule A. That is true. That rule provides, to put it shortly, that the landlord of any house or building let in different apartments or tenements and occupied by two or more persons shall be assessed and charged as on one entire house or tenement. Mr. Hawke said that, as this house had to be assessed as one entire house or tenement, then when you look to the annual value, which is the amount that it is worth to be let by the year at a rack rent, you have to look at the imagined rack rent for the house or building as one entire house or tenement ; and he said that you cannot let a tenement of this kind as one entire house or tenement unless you let it to somebody who takes it as a middleman in order to let it out in weekly tenancies ; and of course he would not do that unless there was a profit to him, and therefore the weekly rents of the tenants are not the immediate basis of the annual value, but they can come in only so far as they influence the middleman in quoting his figure.

I think that is untenable. The purpose of this rule is to make it clear that the tax in respect of these houses is to be charged on the landlord, and not on the occupiers under the *prima facie* rule laid down by No. VII., Rule 1, and the whole group is headed : "Rules as to persons chargeable." Therefore what we find here is a direction that the assessment to income-tax in respect of these premises shall be charged upon the landlord, and the words "as one entire house or tenement" mean that there is to be one charge upon the landlord, and I do not think for a moment that they let in a speculation as to a middleman at all. What the house is worth to be let at a rack rent is the sum of the rack rents you can get for the house, and I do not see that it is any the less so because you get it piecemeal ; and it is not necessary, in order to give effect to the purpose of this rule, which, as I have already pointed out, is to make the landlord assessable in one entire assessment, to introduce an alteration in the principle of valuation.

Mr. Hawke laid some stress on the circumstance that the house or building was to be assessed. Of course that only means that the landlord is to be assessed in respect of the house or building, and the purpose of the rule is not confined merely to showing the person chargeable. But I think he could have made it a little stronger if he had referred to the corresponding section in the old Act, section 36 of the Income Tax Act, 1853, where the words were different : "any house or building let in different apartments" and so on, "shall nevertheless be charged to the duty . . . as one entire house . . . and the assessment thereof shall be made on the landlord"—which is putting it the other way. Even so, I think there is the same answer. What is indicated is the letting of apartments ; it does not come into contemplation that there shall be any hypothetical letting to an intermediary in the way contended for. I really think that is clear, and the well-known case of *Attorney-General v. Mutual Tontine Westminster Chambers Association, Limited* (1 Ex. D., 469), decided in 1876, is of material assistance in taking that view. Therefore I think Mr. Hawke's argument fails.

I think this case must go back to the General Commissioners, because I do not think they have followed the right reasoning at all. They have said : "We take the view that in the case of properties let at a weekly rent or let to more than one tenant the gross rents, less the rates paid by the owner, less a contingency balance of 1/26th of the net rents at the time of making the assessment, represent the rack rent." What they have done is exactly

what Mr. Hills rightly contended was perfectly wrong —namely, to construct a profit and loss account and to see how much was going to come in—and what they have done is to take the weekly rents and knock off 1/26th for contingencies, as they call it, and take that as the rack rent. That is wrong; they must not do it. They are right in taking and adding together the rents of the tenements, but they are wrong in taking and adding together the weekly rents with a discount. They have no right to do that. There is no authority for it at all. They must find out what the particular tenements are worth to let at a rack rent by the year and nothing else than that; it must be by the year. They must say what a man would give if he has to take each tenement for a year and to be responsible for a year; and then, when they have done that, they can add up the rents and allow for the rates and so on, and that will be the correct figure.

I do not know what the result will be; it may be that it will reduce the assessment to something very small; it may not affect it; it may increase it; I do not know; but that is what they must do and they must not take the weekly rents and add them up and then knock off a discount to account for the irrecoverables and voids, or something of that sort. It is not permitted by the Act.

[Solicitors—Messrs. Royds, Rawstorne and Co., for Messrs. Square, Geake, and Windeatt, Plymouth; the Solicitor of Inland Revenue.]

Prob., Divorce, and Adm. Div. (Bateson, J.) 1927. May 18.

FANSHAWE v. FANSHAWE.*

Divorce—Alimony *pendente lite*—Future instalments — Husband's assets — Restriction on power of Court to grant injunction—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 45.

The Court has no power to order that moneys accruing to a husband in the future in respect of shares held by him shall be paid into Court in respect of the future instalments of alimony *pendente lite*. Nor has the Court power, unless there is a sum due by him to be paid under an order of the Court, to grant an injunction restraining him from parting with such assets.

In this case the wife was granted a decree *nisi* for the dissolution of her marriage on February 3, 1927, and the custody of the child of the marriage, a daughter aged nine. An order for alimony *pendente lite* had been made against the husband, and also an order to pay the costs of the petition (as set out in the judgment *infra*). The husband fell into arrears with the alimony payments and did not comply with the order as to costs. He had been the registered holder of 50 Ordinary shares in a brewery company, which had employed him at a salary of £700 a year, and it was a condition of his contract that, on ceasing to be so employed, he should transfer these shares to a nominee of the company in return for a price to be fixed by their auditors. In March, 1927, his employment ceased, and the shares had been transferred.

The wife now moved the Court, (1) for an order to restrain the husband from receiving any moneys accrued or hereafter due to him in respect of the brewery shares formerly held by him, and for the payment of such moneys into Court if already paid to him, and for the appointment of a receiver of such moneys if not already paid to him; (2) alternatively for an injunction to restrain the husband from dealing with such moneys now or hereafter to become payable except by paying them into Court to the credit of the wife.

Mr. Noel Middleton, for the wife, submitted that the Supreme Court of Judicature (Consolidation) Act, 1925, section 45, empowered the Court to make the order sought, and he cited authorities.

Mr. J. H. Watts, for the husband, said that there was no case in which security had been ordered for payments under an order for alimony *pendente lite*. Nor had the Court jurisdiction to grant an injunction until after a final order for permanent maintenance. It would have been open, however, to the wife to proceed to execution, and that would have been her proper remedy.

Mr. Justice Bateson.—This is an application by the wife, who has been granted a decree *nisi* of divorce, asking for an injunction to restrain her husband from receiving moneys that have been realized from the sale of some shares, which, previously, by an order of Mr. Justice Hill, he had been restrained from dealing with. The order for alimony *pendente lite* was made on January 31, 1927, at the rate of £180 per annum, free of tax, and the further sum of £55 per annum, free of tax, was ordered to be paid for the maintenance and education of the child of the marriage, commencing from November 8, 1926, when the petition for divorce was served on the husband. These sums were to be paid in monthly instalments. The proceeds of these shares of the husband are now standing in the joint names of the solicitors to the parties, the shares having been transferred before the original application was made, and the money having been paid for them subsequently to that application.

The husband had had an appointment in a brewery and as part of the appointment he held shares. When the appointment ceased the shares were transferred and he was paid the money according to an accountant's certificate as to their value.

It is quite clear, I think, from *Carter v. Carter* (12 *The Times* L.R., 37; [1896] P., 35) that such an order as is asked for in this case cannot be made so far as future payments of alimony are concerned. In that case, which was a decision of Mr. Justice Gorell Barnes, the husband was not apparently in default in respect of the payment of alimony. The head-note reads: "Where, in a suit by a wife for judicial separation, an order for alimony *pendente lite* had been made against the husband, the Court refused to restrain the husband from dealing with certain of his property."

In this case the instalment of March 8, due under the order for alimony *pendente lite*, was not paid. On March 21 an order was made restraining the sale of the shares, and subsequently, on March 23, there was the sale of some furniture and the money for that was brought into Court.

Counsel have cited all the cases, I think, relating to this matter. They are *Gillet v. Gillet* (14 P.D., 158); *Bullus v. Bullus* (26 *The Times* L.R., 330); *Brewis v. Brewis* ([1893] W.N., 6); *Jagger v. Jagger* (42 *The Times* L.R., 315, 413; [1926] P., 93); *Twentyman v. Twentyman* ([1903] P., 82); *Burmester v. Burmester* (29 *The Times* L.R., 323; [1913] P., 76); *Newton v. Newton* ([1896] P., 36);

* Reported by William Latey, Esq., Barrister-at-Law.

Waterhouse v. Waterhouse ([1893] P., 284); *Carter v. Carter* (*supra*); and *Sidney v. Sidney* (17 L.T., 9), which is almost the genesis of these cases. The result of all these cases is that the Court will not grant an injunction in a case of alimony *pendente lite* unless there is a sum fixed and due by some order of the Court.

I think the proper order to make in this case is one against the husband so far as any sums due and fixed are still unpaid, *i.e.*, there is an order for £73 9s. 2d. for costs; there are arrears of alimony amounting to £57 10s. which ought to have been paid up to May 8, and the costs of the motion, £32 11s. 6d. Beyond that I cannot restrain the husband from dealing with his own property for future sums which may or may not ever come to be due.

Burmester v. Burmester (*supra*) makes it quite clear that unless there is an order for payment in existence for a fixed sum no order can be made. In Mr. Clifford Mortimer's second edition of Rayden on Divorce, at page 193, it is stated in terms: "Before an order for the payment of a fixed sum (or even after an order for alimony *pendente lite* has been made) the Court will not grant an injunction restraining a husband from so dealing with his property as to defeat alimony *pendente lite*." There the author, I think, is thinking of future payments and not payments which are due.

The other cases seem to support my judgment, certainly so far as costs are concerned. In *Gillet v. Gillet* (*supra*) the injunction was granted so far as costs were concerned: there were arrears under a magistrate's order, but the Judge did not think that the injunction should be granted in regard to the allowance. He did not say that he could not have granted it in a proper case. In *Bullus v. Bullus* (*supra*) Mr. Justice Bigham followed *Gillet v. Gillet* (*supra*) in regard to costs. In *Brewis v. Brewis* (*supra*) Sir Francis Jeune said: "I will continue the injunction until such time as the order to give security can be enforced, that is, until a week after the order to pay taxed costs has been issued." That seems to have been an application with regard to costs only. There was no order in *Newton v. Newton* (*supra*), where Sir James Hannen, in a reference to his own order in *Noakes v. Noakes and Hill* (4 P.D., 60), said that he could not grant an injunction merely *quia timet* to restrain the respondent from dealing with his own property.

In *Jagger v. Jagger* (*supra*) Mr. Justice Hill said: "The effect of those cases is that an injunction can be granted after an order for alimony or maintenance and cannot be granted before order made." But there, I think, the learned Judge is only speaking *obiter* and is not dealing with the question of arrears of alimony under an order that has not been obeyed.

Sir Samuel Evans, in *Burmester v. Burmester* (*supra*), did not say that there was no difference between permanent alimony and alimony *pendente lite*; in quoting *Newton v. Newton* (*supra*) he says: "Sir James Hannen, in a considered judgment, deals with the broad question of law, and it seems to me that the proper conclusion to come to is that he did not intend to deal merely with the case of alimony *pendente lite*, but that he laid down principles equally applicable to cases of permanent alimony and maintenance." There again, I think, he refers to future alimony and future maintenance, and does not deal with arrears.

As counsel for the husband points out, in this case the petitioner has never asked for security either in the petition for alimony or in the petition for maintenance which is already on the file, and this is an attempt by a side wind to get such a security in the hope that some time or another there will be an order for permanent maintenance. As things stand at present, according to what counsel for the husband says, this sum of money that is now in the hands of the solicitors is all the money that the husband possesses, and it does not follow that there will ever be an order for maintenance, and to ask anybody to order security—because that is the real effect of this application—in the hope that an order may be made which most probably never will be made is an unprecedented application.

He also points out that if his client had been alert he might have got an order, as soon as he lost his employment, reducing the amount of the present order which he has not obeyed. It seems to me that, where an order for alimony is made and is not obeyed notwithstanding that the respondent has money in his hands wherewith he could pay the money, it is only right that he should pay. For these reasons I allow this application so far as it relates to the costs and arrears that I have mentioned. The wife will have the costs of the motion, and the balance of the money will be paid out to the husband so soon as these payments are made, and the existing injunction then dissolved.

[Solicitors—Mr. Ernest G. Scott; Messrs. Doyle, Devonshire, and Co., for Mr. E. Dennis Berry, Reading.]

Prob., Divorce, and Adm. Div. (Bateson, J.) 1927. May 24.

CAPRON v. CAPRON.*

Divorce — Permanent alimony — Arrears—Husband's assets—Writ of sequestration—Power of the Court—R.S.C., Order XLIII., rr. 6, 7—Matrimonial Causes Rules, 1924, r. 79A.

Where a husband is in arrear with the payment of permanent alimony, after a decree of judicial separation has been pronounced in favour of his wife, a writ of sequestration may issue in accordance with Rule 79A of the Matrimonial Causes Rules, 1924, and the sequestrator may be ordered to realize property of the husband within the jurisdiction and apply the proceeds of sale to the payment of the moneys owing to the wife by the husband under orders of the Court arising in such proceedings.

An order for payment of permanent alimony by monthly instalments is an act to be done "in a limited time" within the meaning of R.S.C., Order XLIII., r. 6, but there is a special divorce rule governing the procedure, namely, the rule above mentioned.

Mrs. Capron was granted on June 10, 1925, a decree of judicial separation on the ground of her husband's desertion. On November 27, 1925, she was granted permanent alimony of £450 a year, free of tax, to commence from the date of the decree, payable monthly. Two orders for costs were made against the husband aggregating about £88. On May 10, 1927,

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

there was due from the husband £666 in respect of arrears of alimony and costs.

The husband, in his answer to the wife's petition for permanent alimony, had disclosed considerable assets within the jurisdiction, consisting principally of shares in English companies. On January 31, 1927, Mr. Justice Hill appointed a receiver of the assets of the husband, but it was then found that the husband had disposed of most of these shares. His assets still remaining within the jurisdiction comprised, (1) two policies of assurance upon his own life in the Sun Life Assurance Society, the surrender value of which was put at £1,416, but which was subject to a mortgage of just over £1,000 ; (2) a sum of £79 got in by the receiver and paid into Court ; (3) a director's share in the British American Tobacco Company (Holland), Limited.

Mr. T. Bucknill, for the wife, moved for leave to issue a writ of sequestration against the estate of the husband and for an order that the sequestrator sell the assurance policies and the share in the tobacco company and apply the proceeds towards the payment of the sums due from the husband. Counsel said that the writ could issue under Rule 79A of the Matrimonial Causes Rules, 1924, which read :—

"In default of payment to any person of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of *fieri facias*, sequestration, or elegit shall be sealed and issued as of course in the registry upon an affidavit of service of the order and of non-payment."

If the writ issued, said counsel, he intended to apply for an order to restrain payment to the husband and secure payment to the wife.

Mr. Noel Middleton, for the husband, opposed the issue of the writ, and said that the sums due for costs had been paid after proceedings in Holland against the husband. He submitted that the whole powers of the Court with regard to sequestration were contained in R.S.C., Order XLIII., rules 6 and 7 :—

Rule 6.—"Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. . . ."

Rule 7.—"No *subpœna* for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued."

Counsel contended that the order for permanent alimony was not an order to do an act within a limited time, that it would be unreasonable to allow the issue of a writ of sequestration as to the share in the tobacco company since it was of hypothetical value, and that in the case of the life policies, as they were mortgaged and in the hands of third parties, the Court could make no order. He cited certain authorities referred to in the judgment.

Mr. Justice Bateson.—In my opinion this writ must issue. Apparently from March 4, 1926, when the respondent was ordered to pay some £58 costs in the alimony proceedings, he proceeded to dispose of his property in this country. In June and December, 1926, he borrowed just over £1,000 on the security of his life assurance policies. Thus between the amount borrowed on the policies and the surrender value there is a sum of £400, less of course any interest that may accrue. But that seems to have exhausted to a large extent any property that he had, at any rate so far as the petitioner knows, available in this country for payment of the various sums ordered to be paid. It turns out that on May 18, 1926, a sum about £16 short of the total amount of the costs that the respondent had to pay was received by the petitioner's solicitors.

In resisting this motion Mr. Middleton says : (1) The Rules of the Supreme Court dealing with sequestration do not permit of it in a case of this kind ; (2) the issue of such a writ is a matter of discretion, and if it is idle or futile or unreasonable to order such a writ to issue the Court will not use its powers. I am against him on both points. The Rules of the Supreme Court do not apply to the Divorce Court except where there is no divorce rule, and there is a special divorce rule 79A which seems to me exactly to cover this case. If there was not such a special rule, I think that this is within R.S.C., Order XLIII., rule 6, because the order for payment of alimony by monthly instalments is an act to be done "in a limited time." When the Court has ordered money to be paid monthly, it means that the moneys are to be paid within the month, which I think is "a limited time."

Mr. Middleton argues that there has been no case since the Judicature Acts in which a writ of sequestration has been allowed to go. Nobody questions that before the Supreme Court of Judicature Act, 1873, a writ of sequestration in the case of alimony was utilized as a means of enforcing payment. *Clinton v. Clinton* (L.R. 1 P. and D., 215) makes that quite clear. Since that Act *Willcock v. Terrell* (3 Ex.D., 323), in 1878, makes it clear that a writ of sequestration may go where quarterly payments have been ordered to be paid. This decision has been approved by Sir James Hannen in *Sansom v. Sansom* (4 P.D., 69). The other cases referred to, *Birch v. Birch* (8 P.D., 163) and *Hyde v. Hyde* (4 *The Times* L.R., 586 ; 13 P.D., 166), do not in any way conflict with what I am saying, but I do not think that they carry the case any further.

With regard to Mr. Middleton's second point, I think that his is a mistaken view. Apart from the policies, from which something may be salved, and the director's share in the tobacco company, this gentleman may have other property in this country which may be found on further investigation. Since the receiver was appointed a sum of money has been collected by him about which apparently nobody knew anything at the time.

As is said by Lord Herschell in *Hulbert v. Cathcart* (12 *The Times* L.R., 379 ; [1896] A.C., 470), "It seems to me to rest upon the debtor who alleges that the proceedings would be futile to show the Court that it would be so." I am certainly not satisfied that it would be futile. Lord Herschell adds :—

"Now, in the present case it is stated that the respondent has a large yearly income" (that is what was stated here), "and I do not think there is anything to show that this sequestration will necessarily and inevitably be futile. It is impossible now to determine, and this is not the time for it, what could be seized, or whether the result of the proceeding will be to secure to the appellants their debt or not."

I think these remarks apply with equal force in this case. So far as the policies are concerned, there can be no great difficulty in persuading the mortgagees to take their money and interest, so as to allow the sequestrator to get the benefit of the balance. At any rate it will be well worth trying.

Another suggestion was that by ordering a writ of sequestration to go I was really making an order

against a third party. That, of course, I am not doing and I am not pretending to do so. It is said I am making an order against the Sun Life Assurance office, which is not represented. I do not even know that they hold the policy, but there is no evidence that they do. They are not before me, and I do not know what attitude they might think wise to adopt. The authorities in support of the view that the Court does not make orders against third parties, *Crispin v. Cumano* (L.R. 1, P. and D., 622), and *Craig v. Craig and Hamp* ([1896] P., 171), were referred to, but I am not making any such order.

For these reasons this writ must issue, with leave to sell the policies and the share in the tobacco company, and for substituted service of this order. The motion will be allowed, with costs.

[Solicitors—Messrs. Lewis and Lewis; Messrs. Timbrell, Deighton, and Nichols.]

K.B. Div. (Rowlatt, J.) 1927. June 17.

ATTORNEY-GENERAL v. BELILIOS AND OTHERS.*

Revenue—Estate duty—Succession duty—Trust established in England as result of foreign disposition—Application of foreign law by English Courts in administration—Trust funds abroad—No direction in disposition to establish trust in England—Succession Duty Act, 1853 (16 and 17 Vict., c. 51), s. 2—Finance Act, 1894 (57 and 58 Vict., c. 30), s. 2 (2)—Finance Act, 1925 (15 and 16 Geo. V., c. 36), s. 24.

Under the will in English form of a testator domiciled in Hong-kong his residuary property, subject to an annuity to his widow, was left on trust for his son for life with the remainder to his son's two sons. The tenant for life died domiciled in Hong-kong, which was also the domicile of his sons. Previously the tenant for life had wished to borrow money and the lenders had insisted on English trustees being appointed. Later, it was discovered that the tenant for life, who had been sole trustee, had drawn wrongfully on capital, and against his wish applications for directions regarding the administration of the trust were made to the English Court of Chancery, and the sons, who were infants, became wards of Court. At the time of the death of the tenant for life the trust property was situated abroad.

Held, that the property other than the annuity to the widow was subject to estate duty, since section 2 of the Succession Duty Act, 1853, applied to the case of a trust established in this country as the result of a foreign disposition in the administration of which trust the Courts of this country might have to apply foreign law, although investments representing the trust fund were abroad and the trust was not established in this country pursuant to directions in the disposition itself.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

Dicta of Lord Cranworth, L.C., in *Wallace v. Attorney-General* (L.R. 1 Ch., 1), explained.

Attorney-General v. Campbell (L.R. 5 H.L., 524), *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106; [1901] 1 K.B., 123), *In re Cigala's Settlement Trusts* (7 Ch.D., 351), and *Thompson v. Birch* ([1876] W.N., 177) applied.

Held, further, that the property in question was not liable to succession duty since s. 24 of the Finance Act, 1925 (which enacts that a succession shall be deemed to arise on the happening of the death by reason of which the successor becomes entitled in possession to the succession or to the receipt of the income or profits thereof), is not retrospective.

This was an information filed by the Attorney-General against Vera Carlotta Belilios, Richard Owen Roberts, and Edward Elvy Robb, the defendants.

By his will dated October 1, 1883, the testator, Emanuel Raphael Belilios, declared that the instrument was to take effect according to the law of the colony of Hong-kong where he was domiciled, and he devised and bequeathed his real and personal property to trustees to hold (with a power to convert), to pay certain specific bequests to his wife and children and to invest the residue in certain securities to pay the annual income thereof to the sons or son of the testator during their or his lives or life who should have attained or should attain the age of 21 years, and if more than one in equal shares, and on the death of the last survivor of his sons to stand possessed of the residuary trust funds in trust for the children or child of his sons who being sons or a son should have attained or should attain the age of 21 years, or being daughters or a daughter should have attained or should attain that age or should have married or should marry under that age with the consent of their or her guardians or guardian, and if more than one in equal shares. In the event of no child or children of the testator's sons living after the death of the survivor of his sons to attain a vested interest or vested interests in the testator's residuary trust funds those funds were to be employed to form and found a free college for the education of Jewish children at Calcutta, India, after which event the will was to take effect according to the law of the Empire of India.

The testator appointed his wife and Elias David Joseph Ezra Rajah Sutty Amindo Gho Sual Bahadoor and Jacob Benjamin Elias executrix and executors of his will. By a codicil dated April 20, 1892, the testator after reciting that the executors named in his will other than his wife were then dead appointed his wife and the manager in Hong-kong for the time being of the Hongkong and Shanghai Banking Corporation and the manager in Hong-kong for the time being of the Chartered Mercantile Bank of India, London and China, and also his son, Raphael Emanuel Belilios, on his attaining the age of 25 years, as his will trustees and also executrix and executors of his will. By a second codicil dated December 13, 1899, the testator appointed Robert Chesterton Wilcox to be an additional trustee and executor of his will.

The testator died domiciled in the colony of Hong-kong on November 11, 1905, where his will and two codicils were on May 15, 1906, duly proved by Raphael Emanuel Belilios alone, he being the only son of the testator living at his death, power being reserved to the testator's widow to prove, the other persons named

as executors having renounced probate. The grant of probate was duly sealed in this country on November 5, 1906. Of the persons named in the will and codicil as trustees Raphael Emanuel Belilios alone acted in the trusts and by deed poll dated December 13, 1910, the testator's widow, Sema Belilios, wholly renounced and disclaimed the office of trustee.

The testator died possessed in this country of certain leasehold premises and furniture therein and a balance at his bankers the value whereof was exceeded by the amount of the debts due from the testator to persons resident in England, so that no estate duty became payable in respect of such property in this country. The testator also died possessed of immoveable property in Hong-kong and net personalty then valued at $2,424,688 of Hong-kong currency (exceeding £250,000) on which probate duty amounting to $72,741 (£7,634) was paid in that colony.

By a deed of appointment dated May 4, 1911, and made between Raphael Emanuel Belilios, therein described as of Deane Lodge, Ash Green, in the county of Surrey, barrister-at-law, of the one part; the defendant Vera Carlotta Belilios, of Deane Lodge, aforesaid, the wife of Raphael Emanuel Belilios; the defendant, Richard Owen Roberts, of No. 1, The Cloisters, Temple, in the City of London, barrister-at-law; Ernest Samuel Halford, of 93, Chancery-lane, in the City of London, gentleman; and the defendant, Edward Elvy Robb, of Temple Chambers, in the City of London, solicitor (thereinafter called the "new trustees"), Raphael Emanuel Belilios, in exercise of the power for that purpose vested in him by virtue of the will and of the Ordnance or other law of Hong-kong in that behalf and of every or any other power enabling him in that behalf, appointed the new trustees to be trustees in the place of the testator's widow and other the renouncing trustees and to act jointly with him as the will trustees within the meaning of the will and codicils and for all the purposes thereof or such as might be subsisting and capable of taking effect. Raphael Emanuel Belilios also declared that all and singular the hereditaments, chattels and property, whether real or personal, wheresoever situate, including things in action and the right to receive and recover the same, which were then subject to the trusts of the will and codicils and were capable of being vested by that declaration under the local law affecting the same, should vest in himself and the new trustees for all the estate and interest therein subject to the trusts of the will and codicils. The indenture was in fact executed in this country by all the parties thereto, all of whom, with the exception of Raphael Emanuel Belilios, and his wife, the defendant, Vera Carlotta, were permanently resident here. Raphael Emanuel Belilios resided in England for some periods down to the date of his death during a visit to this country on October 17, 1922, but neither he nor his wife ever acquired an English domicile.

There was issue of the marriage of Raphael Emanuel Belilios and the defendant, Vera Carlotta Belilios, two children and no more, namely, Lionel Emanuel Raphael Belilios, who was born on October 31, 1905, and Nigel Edward Richard David Belilios, who was born on April 6, 1909, who were both now living in this country with the defendant and had always lived in this country since their birth.

On April 7, 1913, October 11, 1915, and June 17, 1918, the defendants commenced certain actions in the Chancery Division by originating summonses against Raphael Emanuel Belilios, his infant sons and other parties, asking for directions in connexion with sundry questions which had arisen in the administration of the trusts of the will and codicils of the testator, and the Court made orders in these actions.

On December 17, 1920, Ernest Samuel Halford retired from the trusteeship.

On October 17, 1922, Raphael Emanuel Belilios died leaving him surviving his widow, the defendant, Vera Carlotta Belilios, and his two infant children, who, the Attorney-General claimed (but the defendants denied), had been made wards of Court by virtue of the proceedings in the Chancery Division and the orders made therein. After the death of Raphael Emanuel Belilios the Court made orders in the last of the actions in relation to the education and temporary removal of the infants outside the jurisdiction and authorizing the expenditure as an advancement of £39,809 10s. 10d. on a residence for them in Sussex, for which £43,199 8s. 8d. was in fact raised and applied.

At the date of the death of Raphael Emanuel Belilios the residuary estate of the testator, consisted of (*a*) a sum of £1,300 or thereabouts in a bank in the United Kingdom, (*b*) 15,555 fully paid shares of $15 each in the Hong-kong, Canton and Macao Steamship Company, Limited, 534 shares of $10 in the Hong-kong Dairy Farms and Ice Storage Company, Limited, which were then registered abroad in the names of the trustees of the testator's will, but were subsequently sold by the defendants and realized £66,246 15s. 7d. net, and 10 shares in the Bank of China and Japan, Limited, in liquidation, and (*c*) certain unsold immoveable property situate in the colony of Hong-kong which was subject to the trust for sale in the will contained.

The Attorney-General claimed that: (1) At the date of the death of Raphael Emanuel Belilios the will of the testator was for the purposes of the Succession Duty Act, 1853, an English settlement in that the trust funds and property, although for the most part situate abroad, were vested in trustees who were all resident within the United Kingdom and subject to the jurisdiction of the High Court of Justice whose wards the infants had become by virtue of the orders referred to.

(2) Upon the death of Raphael Emanuel Belilios the whole of the residuary estate, except so much thereof as was required to provide for payment of the annuity of $12,000 bequeathed to the testator's widow, Sema Belilios, passed within the meaning of the Finance Act, 1894, and the infants became beneficially entitled thereto in equal shares contingently upon attaining their respective ages of 21 years, and such beneficial interests constituted a succession within the meaning of section 2 of the Succession Duty Act, 1853, upon which succession duty became payable at the rate of 1 per cent. by virtue of that Act and of section 58 (2) of the Finance (1909-10) Act, 1910, and section 24 of the Finance Act, 1925.

(3) The defendants as such trustees were accountable for such succession duty in respect of the sums of £39,809 10s. 10d. or £43,199 8s. 8d., or other the sum or sums from time to time paid or applied by them to or for the maintenance, advancement or benefit of the infants.

(4) Estate duty at the appropriate rate in respect of so much of the residuary estate as so passed became payable by virtue of section 2 (2) of the Finance Act, 1894, and the defendants were accountable for such duty.

The Attorney-General on behalf of his Majesty accordingly prayed:—

(1) That it might be declared that, upon the death of Raphael Emanuel Belilios, succession duty at the rate of 1 per cent. became payable in respect of the

successions of the infants respectively to the whole of the residuary estate, wherever situate, except such part thereof as was required to provide for payment of the annuity of $12,000 to the testator's widow, Sema Belilios, and that the defendants, as trustees, were accountable for such duty in respect of the sum of £43,199 8s. 8d., or other the sum or sums from time to time paid or applied by them to or for the maintenance, advancement or benefit of the infants respectively.

(2) That an account might, if necessary, be directed to ascertain the amount of the succession duty for which the defendants were accountable upon the footing of the foregoing declaration, together with interest thereon at the rate of £4 per cent. per annum from the time or times when the same became so payable.

(3) That it might be declared that on the death of Raphael Emanuel Belilios estate duty became payable at the appropriate rate under the provisions of the Finance Act, 1894, upon the whole of the residuary estate of the testator, wherever situate, except such part thereof as was required to provide for payment of the annuity of $12,000 to the testator's widow, Sema Belilios.

(4) That an account might if necessary be directed to ascertain the amount of the estate duty payable on so much of the residuary estate as passed on the death of Raphael Emanuel Belilios, together with interest thereon at 4 per cent. per annum from the time when the same became payable, and that the defendants might be ordered to pay to the Commissioners of Inland Revenue the amount of such succession and estate duties and interest, the informant waiving such penalties as the defendants might have incurred by reason of the duties not having been paid up to the present time.

(5) That all necessary and proper inquiries might be made, directions given, and accounts taken for the purposes aforesaid.

By their answer, the defendants contended that they were not liable to pay the succession duty or the estate duty claimed on the grounds :—

(1) That no duty was payable on the death of Raphael Emanuel Belilios in respect of any part of the residuary estate.

(2) That the testator's will at no time constituted an English settlement, but was in form and in substance a settlement subject only to the law of Hong-kong, and that no person entitled thereunder to any benefit might or would become so entitled by virtue of English law.

(3) That none of the property in respect of which the claim of the Commissioners was made was property which passed on the death of Raphael Emanuel Belilios, nor property which, by virtue of the Finance Act, 1894, or any other Act, was to be deemed to have so passed or be included in any such Act.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. M. J. L. Beebee appeared for the Crown ; Mr. F. H. Maugham, K.C., Mr. A. M. Latter, K.C., and Mr. J. Israel for the defendants.

Mr. Justice Rowlatt read the following considered judgment :—The first question in this case—namely, whether estate duty is payable in respect of this property—depends on whether succession duty would have been payable under section 2 of the Succession Duty Act, 1853.

The facts are that under the will of a testator domiciled in Hong-kong which was made in English form (which may, for all I know, be Hong-kong form also) property was left (and so far as it was real property with a trust for conversion) upon trust for the testator's son for life with, in the events that happened, remainder to his two sons. The tenant for life died in 1922, domiciled in Hong-kong, which was also the domicil of his sons. At the date of his death the trustees were resident in this country, but the property, so far as material to this case, was abroad. The circumstances under which the trust fund came to be and remained vested in English trustees I will deal with later.

The limitation which it was common ground has to be read into section 2 of the Succession Duty Act, 1853, for the purpose of its application to foreign dispositions has never been stated in words capable of being read textually into the section, unless it was by Lord Cranworth in *Wallace v. Attorney-General* (L.R. 1 Ch., 1), where he said that the successor must become entitled by virtue of the laws of this country. Mr. Maugham contended that that remained the true test. Having regard, however, to *Attorney-General v. Campbell* (L.R. 5 H.L., 524) and to *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106 ; [1901] 1 K.B., 123), Lord Cranworth's words must be taken in a sense wide enough to include the case of a trust established in this country, as the result of a foreign disposition, in the administration of which trust the Courts here might have to apply foreign law. Further, in view of *In re Cigala's Settlement Trusts* (7 Ch.D., 351), it seems to me that the circumstance that the investments representing the trust fund are abroad cannot be decisive though it may have to be taken into consideration in determining whether the trust has or has not been established in this country.

What I have to ascertain is, therefore, whether the disposition conferring the succession is being carried out by a trust established here fulfilling the requirements of the principle laid down in *Attorney-General v. Campbell* (*supra*). In that case the trust was established in this country pursuant to directions in the disposition itself. Here it was not. Possibly a good deal might be said in favour of a contention that this circumstance of itself differentiates the present case from *Attorney-General v. Campbell* (*supra*) and that the removal to this country of the trust of a foreign disposition not in pursuance of the terms of the disposition but at the choice of the parties does not bring the successions conferred within the scope of the Act. But I do not think that that point is open before me, because in *Thompson v. Birch* ([1876] W.N., 177 ; Hanson's Death Duties, p. 393) Vice-Chancellor Bacon clearly ruled that the principle of *Attorney-General v. Campbell* (*supra*) applied to a fund established in this Court—that was the fact in that case—" no matter by what means." The testator there had not directed that the fund was to be transferred to this country, and it is in reference to that circumstance that the Vice-Chancellor uses the words " no matter by what means."

The question, therefore, is reduced to this : Was the trust at the death of the tenant for life in fact established in this country ? Now Mr. Maugham pointed out that, whenever a trustee can be found in England, the trust, wherever its origin or subject-matter, can be enforced against him and he urged that the mere presence in this country of the trustee of a foreign disposition cannot alone attract duty to the successions it may have conferred. I feel the force of that argument, but I have not that simple case to deal with. Here the history was shortly as follows. The tenant for life got into financial difficulties and wanted to borrow money. The proposed lenders insisted on English trustees, and

gentlemen of position and of permanent British residence were appointed. Then it was discovered that the tenant for life, who had been sole trustee, had drawn wrongfully upon capital and a particularly close and strict supervision of the affairs of the trust became necessary on the part of the trustees. Several applications were made to the Court and the sons who were infants became wards of Court. In former days no doubt the trust would have fallen to be fully administered by the Court. The tenant for life strongly objected to this English *régime*, but the strength of his resistance, which was in vain, only emphasizes the English character which this trust had assumed. I think that it was as much established here as if the fund had been brought into Court as in *Thompson v. Birch* (*supra*).

For these reasons, and applying the law as laid down in that case, I hold that, on this part of the case, there must be judgment for the Crown.

The second question in the case on which the claim to succession duty itself depends is whether section 24 of the Finance Act, 1925, is retrospective. That section enacts that a succession shall be deemed to arise on the death. The act of interpretation referred to in the word "deemed" must of course be in the future, but the moment when interpretation is called for is the moment of the death. The section, therefore, refers to the interpretation to be applied upon future deaths. If it had been intended to enact that from the passing of the Act the effect of past events should be reversed it was easy (and there are well-known forms of words for the purpose) to provide that the law should be deemed to have always been as then provided.

In the result, there must be judgment for the Crown upon the first point—the claim for estate duty—with the general costs of the information, and judgment for the defendants upon the claim for succession duty, with the costs of the issue as regards that.

A stay of execution was granted.

[Solicitors—The Solicitor of Inland Revenue: Messrs. Elvy Robb and Co.]

Railway and Canal Commission. (Sankey, J., Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C.) 1927. June 27.

IN RE APPLICATION OF AMALGAMATED ANTHRACITE COLLIERIES, LIMITED, AND OTHERS.*

Mines—Coal-mines—Amalgamation of colliery companies — Scheme — Confirmation — Requirement that it should be in the national interest—Mining Industry Act, 1926 (16 and 17 Geo. V., c. 28), s. 7 (2) (*a*).

Observations on the meaning of the expression "national interest" in s. 7 (2) (*a*) of the Mining Industry Act, 1926.

The Commission granted the application of certain companies for the confirmation of a scheme of total amalgamation. The companies making the application were the Amalgamated Anthracite Collieries, Limited, United Anthracite Collieries, Limited, Cleeves Western Valleys Anthracite Collieries, Limited, Gurnos Anthracite Collieries Company, Limited, Gellyceidrim Collieries Company, Limited, Caerbryn Anthracite Colliery Company, Limited, Carway Collieries, Limited, Gwendraeth Valley Anthracite Collieries, Limited, New Rhos Anthracite Collieries, Limited, and Pentremawr Colliery Company, Limited.

The Amalgamated Anthracite Collieries, Limited, were the owners of all the issued shares in companies owning 12 freehold or leasehold anthracite collieries. The United Anthracite Collieries, Limited, were also owners of all the issued shares in companies owning 12 freehold or leasehold anthracite collieries. All the collieries were situate in close proximity to one another in the South Wales anthracite area in the counties of Carmarthen, Glamorgan, and Brecon.

It was claimed that the confirmation of the scheme would result in the more economical and efficient working, treating, and disposing of coal over a large and important area; that the various undertakings would be controlled by a single policy and establishment charges would be substantially reduced; and that amalgamation would:—

(i.) Pool the financial resources of the whole of both existing groups and render them available in aid of any individual colliery which might at any time require further capital outlay.

(ii.) Eliminate uneconomic and wasteful competition.

(iii.) Reduce overhead charges.

(iv.) Afford facilities for the pooling of wagons.

(v.) Permit of the installation of joint power plant linking together a number of the collieries and supplying the additional power essential to the development of certain of them.

(vi.) Enable certain of the coal reserves at present controlled by a colliery of one company to be re-allocated so that they could be worked more efficiently by a colliery of the other company.

(vii.) Abolish the limits at present existing between the underground workings of the collieries of the two groups as far as ownership was concerned, thus giving flexibility to boundaries between collieries and enabling the major faults of the coalfield to be used for this purpose.

(viii.) Enable large-scale breaking, washing, and cleaning plants to be installed in place of existing small plants.

(ix.) Permit of centralized control and purchase of plant, equipment, and stores.

(x.) Give opportunities for the application of scientific and technical research.

It was claimed that on the sales side the following advantages would be obtained:—

(i.) Increased efficiency in marketing through greater specialization.

(ii.) Improved facilities for maintaining and expanding present and developing new markets.

(iii.) Efficient production of standard qualities.

(iv.) Increased opportunities for stabilization of both prices and markets.

(v.) Reduction of selling costs.

It was submitted that the terms of the scheme were fair and equitable to all persons affected thereby. It was further submitted that it was in the national interest that the scheme should be confirmed, because —(*a*) it would enable the coal reserves of the two companies to be worked, treated, transported, and sold more efficiently than was possible at present; (*b*) improved efficiency would result in more regular working and increased demand; (*c*) the more regular working would lead to more constant employment,

* Reported by T. R. F. Butler, Esq., and J. W. Hall, Esq., Barristers-at-Law.

while the increased demand would call for additional development with corresponding additional employment ; and (*d*) the pooling of the existing resources of the two companies in regard to finance, administration, and *personnel*, would enable the welfare programme already commenced to be consolidated and enlarged, and thus improve and increase the amenities provided for the men employed.

Mr. W. A. Jowitt, K.C., Lord Erleigh, and Mr. L. Cohen appeared for the applicants, the Amalgamated Anthracite Collieries, Limited ; Mr. Clement Davies, K.C., and Mr. Stamp for the applicants, the United Anthracite Collieries, Limited ; and Mr. Geoffrey Smallwood for the Great Western Railway Company, who had lodged an objection to the scheme which was subsequently withdrawn.

Mr. Crankshaw, an objector, appeared in person.

MR. JUSTICE SANKEY read the judgment of the Court. His Lordship referred to the provisions of the Mining Industry Act, 1926, and especially to section 7, which provides :—

" (1) Where a scheme has been referred to the Railway and Canal Commission, the Commission, if satisfied that the scheme conforms to the requirements of this Part of this Act, shall take into consideration all objections to the scheme which may be lodged by any person or by any class or body of persons within such time and in such manner as may be directed by the Commission, and where any objections have been so lodged shall hear any objectors whom they consider entitled to appear.

" (2) The Commission, after hearing such objectors as aforesaid, may confirm the scheme either without modifications or subject to such modifications as the Commission think fit, or may refuse to confirm the scheme : Provided that the Commission—(*a*) shall confirm a scheme if satisfied that it would be in the national interest to do so, and that the terms of the scheme are fair and equitable to all persons affected thereby. . . ."

The judgment proceeded :—The object of the scheme is to amalgamate all the various colliery companies into one big concern, under the name of the Amalgamated Anthracite Collieries, Limited, and to allot shares in that concern proportionate to the interests of the various shareholders in the constituent companies.

The facts are as follows. All the collieries are situate in close proximity to one another in the South Wales anthracite area, in the counties of Carmarthen, Glamorgan, and Brecon. Some of them had already joined up together so as to form two big groups. One of the groups, known as the Amalgamated, owned all the issued shares in the Cleeves Western Valleys Anthracite Collieries, Limited, and the Gurnos Anthracite Collieries, Limited ; the former of which owned all the issued shares in the Gellyceidrim Collieries Company, Limited ; whilst another group, called the United, owned all the issued shares in the Caerbryn Anthracite Colliery, Limited, the Carway Collieries, Limited, the Gwendraeth Collieries, Limited, the New Rhos Collieries, Limited, and Pentremawr Collieries, Limited.

The number of mines owned by these various companies amounted to between 20 and 30. The Welsh anthracite area is a strip of land stretching across the counties above mentioned, about 27 miles in length and five miles in width.

The total reserves of coal remaining to be worked on the property are about 230,000,000 tons. Except for the small field to the north-east of Glasgow, the whole of the anthracite coal in the United Kingdom is contained in such area. . . .

No suggestion has been made by any shareholder, and no person has come before us to raise any objection, upon the first part of the case—namely, as to whether the proposed allotment of shares is a proper one in the interests of the various constituent companies. It will be recollected that it is the duty of the Court to take into consideration any objection to the scheme which may be lodged by any person or by any class or body of persons, and that the Court may confirm the scheme provided that the terms of the scheme are fair and equitable to all persons affected thereby (section 7 (2)).

We have come to the conclusion that, so far as the terms of the scheme are concerned, they are fair and equitable to all persons affected. We have had the evidence of two very distinguished witnesses who have explained the terms to us, and there has been no dissentient shareholder appearing to object.

We now pass on to a more difficult part of the case, for it is further provided by the Mining Industry Act, 1926, that the Commission shall confirm the scheme if satisfied that it would be in the national interest to do so. Upon this point we did have an objector in the person of a Mr. Crankshaw, a mining engineer now residing at Bath, but at one time a managing director of one of the collieries concerned—namely, the Ammanford Colliery. He called as a witness a Mr. Thomas Gibbon Davies. We propose to discuss this opposition when we have set out the facts.

The main difficulty in which the Court finds itself in deciding this question is to come to a satisfactory conclusion as to the meaning of the words " national interest," which is further complicated by the fact that we have no independent assistance upon this point either by counsel or by the witness. When we say this, we must not be thought to be in any way impugning the good faith of the promoters, but they are interested parties and naturally think that a scheme which provides in a great measure for their own interest is also in the interest of the nation.

Now, in considering what is the national interest, various questions at once emerge. It is obvious that, as coal is a source of light, heat, and power, it is a commodity which is necessary for the life of the nation, and that it is in the interest of the State that it should be won and used to the best advantage. Any scheme which substantially increases the economy and efficient production and user of coal, provided that it is satisfactory in other respects, can be said to be in the national interest. We do not think that it would be desirable, even if it were possible, to lay down an exhaustive definition of what is in the national interest. As has been said in another set of circumstances, " The fact that opinion, grounded on experience, has moved one way does not preclude the possibility of its moving, on fresh experience, in the other. Nor does it bind succeeding generations when conditions have changed. After all, the question whether a particular thing is in the national interest is a question of the times, and it is a question of fact."

This question is more fitting for the High Court of Parliament than for the High Court of Justice. After all, what is in the national interest is rather a question of policy to be pursued by Parliament from time to time than a question for legal decision, and, as above pointed out, a Court is likely to be embarrassed when considering a topic of this sort. It hears one side—namely, the side of those who, with perfect good faith, desire to persuade the Court that what is

obviously in their own interest is in the national interest—but it does not bear adverse criticism.

We agree with three of the main tests which were proposed by the applicants themselves, and, in considering a scheme of this character, we think it right to satisfy ourselves that, first, the workers, whether manual or clerical, who are engaged in the undertaking should receive not merely a living, but a reasonable, wage for their exertions ; secondly, that those who are willing to risk their capital in such an undertaking should receive a reasonable return for the money they lend ; and, thirdly, that the persons who are to use the article produced—that is to say, the consumers—should be able to get such article at the lowest rate, having regard to the first two propositions.

It is not necessary to enlarge upon these topics. A judicial mind would, we think, recognize the justice of all of them.

One other topic may have to be considered, as was admitted by Sir Alfred Mond, who is the originator of this scheme and who gave evidence before us. It may well happen that, in the not very distant future, it will be in the national interest to consider the international position of the coal industry ; but upon that we do not propose to say anything at present except when we come to refer to one of the export markets of the Welsh anthracite coalfield.

In the application the following advantages are claimed as being likely to accrue should the Court see its way to sanction the scheme. It is said that the result will be a more economical and efficient working, treating, and disposing of coal over a large and important area ; that the various undertakings will be controlled by a single policy and establishment charges will be substantially reduced ; that amalgamation will (i.) pool the financial resources of the whole of both groups and render them available in aid of any individual colliery which may at any time require further capital outlay ; (ii.) eliminate uneconomical and wasteful competition ; (iii.) reduce overhead charges ; (iv.) afford facilities for the pooling of wagons ; (v.) permit of the installation of joint power plant ; (vi.) enable coal reserves to be reallocated so that they can be worked more efficiently and quickly at another neighbouring colliery ; (vii.) give greater flexibility to boundaries between collieries, enabling major faults of the coalfield to be adapted in substitution of barriers of solid coal which would otherwise have to be left ; (viii.) enable large-scale breaking, washing, and cleaning plant to be installed ; (ix.) permit of centralized control and standardization ; (x.) give opportunities for the application of scientific and technical research. So far with regard to the actual working of the coal.

Another equally, if not more, important advantage claimed is on the sales side of the business. It has, unfortunately, been considered in the past that English coal sells itself. That may have been true when our foreign competitors were not so numerous and so well equipped as they have now become. As Sir Alfred Mond pointed out, propaganda is necessary both in the home and in the export market. Indeed, he said in striking language that up to now "anthracite has not been sold at all." It is claimed and, as we think, justly claimed, that this amalgamation will provide the following, amongst other, advantages on the sales side :—(i.) Increased efficiency in marketing, through greater specialization ; (ii.) improved facilities for maintaining and extending present and developing new markets ; (iii.) efficient production of standard qualities ; (iv.) increased opportunities for stabilization of both prices and markets ; (v.) reduction of selling costs.

One of the greatest benefits which could accrue to the coal industry would be to equalize the running of pits and so to produce a regularity of employment by stabilizing production. It is plain that, if you narrow your selling area, the coal industry is a seasonal one and there are times, therefore, when there is much less employment and times when there is much more employment. It may not be easy to provide large storing places for coal so as to produce these desired results, but Sir Alfred Mond pointed out a way in which they could be attained by discovering whether one market wanted coal at a time when another market could do without it. For example, it may well be that France and Italy want anthracite at one time and Canada may want it at another ; and, indeed, Sir Alfred has managed, by following this train of thought, to foster a Canadian export trade from Wales at a time when anthracite is not so urgently needed in the nearer foreign market. If this policy can be pursued, it no doubt would go far to decasualize the industry—a position which certainly would be greatly to the interests of those engaged in it, who must suffer from a system which at one time of the year may give them quite good wages and at another time of the year a remuneration entirely inadequate for their weekly necessities.

So far as to the effects which amalgamation may produce in the winning of the coal and in improving the position of those who are engaged in the process. There is still one equally, if not more, important consideration remaining, and that is the opportunity which amalgamation offers for research and experiment. We are satisfied, on the evidence before us, that a great field is open here. It can hardly be doubted that the use and consumption of coal in this country are productive of great loss and great waste. This is an evil for which no particular class of society is responsible, and to which everybody is a party. An amalgamation of this character will enable research to be made for the best way of using the great national asset which the country is fortunate in possessing. Such research and such experiment cannot be carried on by small individual concerns, but must be the result of the larger and stronger unit. The result may be put in the answer given by Mr. Forster Brown in his evidence : "Any reorganization of financial and administrative control is in the national interest. It enables the national resources of the country to be produced and conveyed to the consumer at a lower cost than if that reorganization had not taken place, and always upon the understanding that that reduced cost is not arrived at by asking Labour to take less wages or to work longer hours."

Both Sir Alfred Mond and Mr. Forster Brown were of opinion that this amalgamation would produce these results. If that is so, as we are disposed to think it is, it is obvious that this Court, by sanctioning this scheme, will be benefiting not only the workmen employed but also those who are risking their capital in the undertaking, and last, and by no means least, although his position is not always considered by the other two parties, the interest of the consumer.

We now say a few words about the opposition. As previously stated, it was conducted by Mr. Crankshaw, a former manager of one of the collieries, and his witness was a Mr. Davies, who was formerly employed at the Ammanford Colliery and was chairman of the Miners' Lodge, but who, after a recent strike in which the safety men were withdrawn, has failed to find employment at the colliery. The point urged by

Mr. Crankshaw was that the collieries have been over-capitalized and that when they were nationalized this might induce the Government to pay too much for their acquisition. The point made by Mr. Davies was that an amalgamation resulted in the lowering of men's wages and therefore should not be encouraged.

We do not desire to say a single word about the *bona fides* of either of these gentlemen. Indeed, we do not question it; but we must point out that Mr. Crankshaw is at the present moment the defendant in a libel action brought against him for using, as it is alleged, very opprobrious language against some of the directors, and Mr. Davies naturally feels rather bitter that he is no longer in the employment in which he was for so many years.

With regard to Mr. Crankshaw's point, we can leave it safely to the good sense of some future Government. With regard to Mr. Davies's point, if we were satisfied that amalgamation would result in a general lowering of wages, or if we thought that the object of the amalgamation was to enable its promoters to make more profits at the expense of the workmen, we should not hesitate to withhold our approval of the scheme; but we must point out that there was no satisfactory evidence in this case that either of these events was likely to happen, or, indeed, has happened in the partial amalgamation which has already taken place.

For these reasons we give judgment for the applicants and confirm the scheme proposed by them.

Sir Lewis Coward.—I desire to add only one word, on the question of wagons. It was with regret that I learnt that in this amalgamation, in which it was represented to the Court that exceptional national advantages accrued, the present primitive means of transport in 10-ton and 12-ton wagons was to be continued, and, further, that the number of the existing wagons was apparently thought to be sufficient. One would have thought that, with an amalgamation launched by such an influential company and directorate, some evidence would have been forthcoming upon this question—namely, the increased capacity of wagons, which, in my judgment, has been and always will be one of the most vital questions in the development of colliery enterprise. The recent Report of the Royal Commission presided over by Sir Herbert Samuel stated that in France, in Belgium, and in the Ruhr the standard wagon now used is a 20-ton wagon, and that the 10-ton and 12-ton wagons, which are the wagons used here, are rapidly disappearing.

I trust that this great amalgamation will take immediate steps in considering the construction of new wagons, which are certainly required; and that they will pay careful attention to and carry out the recommendation of the Royal Commission, more especially as Mr. Forster Brown, a mining engineer of over 27 years' experience, who gave evidence before us, said at page 24 of the second day's evidence as follows: "If the result of the amalgamation of railways has the effect of hanging up the circulation of wagons, what was an adequate wagon capacity before the amalgamation will not be adequate now; but I am assuming that the amalgamation of railways will not be so disastrous as it has been up to the present time to the trader."

[Solicitors—Messrs. H. Oppenheimer, Nathan, and Vandyk; Messrs. Clifford Turner, Hopton, and Lawrence; the Solicitor to the Great Western Railway.]

K.B. Div. (Wright, J.) } 1927. June 24.

W. ANGLISS AND CO. (AUSTRALIA) PROPRIETARY, LIMITED v. P. AND O. STEAM NAVIGATION COMPANY.*

Carriage of Goods by Sea—Damage by oil fuel—Unseaworthiness—Design of ship—Bad workmanship—Leakage from oil bunker—Non-responsibility of shipowners.

The plaintiffs shipped a quantity of carcasses of lamb for carriage from Australia to London by a new oil-fuel steamer built for the defendants. The bills of lading incorporated the rules in the Schedule to the Australian Sea Carriage of Goods Act, 1924, by which the carrier is not liable for damage from unseaworthiness unless caused by want of due diligence to make the ship seaworthy. During the voyage some of the rivets between an oil bunker and the hold became loose, and oil leaked through and tainted the meat. In an action for damages the plaintiffs contended that the ship was unseaworthy, in the sense of being unfit for the carriage of the particular cargo, by reason of inefficient design or of bad workmanship, and the defendants pleaded that the unseaworthiness (if any) was not owing to any want of due diligence on their part.

Held, that the damage was caused by defects of design, and, although in view of recent experience the particular design was unsatisfactory, yet the adoption of it, at the time when the ship was built, did not involve any lack of due diligence on the part of the defendants, and that, although bad workmanship did to some extent contribute to the damage, yet, as it was not such as could have been discovered by the defendants' inspectors, and as the shipbuilders were not servants or agents of the defendants, the defendants were not liable for it, and therefore the action failed.

In this action the plaintiffs claimed damages for breach of contract and/or duty in the carriage of a shipment of meat from Australia to England.

Mr. Miller, K.C., and Mr. David Davies appeared for the plaintiffs; Sir John Simon, K.C., Mr. Stuart Bevan, K.C., and Mr. Harold Stranger for the defendants.

In October, 1925, the plaintiffs shipped on a steamer of the defendants, the Cathay, some 10,000 carcasses of lamb for carriage from Australia to London. The plaintiffs alleged that the lamb was shipped in good order and condition, but that when it was delivered in London 5,711 of the carcasses were found to be tainted by oil.

By their defence, the defendants pleaded that if any of the carcasses were delivered damaged (which they denied) the damage was due to perils excepted by the bills of lading. They said that during the voyage a number of rivets in a bulkhead between an oil bunker and the hold in which the carcasses were

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

stowed became loose owing to the straining of the Cathay in heavy weather and, as a result, oil leaked through the rivet holes and tainted the meat. They also pleaded that the bills of lading under which the meat was carried incorporated the terms of the Australian Sea Carriage of Goods Act, 1924, and the rules in the schedule to that Act. Those rules provided, *inter alia*, that the carrier should not be liable for loss or damage arising from perils of the sea.

A large amount of evidence of a technical character was called dealing with the design of the Cathay and the workmanship of her builders.

MR. JUSTICE WRIGHT, in the course of his considered judgment, said that, although the sum claimed amounted only to £1,672 odd, the case had occupied the Court for many days and, although it might be that other cases would depend on the decision in this case, it was surprising that business people on both sides should have been willing to incur so much expense in contesting the matter. Perhaps the explanation was that the action was an underwriters' action; for it had long been the practice of underwriters to enforce claims against shipowners arising out of allegations of unseaworthiness or breach of contract.

The Cathay at the material time was homeward bound on her second round voyage to Australia and back. She was a new ship, built by Barclay, Curle and Company, a well-known firm of high reputation, and she had the highest class at Lloyd's. He was satisfied on the evidence that there were no extraordinary features on this voyage; there was some bad weather, but nothing worse than might reasonably have been anticipated and nothing which ought to have caused the damage complained of.

The defence put in was that the damage was caused by perils of the seas, for which the defendants were not responsible. To that the plaintiffs replied that the ship was unseaworthy, in the sense that she was unfit for the carriage of this particular cargo. By rejoinder, the defendants pleaded that even if the ship were unseaworthy in fact, which they denied, the unseaworthiness was not due to any want of due diligence on their part.

In the course of the case the defendants had really abandoned the theory that bad weather had caused the damage, and the real dispute had been whether it had been caused by inefficient design of the Cathay or by bad workmanship in the building of her. The decision as to which cause, if either, was responsible would decide how far the defendants could succeed on their plea of no want of due diligence.

His Lordship then discussed the expert evidence in detail, and pointed out that similar trouble had been experienced with other vessels carrying oil fuel in the same way as the Cathay. The practice of carrying oil fuel in that way was comparatively new.

Lord Sumner laid down in *Bradley and Sons, Limited v. Federal Steam Navigation Company* (27 Ll. L., 395) that the warranty of seaworthiness was not absolute, but must be judged by the state of knowledge prevailing at the time. He held, therefore, that, although in view of recent experience the design was unsatisfactory in fact, the adoption of that design at the time when the ship was built did not involve any lack of due diligence on the part of the defendants.

There remained the question of bad workmanship. If there were bad workmanship in the building of the Cathay, did it contribute to the damage in this case; and, if it did, could it have been detected by the inspectors of the defendants if they had exercised reasonable skill and care?

His Lordship then examined the evidence as to the riveting, caulking and other matters and said:—I summarize my findings of fact as follows. (1) The design of the bar and of its fitting was defective, and there should have been a cofferdam. These defects of design involved no failure of due diligence on the part of any person concerned. (2) There was some bad workmanship both in riveting and in fitting the bar to the bulkhead. That was entirely the fault of the individual workmen employed by the builders and could not have been detected by any reasonable care on the part of the defendants' inspector or by Lloyd's inspector or the Board of Trade inspector or by the builders' foremen. (3) The damage to the plaintiffs' cargo was due to the defects of design, though it may have been contributed to by the bad workmanship.

I have to consider the law in relation to these findings. The bill of lading recites receipt of the goods in apparent good order and condition, the goods to be delivered in London subject to the contract. The contract for material purposes is to be found in the provisions of the Australian Sea Carriage of Goods Act, 1924, which by the clause paramount in the bill of lading is embodied in the Act. That Act is identical with the English Act in that it, like the English Act, embodies a schedule containing the rules relating to bills of lading. Section 5 of the Australian Act, practically in identical terms with section 2 of the English Act, provides as follows: "There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship." Article II. of the Schedule is in the following terms: "Subject to the provisions of Article VI., under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." Article III. (1) is in these terms: "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(*a*) Make the ship seaworthy: (*b*) Properly man, equip, and supply the ship: and (*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation." It is subsection (*c*) which is material in this case. Then Article IV. (1) is as follows: "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section." "Carrier" is defined in Article I. (*a*) as including "the owner or the charterer who enters into a contract of carriage" (as by bill of lading) "with a shipper." The obligation of the carrier to exercise due diligence to make the ship fit is clearly not limited to his personal diligence. The carrier may

be a company, and in any case, in the complication of modern affairs and by reason of the widely scattered situation of seaports, must act by agents or servants, which is the phrase employed in Article IV. (2) (*q*). The question is, how wide is the category of agents or servants in reference to the obligation in question? It is contended by the plaintiffs that as the primary obligation on the carrier is to provide a seaworthy ship the carrier cannot delegate any part of that obligation so as to relieve his personal liability, and hence must account for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be the carrier's agents to make the ship seaworthy and fit; and that accordingly the defendants must be held liable for the bad workmanship of which I have found the shipbuilders' men were guilty. I do not think that this contention is sound. The Carriage of Goods by Sea Acts have introduced a new and obligatory code of responsibility and immunities as affecting carriers under bills of lading in place of the former rule that carriers by sea, while under the liability of common carriers, were free by contract to vary and limit their liabilities. In particular the Acts have expressly abolished the previous obligation to provide a seaworthy ship and have substituted an obligation to use due diligence to that effect. The carrier may not be the owner of the ship but merely the charterer; he may not have contracted for the building of the ship but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier, and it is illogical that there should be such a difference in the carrier's obligations merely because he has bought the ship by contracting with the builders to build it for him. In addition, if the carrier were held liable for the bad workmanship of the builders' men, he might equally be held liable for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel workers in furnaces and rolling mills, or who supply special articles such as castings, pumps or proprietary machines, which would involve an almost unlimited retrogression.

Under the old rule the only relevant question was whether the ship was seaworthy or unseaworthy. That rule no doubt was well adapted to more simple days when ships were not very complicated wooden structures of a few hundred tons, but in modern times, when ships are complicated steel structures full of complex machinery, the old rule imposed too serious an obligation on carriers by sea, and I think that the new Acts intended to emphasize the growing specialization and, also, have emphasized the distinction between carrier and shipowner and limited the carrier's obligation to due diligence in his capacity as carrier. He is to be liable for all such duties as appertain to a provident and careful carrier acting as such by the servants and agents in his direct employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions; for instance, requiring the builders to satisfy one of the well-known classification societies, such as Lloyd's, and engaging skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buy a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. But I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which in fact, though concealed, renders the vessel unfit.

In the present case the defendants employed an inspector to supervise the work. I have held that that inspector used due diligence. It may well be that if he had negligently passed bad work which he saw, or even perhaps which he ought to have seen, the carrier would be liable for want of due diligence on the part of one to whom he had delegated the task of inspecting the work. Similarly, he might be held liable if the naval architect whom he employed to supervise the design failed to detect a definite error in design, though I do not think he would be so liable for an error on the part of one of the classification societies, such as Lloyd's, which occupy a public and *quasi*-judicial position. He might also be liable if, either personally or by his scientific advisers, he chose a special form of construction which involved a risk; for example, if he chose to dispense with a cofferdam in order to increase his cargo space though the best opinion was that a cofferdam was necessary. Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is primarily responsible, that the repairs adequately make good the defects.

It was argued that the obligation only attached in respect of matters at the port of loading, the words being "before and at the beginning of the voyage" and the obligation being only on the shipper and dating at earliest from the time of the material contract of carriage. In a sense I think this is true, but if the vessel were in fact unfit owing to some earlier breach of due diligence by the carrier, his agents or servants, I think the carrier would be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence.

In matters pertaining to the actual conduct of the voyage a somewhat different principle may apply as to the carrier's liability for acts of servants of sub-contractors: for example, for the negligence of stevedores' men; but to load or discharge is part of the definite acts undertaken by the carrier in his capacity of carrier, and he is necessarily liable for the due performance of such acts by the persons who may do them on his behalf.

I have thought it better to deal with the question involved in the construction of the Act itself because it is a new departure on new principles and it has been applied by other countries not necessarily conversant with the English case law. Nor have counsel professed to refer me to any authorities likely to afford me much assistance. I have been referred to two cases under the Harter Act in which the meaning of due diligence to make the ship seaworthy has been discussed, but under that Act the absolute obligation to provide a seaworthy ship is left unabrogated. In the *Fitzgerald* case (212 Federal Reporter, 678) a shipowner was held liable in respect of an obvious defect in a vessel. In the *Abbazia* case (127 Federal Reporter, 495) a shipowner was debarred from relying on surveyors' certificates given under circumstances known to the master and engineer to be inconsistent with proper inspection. These cases seem rather to accord with what I have said above. In the English case of *Dobell and Co. v. Steamship Rossmore Company, Limited* (11 *The Times* L.R., 501; [1895] 2 Q.B., 408) a shipowner was held responsible for the failure of the ship's carpenter to close a porthole the closing of which was necessary for the seaworthiness of the ship; this was clearly a failure of due diligence on the part of the carriers' servant. In *London Rangoon Trading Company,*

Limited v. Ellerman Lines, Limited (39 *The Times* L.R., 284) Mr. Justice Sankey held under a charterparty that there had been a failure of due diligence on the part of the shipowners' own servant in not observing an obvious defect, but he indicated that the ship repairers might be regarded as the shipowners' agents to do the repairs. But it appears from *Ellerman Lines, Limited v. Smith's Dock Company* (18 Ll. L., 172) that the ship repairers had limited instructions and were not instructed to repair the particular defect.

I did not gather that reliance was placed on the exception of "latent defects not discoverable by due diligence," which is contained in Article IV. 2 (*p*) of the Schedule. Assuming that that refers to defects in the ship, it seems to me to involve the same question of the range of persons whose due diligence is involved, and would also raise the difficult question of the exact meaning of "latent," as to which I may refer to a case in the Court of Appeal, *The Dimitrios N. Rallias* (128 L.T., 491).

The result is that there will be judgment for the defendants.

[Solicitors—Messrs. Parker, Garrett, and Co.; Messrs. Freshfields, Leese, and Munns.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. June 27.

GLEED v. GLEED.*

Divorce — Husband's petition — Obligation to make alleged adulterer a co-respondent—Power of Court to grant dispensation—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 177.

In this summons, adjourned into Court, Mr. G. Tyndale asked for leave to dispense with a named co-respondent in a Poor Person's divorce petition.

The President said that this was an application by the petitioner to be relieved of some of the difficulties arising out of the provisions contained in section 28 of the Matrimonial Causes Act, 1857, and now embodied in section 177 of the Supreme Court of Judicature (Consolidation) Act, 1925, whereby a peremptory obligation was imposed on a husband petitioning in divorce to make the alleged adulterer a co-respondent unless, on special grounds to be allowed by the Court, he should be excused. That matter had given rise to difficulties. Questions of the same kind were constantly coming before the Registrars and he had therefore adjourned this summons into Court.

In this case the petitioner in 1923 received an admission from his wife that she had been guilty of adultery with one Bert Morgan, during that year. The petitioner had no knowledge of the identity of Bert Morgan and, if he had known anything about him, probably he would not have discovered his whereabouts after the long interval which elapsed before he became aware of the Poor Persons' Department and was in a position to take any steps.

Unless special grounds could be established to the satisfaction of the Court the petitioner could not proceed without naming a co-respondent. He (his Lordship) had come to the conclusion that it would be a denial of justice in these circumstances to insist on the usual procedure in this case. The petitioner might have been given leave to serve Bert Morgan by substituted service, by way of advertisement, but the alleged adulterer was said to be in Australia and it would be difficult to know in what State of that Commonwealth and in what newspapers such an advertisement could be inserted to be effective. It was quite clear that the provisions referred to for the administration of the divorce law were precautionary and intended to secure a proper observance of the law as to collusion and other matters.

In this case he saw no advantage in putting this litigant to the expense of advertising either in England or in Australia and he directed that, on the facts of the case, leave be given to dispense with the naming of a co-respondent.

[Solicitors—Messrs. Tarry, Sherlock, and King, for Messrs. Townsend, Wood, and Calderwood, Swindon.]

* Reported by William Latey, Esq., Barrister-at-Law.

K.B. Div. (Acton, J.) } 1927. June 30.

ALLIANCE FILM CORPORATION, LIMITED v. KNOLES.*

Companies — Call—Company in liquidation—Action for call previously made—Sums alleged to be due from company to shareholder—No right of set-off.

In a common law action by a company, which is in liquidation, against a shareholder for a call made before the liquidation, the defendant has no right of set-off in respect of sums alleged to be due to him from the company.

Brighton Arcade Company, Limited v. Dowling (L.R., 3 C.P., 175) not followed.

In this action the Alliance Film Corporation, Limited (in liquidation), of 61 and 62, Lincoln's Inn-fields, W.C., sought to recover from Mr. Harley Knoles, a producer for the company, £3,375 and interest in respect of a call of 5s. per share on £13,500 shares, made before the company went into liquidation. Counsel said that the figures would need adjustment. Mr. Knoles claimed to set off various sums which he alleged to be due to him from the company in respect of income-tax and supertax agreed to be paid by the company, commission, and expenses.

Mr. H. S. G. Buckmaster appeared for the plaintiffs; the Hon. S. O. Henn Collins for the defendant.

Mr. Buckmaster referred to Palmer's Company Law, 12th Edition, page 432; and Buckley on Companies, 10th Edition, page 396. *Brighton Arcade Company, Limited v. Dowling* (L.R., 3 C.P., 175) must now be regarded as overruled. *Grissell's* case (L.R., 1 Ch., 528) decided that there could be no set-off against calls made in the winding up, and *Calisher's* case (L.R., 5 Eq., 214) that there could be no set-off against a call made before the winding up.

Mr. Henn Collins said that had this been a proceeding by the liquidator in the winding up he could not have disputed that proposition. But this was, in form, a common law action for debt in the name of the company and, therefore, the ordinary defences were open to him. All the cases in which it had been held that there was no right to set-off were in the winding up Court, but *Brighton Arcade Company,*

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Limited v. Dowling (*supra*), where the right was allowed, was the only common law action on the point. To exclude the right of set-off might deprive the defendant of his rights under section 165 (3) of the Companies (Consolidation) Act, 1908.

MR. JUSTICE ACTON.—That only applies to a call made in the liquidation after all the creditors have been paid in full. This call was made before the liquidation, and there is no evidence that the creditors have been paid.

MR. JUSTICE ACTON, in giving judgment for the plaintiffs, said that he thought that the point raised by Mr. Henn Collins, though ingenious, could not prevail. He had urged that the action being, in form, a common law action there arose a right of set-off which did not exist in other proceedings. His argument was that, though the action was, in substance, a claim by the liquidator in the liquidation, it was, in form, a common law action by the company, and, therefore, he had the common law rights which were not available in proceedings taken under the Companies (Consolidation) Act, 1908. He (his Lordship) did not think that in these days such an extremely barren technicality ought to prevail, and, anyhow, the defendant would not be excluded from any rights under section 165 (3), which had no application to the present case.

There would be judgment for the plaintiffs for an amount to be adjusted.

[Solicitors—Messrs. Amery Parkes and Co.; Messrs. Wiley and Powles.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. June 24.

JAMES DURNFORD AND SONS, LIMITED v. GREAT WESTERN RAILWAY COMPANY.*

Contract — Indemnity — Undertaking to indemnify against all claims—Whether inclusive of claims by the persons giving the undertaking —Claim for negligence—Whether the damage arose out of such negligence.

The plaintiffs took a lease of premises from the defendant railway company, and, by an agreement supplemental to the lease, the defendants gave the plaintiffs permission, on certain terms, to use for the transport of materials a portable gangway which could be moved over certain of the defendants' railway lines. One of the terms was that the plaintiffs "agree and undertake to indemnify the said [railway] company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway." When the plaintiffs were using the gangway some trucks were shunted down the line, and the gangway was destroyed. In an action for damages for negligence and/or breach of duty the defendants denied liability and pleaded the aforesaid term of the supplemental agreement. On a preliminary point as to the construction of the agreement,

Held (Sargant, L.J., dissenting), that the undertaking was only one to hold the defendants harmless against claims by third parties, and the preliminary point must be decided in favour of the plaintiffs.

Decision of MacKinnon, J. (43 *The Times* L.R., 527), affirmed.

This was an appeal from a judgment of Mr. Justice MacKinnon (43 *The Times* L.R., 527), which raised the question whether an agreement by the plaintiffs, James Durnford and Sons, Limited, to indemnify the defendants, the Great Western Railway Company, in respect of a certain matter "against all claims and demands or liability whatsoever" operated only to protect the defendants in the case of a claim by third parties, or whether it nullified a claim against the defendants by the plaintiffs themselves—the indemnifiers.

An action had been brought by the plaintiffs to recover damages for negligence. An order was made that before dealing with the claim on the facts a preliminary point of law, turning on the true construction of an agreement between the parties, should be tried before the Judge taking the Special Paper.

The facts out of which the case arose were the following:—

In 1914 the Great Western Railway Company let certain premises to the plaintiffs at Bristol. The plaintiffs were contractors, and in the course of their business required to move large quantities of materials by rail. To facilitate the transport of materials they constructed a portable gangway which could be moved over certain railway lines belonging to the Great Western Railway Company. The railway company gave them permission to use the gangway upon certain terms, which were embodied in a memorandum drawn up in 1921 and indorsed on the plaintiffs' lease.

The plaintiffs proceeded to make use of the gangway, and on August 27, 1926, they were using it for the purpose of discharging a load of lime from a motor-lorry into a railway truck when shunting operations were in progress on the railway. While the lorry was on the gangway some trucks were shunted down the line over which it was standing, and the result was that the gangway was struck and destroyed and the motor-lorry was thrown to the ground and so badly damaged that it was rendered useless.

The plaintiffs claimed damages for negligence and/or breach of duty. The Great Western Railway Company denied liability and relied on a condition in the memorandum of 1921. The condition was in the following words:—

"[The plaintiffs] agree and undertake to indemnify the said company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway. . . ."

The railway company submitted that the expression "claims and demands or liability whatsoever" covered every kind of claim, whether made by third parties or by the plaintiffs themselves. "Whatsoever" was equivalent to "however caused and by whomsoever made." The wording of the condition showed that the defendants intended to protect themselves against that very kind of accident.

The plaintiffs contended that the words of the clause in question were not apt to release the railway company from a claim by the plaintiffs themselves, and that the words must be construed strictly against the company, and it was for them to show that the

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

words were apt to give the protection desired, and the plaintiffs further contended that the accident did not arise out of the user of the gangway, but from the negligence of the defendants' servants.

Mr. Justice MacKinnon said that there were three questions :—(1) Did the undertaking to "indemnify" include the abandonment of any claim which the plaintiffs themselves might have against the company ? (2) Did the words "all claims whatsoever" include a claim arising out of negligence by the servants of the railway company ? (3) Did the damage in this case arise out of or in connexion with the user of the gangway ? He held that the words of the indemnity were wide enough to cover negligence by the company's servants and that the damage did arise through the user of the gangway. On the first question he adopted the plaintiffs' suggestion. At the least the expression was, in his opinion, ambiguous and must be construed *contra proferentem*.

The defendants appealed.

Mr. Stuart Bevan, K.C., Mr. Wilfrid Lewis, and Mr. J. A. Stainton appeared for the appellants ; Mr. Rayner Goddard, K.C., and Mr. E. H. C. Wethered for the respondents.

The Master of the Rolls, after stating the facts, said that the words used did not seem apt to bar a claim by the plaintiffs themselves. He could see that words might have been used to the effect that the user of the gangway should be entirely at the plaintiffs' risk and that the railway company should not be responsible in any way for the user. But, taking the clause as a whole, that did not seem to be the effect of the actual words used. It was curious that the words "from and against all claims," &c., were not used. Exactly what the clause might be construed to mean he hesitated to say, but he agreed with Mr. Justice MacKinnon that the words were not apt to defeat a claim by the plaintiffs themselves.

Lord Justice Scrutton delivered judgment to the same effect.

Lord Justice Sargant said that he had the misfortune to differ. A study of the circumstances indicated that the grant of the user of the gangway involved extra danger for the company, and it seemed to him that the company only granted permission to use the gangway on condition that the plaintiffs guaranteed them against any consequences which might arise from its overlapping the railway line. The defendants' contention was not that the plaintiffs had no claim, but that they (the defendants) were indemnified so that they could recover from the plaintiffs anything which they were forced on the claim to pay to the plaintiffs. The Judge below had dealt with the matter as if it were a question of the release of the plaintiffs' claim, whereas it was really a question of the defendants' counterclaim under the terms of the indemnity.

The words used in the indemnity clause seemed to him (Lord Justice Sargant) to be as wide as possible. There was no exception as to any claim by the plaintiffs themselves, and nothing to limit the liability to indemnify to the case of a claim by third parties. If a man insured another against all risk in respect of the latter's motor-car and the motor-car knocked down and injured the insurer, it seemed to him that the injured insurer would be left to find an indemnity from his own insurance.

[Solicitors—Mr. A. G. Hubbard ; Messrs. Calder Woods and Sandiford, for Messrs. Wansbroughs, Robinson, Tayler, and Taylor, Bristol.]

K.B. Div. (Bateson, J.) } 1927. July 1.

FIREMAN'S FUND INSURANCE COMPANY v. WESTERN AUSTRALIAN INSURANCE COMPANY, LIMITED, AND ANOTHER.*

Insurance (Marine)—Reinsurance—Payment on original policy — Non-liability by reason of unseaworthiness — Failure of claim against reinsurers.

The plaintiffs insured a consignment of gunpowder on a voyage and reinsured with the defendants. Both the original policy and the reinsurance policies covered perils of the sea and jettison and were expressed to be "warranted free from loss arising from . . . destruction . . . in a port of distress or otherwise." The original policy contained no admission of seaworthiness, but the reinsurance policies did contain such an admission, and they provided that the defendants would "pay as paid thereon," and that the payment should be subject to the same terms as in the original policy. The vessel carried, in addition to the gunpowder, 3,000 drums of sulphuric acid, and owing to heavy weather some of the drums burst and the acid disabled the machinery, with the result that the ship had to put in to a port of distress. There the required repairs could not be carried out with the gunpowder on board, and it was thrown overboard and became a total loss. The plaintiffs paid the owners as for a total loss and claimed to be reimbursed by the defendants.

Held, that as the way in which the sulphuric acid was stowed and loaded affected the safety of the ship and rendered her unseaworthy, the plaintiffs were under no liability on the original policy, and therefore they could not recover from the defendants on the reinsurance policies.

This was an action in which the plaintiffs, the Fireman's Fund Insurance Company, claimed, as original insurers, to be reimbursed by the defendants, the Western Australian Insurance Company, Limited, and the Atlantic Assurance Company, Limited, as reinsurers, in respect of a loss under a policy of marine insurance.

Mr. Dunlop, K.C., and Mr. Simey appeared for the plaintiffs ; Mr. Porter, K.C., and Mr. David Davies for the defendants.

The plaintiffs had insured a consignment of 300 cases of gunpowder on a voyage from New York to La Plata, and had reinsured their risk with the defendants.

The gunpowder was shipped on a wooden steamer belonging to the United States Shipping Board and chartered by them to charterers. In the course of the voyage the gunpowder was jettisoned. Besides the 300 cases of gunpowder a large quantity of other explosives, not concerned in the present action, including T.N.T., dynamite and detonators, and nearly 3,000 drums of sulphuric acid, were put on board. The steamer met with heavy weather which caused some of the drums of sulphuric acid to burst. The

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

acid spread about the ship, corroding the woodwork and disabling the pumps and machinery, and the steamer had to put in to Barbados in distress. The repairs which the master wanted to be done could not be carried out with the gunpowder on board. By direction of the harbourmaster it was thrown overboard and became a total loss.

In October, 1921, the plaintiffs paid the owners as for a total loss and claimed to be reimbursed by the defendants.

Both the original policy and the reinsurance policies covered the risks of, *inter alia,* perils of the sea and jettison.

The plaintiffs contended (1) that, even if the shipping of sulphuric acid in drums which were dangerously weak rendered the vessel unseaworthy at the beginning of the voyage, the reinsurance policies contained a statement that the seaworthiness of the vessel was admitted, and this amounted to an estoppel by agreement and barred the defendants from pleading unseaworthiness; (2) that the reinsurance policies provided that the defendants would "pay as paid thereon," and, if the original insurer in such a case honestly paid a claim, he could recover from his reinsurers even though it was found on further discovery of the facts that he would have had a good defence against the claim; (3) that even if an insurer believed that the vessel was unseaworthy he was not bound to take the defence of unseaworthiness against an innocent cargo owner; (4) that the burden of showing unseaworthiness was on the defendants and all that they had been able to prove was that the sulphuric acid had been improperly stowed; (5) that the harbourmaster did not in fact order, but only requested, that the gunpowder should be jettisoned, and even if he had given the order his position was not such as would make the order a restraint of princes; and (6) that the captain would have thrown the gunpowder overboard without any request, because by that time the adventure was lost and he could not get repairs done as long as the gunpowder remained on board.

The defendants originally put in a defence that the gunpowder was not lost by any of the perils insured against, but subsequently they amended by adding a plea that the steamer on which the gunpowder was carried was unseaworthy at the beginning of the voyage; that both the original policy and the reinsurance policies were expressed to be "warranted free from loss arising from restraint . . . or destruction . . . whether . . . occurring in a port of distress or otherwise . . ."; and that the jettison took place by order of the harbourmaster of Bridgetown, Barbados.

Mr. Dunlop, for the plaintiffs, said that the owners of the gunpowder had nothing to do with the shipping of the sulphuric acid. There was no allegation that the settlement between the plaintiffs and their insured was not an honest settlement. An underwriter must not pay unless his insured made out a *prima facie* case, but if the insured did prove facts showing a *prima facie* case the underwriter could waive any defence that he might have, provided that in doing so he acted honestly and reasonably in the circumstances.

On the point of seaworthiness, it had never been decided that the claim of a shipper of innocent cargo could be defeated on the ground that the ship was unseaworthy by reason of loading the dangerous cargo of some other owner. In fact, the ship, as a ship, was perfectly seaworthy when she began to load the sulphuric acid, and as between an insurer and an insured it had never been decided that bad stowage amounted to unseaworthiness. What would amount to unseaworthiness as between shipowner and cargo owner need not be unseaworthiness as between an innocent cargo owner and his insurer.

The steamer in this case was sufficiently repaired at Barbados to enable her to get back to the United States, and there she was sold for $900, being worth practically nothing. The trouble here arose from the fact that the sulphuric acid was badly stowed, and when rough weather was met with the drums broke loose and burst.

As to the law, even if the vessel was not seaworthy at the beginning of the voyage the defendants could not rely on that fact as they had admitted seaworthiness by their contract, *Parfitt v. Thompson* (13 M. and W., 392); *Phillips v. Nairne* (4 C.B., 343); *Cantiere Meccanico Brindisino v. Janson* (28 *The Times* L.R., 564; [1912] 3 K.B., 452).

Mr. Porter, interposing, said that a contract of reinsurance was only a contract to indemnify the insured against claims which he was legally bound to pay, and if the person insured under the reinsurance policy chose to pay a claim to which he would have had a good defence he could not recover from his reinsurer.

Mr. Dunlop submitted that the admission of seaworthiness in the reinsurance policies was an admission between the plaintiffs and the defendants for all purposes whatever, and as a result of that admission even if the vessel was unseaworthy at the beginning of the risk the defendants were estopped from relying on that fact, whether the original insurers could have relied on it or not.

Further, in view of the covenant in the reinsurance policy to "pay as paid thereon" the reinsurers here were bound to recompense the reinsured for any payments honestly and reasonably made by the reinsured, and the reinsurers could not refuse to pay because the reinsured might have resisted payment to their own assured by raising defences such as non-disclosure, &c. *Chippendale v. Holt* (12 *The Times* L.R., 50); *Western Assurance Company of Toronto v. Poole* ([1903] 1 K.B., 376, at pp. 385-6); *Marten v. Steamship Owners' Underwriting Association* (18 *The Times* L.R., 613); *Nelson v. Empress Assurance Corporation, Limited* (21 *The Times* L.R., 555; [1905] 2 K.B., 281); *Scottish Metropolitan Assurance Company, Limited v. Groom* (40 *The Times* L.R., 676; 41 *The Times* L.R., 35).

The plaintiffs here insured the gunpowder against loss by the perils insured against, and what they reinsured was, not their liability to pay on the original policy, but the risk of the gunpowder being lost by a peril insured against; and in the events which happened the gunpowder was lost by the perils insured against. Section 34 (3) of the Marine Insurance Act, 1906, expressly provided that an insurer could waive a breach of warranty, and the only case that he had been able to find which dealt with the right of a reinsured to waive conditions in the contract between himself and his own assured was *Fire Insurance Association, Limited, and Others v. Canada Fire and Marine Insurance Company* (2 Ont. Rep., 481). Underwriters on cargo did not in practice take the defence of unseaworthiness, *Sleigh v. Tyser* (16 *The Times* L.R., 404; [1900] 2 Q.B., 333, at p. 336). A contract of reinsurance was not a contract of indemnity, but was a new insurance of the thing originally insured (Arnould on Marine Insurance, section 323); *British Dominions General Insurance Company, Limited v. Duder* (31 *The Times* L.R., 361; [1915] 2 K.B., 394, at p. 400).

There was the further question, whether this was

a loss by restraint of princes. A harbourmaster was not a "ruler" or "prince," and this harbourmaster did not in fact give any order which prevented the carrying out of the adventure. His request did not amount to a "restraint."

Mr. SIMEY followed, and submitted that, on the question of seaworthiness, the goods owner warranted his insurer that the ship was fit to take the particular cargo, and warranted that the result of putting his cargo on board should not endanger the ship, *Biccard v. Shepherd* (14 Moore, P.C., 471), but he did not make any warranty with reference to cargo put on board by other persons.

He referred to the Marine Insurance Act, 1906, section 40 (1), (2), and to *Elder, Dempster and Co., Limited v. Paterson, Zochonis and Co., Limited* (40 *The Times* L.R., 464 ; [1924] A.C., 522, at pp. 561-2).

Mr. PORTER, for the defendants, submitted that the fact that without exceptionally heavy weather, the cargo of acid was adrift within a few hours of leaving New York, was *prima facie* evidence that the vessel was unseaworthy for this adventure. It was known that sulphuric acid was a dangerous cargo and should either be carried on deck, so that if any trouble arose it could be at once jettisoned, or, if carried in a hold should be packed in some absorbent material so that if leakage should occur the escaping acid would be absorbed before it could do any damage. Here neither of those precautions had been taken.

The unseaworthiness which in fact existed was due to three causes : the drums were of too weak construction ; some of the drums were leaking at the start ; and the whole of the drums were badly stowed. Bad stowage which endangered the ship amounted to unseaworthiness, *Kopitoff v. Wilson* (1 Q.B.D., 377) ; *Ingram and Royle, Limited v. Services Maritimes du Tréport* (29 *The Times* L.R., 274 ; [1913] 1 K.B., 538). The standard of seaworthiness required was shown by section 39 (4) of the Marine Insurance Act, 1906, and that applied whether the insurance was one of a ship or of goods. So far as unseaworthiness was concerned the warranty was the same both in a bill of lading and in an insurance, *Becker, Gray and Co. v. London Assurance Corporation* (34 *The Times* L.R., 36 ; [1918] A.C., 101, at p. 114).

A contract of reinsurance was only a contract to indemnify the original insurer against the sum which he actually had to pay, it was not an independent insurance of the goods for the voyage, *British Dominions General Insurance Company, Limited v. Duder* (*supra*). The reinsurance contract might be defined as a contract of insurance on goods, limited to the liability of the original insurer. Section 1 of the Marine Insurance Act, 1906, expressly limited the contract of marine insurance to indemnity. A reinsurer was only liable if the original insurer was liable, *St. Paul Fire and Marine Insurance Company v. Morice* (22 *The Times* L.R., 449).

As to the words, "pay as paid thereon," those words had never been held to create an obligation to pay unless the original underwriter was legally compellable to pay, except that if the original underwriter had made a reasonable settlement the reinsurer could not dispute it. The original underwriter had no right to be generous with other people's money. There was a provision also in this reinsurance policy that the payment should be subject to the same terms as in the original policy.

On the point of restraint of princes, the original policy contained a warranty free from capture, seizure . . . restraint . . . destruction . . ., and so, if the action of the harbourmaster was a restraint, it was not covered by that policy. And the evidence showed that the gunpowder was really thrown overboard by order of the authorities, or in consequence of their refusal to allow it to be landed.

He referred to *Miller v. Law Accident Insurance Company* (19 *The Times* L.R., 331 ; [1903] 1 K.B., 712, at p. 720).

Mr. SIMEY replied. It was the condition of the steamer, not the request of the harbourmaster, that put an end to the adventure. The fate of the gunpowder would have been just the same if the harbourmaster had not done anything at all.

MR. JUSTICE BATESON, in his considered judgment, said that he must decide for the defendants on the ground that, these being policies of reinsurance, there was no liability under them unless there had been liability under the original policy, and, in fact, there had been no liability under that policy, because the vessel was unseaworthy.

His LORDSHIP read clauses from the original policy and from the reinsurance policies. He said that they all included perils of the sea and jettison, but the original policy did not contain any admission of seaworthiness. It was clear that the reinsurance policies covered the liability of the original insurer and it was also clear that the original insurer could have avoided payment if the goods were lost owing to the ship being unseaworthy.

He then dealt with the facts and held that the ship was so loaded and stowed as to be unseaworthy at the beginning of the adventure. Sulphuric acid was a dangerous cargo and the way in which it was stowed and loaded in this case affected the safety of the ship, as a ship, and rendered her unseaworthy. For the plaintiffs, it was contended that it was not the gunpowder which caused the unseaworthiness and that the owner of the gunpowder could not be made to suffer because the ship had been made unseaworthy by the cargo of someone else. There was no authority for drawing that distinction and section 39 of the Marine Insurance Act, 1906, was against the contention.

It was also said that, on the facts, this was only a case of bad stowage and not one of unseaworthiness, but he could not agree with that. It was further contended that the words "seaworthiness admitted" in the reinsurance policies estopped the reinsurers from taking any point as to unseaworthiness ; but the answer to that was that a reinsurance policy covered only the liability of the original insurers and if the original insurers never were liable the reinsurers also were not liable.

Then it was said that the words "to pay as paid thereon" made the reinsurers liable because the original insurers had in fact paid and were entitled to waive any defences which they might have against their assured provided that they acted honestly and reasonably. The plaintiffs, in fact, did not "waive" anything ; they paid apparently without knowing or caring what defences they might have to the claim. In any case an insurer could not waive defences without the consent of his reinsurer if by so waiving he extended the reinsurer's liability. The Court had nothing to do with the statement that it was contrary to respectable business practice for underwriters to take a defence of unseaworthiness against the owner of a parcel of innocent goods. The ship here was, in fact, unseaworthy, and it would be improper to hold that the word "unseaworthy" had a meaning in a policy different from its meaning in a contract of carriage, *Becker, Gray and Co. v. London*

Assurance Corporation (34 *The Times* L.R., 36 ; [1918] A.C., 101, at p. 114).

A contract of reinsurance was a contract to indemnify against losses suffered by the original insurer, not against gifts made by him ; the original insurer must have both paid and been liable to pay. The words "to pay as paid thereon" only covered payments for which the original insurer was legally liable and, if the original insurer wished to be covered in respect of payments which he might voluntarily make, he must stipulate to that effect. No doubt the original insurers in this case would have had a right over against the carrier, but, unfortunately, the carrier was insolvent. That, however, gave the original insurers no right against the reinsurers. The Canadian case, *Fire Insurance Association, Limited, and Others v. Canada Fire and Marine Insurance Company* (2 Ont. Rep., 481), which had been referred to in argument, was quite different in its facts and had no application here.

He decided the case on the ground that the ship was unseaworthy. That made it unnecessary to deal with the further point which was raised of restraint of princes, and he said nothing about that.

There must be judgment for the defendants, with costs.

[Solicitors—Messrs. William A. Crump and Son ; Messrs. Parker, Garrett and Co.]

K.B. Div. (McCardie, J.) } 1927. June 30.

COOPER v. MIRRON AND ANOTHER.*

Practice — Poor persons—Costs—Admission to sue or defend as a poor person—Change in financial position before hearing—No obligation on poor person to inform the Court—R.S.C., Order XVI., rr. 22-31 H.

Observations on the omission, from the Poor Persons Rules, of an obligation on a person admitted to sue or defend as a poor person to inform the Court that his income or assets have undergone a change which would take him out of the class of persons for whom the Poor Persons Rules were intended.

In this action Mrs. Alice Jane Cooper, a widow, of 2, Belmont-road, Clapham, S.W., claimed from Mr. Gabriel Mirron, a registered dentist, of 24, Great Russell-street, Bloomsbury, W.C., and Dr. Alfred Joseph Chiappa Sinclair, of 30A, Wimpole-street, W., damages for the death of her daughter, Edith, aged 30, which, she said, was caused by the negligence of the defendants, in connexion with the extraction of her daughter's teeth at the National Dental Hospital, Great Portland-street, W.

Mr. Mirron was the house surgeon and Dr. Sinclair was the medical superintendent at the hospital, which was now the dental department of University College Hospital, and the evidence showed that on May 22, 1925, Miss Cooper had a tooth extracted under gas by a student. In the course of the operation a piece of the tooth broke off, and, passing down her windpipe, became embedded in the right bronchus. She was not informed of the accident and pneumonia supervened, from which she died on August 27, 1925.

Both the defendants denied that they were guilty of negligence. The jury, however, found that Mr. Mirron had been guilty of negligence which had resulted in Miss Cooper's death and they awarded the plaintiff £150 damages against him. They found no negligence by Dr. Sinclair.

Leave had been granted to Mrs. Cooper to sue and to Mr. Mirron to defend as poor persons. After the jury had returned their verdict, it was stated that Mr. Mirron was admitted to defend as a poor person on March 5, 1926, when his means came within the necessary limits, but, a month later, he obtained an appointment as a dentist's assistant at a salary of £6 10s. a week and lived rent free in the dentist's house. He had not informed his legal advisers or the Court of his change of means and his Lordship said that he would postpone entering judgment.

Mr. A. T. Denning and Mr. E. H. O'Donnell appeared for the plaintiff ; Mr. F. W. Wallace and Mr. P. B. Showan for Mr. Mirron ; and Mr. A. A. Pereira for Dr. Sinclair.

Mr. PEREIRA asked for an order that Dr. Sinclair's costs should be provided for. Had it not been, he said, for the fact that both Mrs. Cooper and Mr. Mirron had been admitted as poor persons his Lordship would probably have made an order that Mrs. Cooper should pay Dr. Sinclair's costs and that she should be able to recover them from Mr. Mirron (see *Bullock v. London General Omnibus Company, Limited* (23 *The Times* L.R., 62 ; [1907] 1 K.B., 264). Order XVI., rule 28, however, which provided that, in the absence of a special order, a poor person should not be liable to pay costs to another party, rendered an order in that form in Dr. Sinclair's favour useless to him. But his Lordship had a full discretion under Order XVI., rule 29, to make an order regarding the costs without fully "depauperizing" Mr. Mirron.

MR. JUSTICE MCCARDIE.—There seems to be a defect in these Poor Persons Rules. Under Order XVI., rule 31, "should the conducting solicitor discover at any time that the poor person . . . is possessed of means beyond those stated in the certificate he shall at once report the matter in writing to the Court and to the committee which nominated him," but I can find nothing in the Rules which provides that an admitted poor person who becomes possessed of means which, *prima facie*, would prevent him from being a poor person, is under any obligation to inform anyone of the change in his position. The result is amazing. A man may get leave to sue as a poor person on the footing that his wages are not more than £2 a week and that he is not worth more than £50, and within a month he may become entitled to a fortune of £10,000, and no obligation is imposed on him to say a word about it to his solicitor, or his counsel or the Court. That is a very serious omission.

Mr. PEREIRA said that a litigant in that position had a moral obligation to disclose the change in his means and if he did not discharge it his Lordship could exercise his discretion as he thought fit.

Counsel added that, if his Lordship had not a discretion, Dr. Sinclair would have to pay the costs of an action in which he had been successful and would have no redress against any one. No action would have been brought against Dr. Sinclair if Mr. Mirron had not thrown the blame entirely on him. He asked his Lordship to order that Mr. Mirron should pay Dr. Sinclair's costs direct, or to order specially that Mrs. Cooper should pay the full costs and should be able to recover them from Mr. Mirron. He referred to the Supreme Court of Judicature (Consolidation) Act, 1925, section 50, subsection 1, and *The Esrom and The Wills, No.* 66 ([1914] W.N. 81).

Mr. WALLACE agreed that his Lordship had a full discretion to deal with the matter. Mr. Mirron's

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

conduct, however, was not open to any reprehension or criticism. He had made a full disclosure of his means when he was admitted as a poor person and there was on him no obligation, moral or legal, to disclose the subsequent acquirement of means. There was no reason to depart from the ordinary procedure in poor persons' cases which was that a plaintiff did not get an order for costs against an unsuccessful poor person defendant. *Bullock v. London General Omnibus Company, Limited* (*supra*) was a very different case. There both the defendants expressly alleged negligence against each other. In the present case Mr. Mirron had to mention Dr. Sinclair when he stated the facts *bona fide*, and Dr. Sinclair was made a party to the action, not to establish Mrs. Cooper's case against Mr. Mirron, but as a second string to her bow. Mr. Mirron had succeeded on two out of three issues.

Mr. O'Donnell submitted that Mr. Mirron could be ordered to pay Dr. Sinclair's costs direct, but he asked that an order should be made for such payment only after Mr. Mirron had paid the damages. There was no question that Mrs. Cooper was in greater financial need than Dr. Sinclair.

Mr. Pereira said that Dr. Sinclair had no desire to be in any way oppressive to Mrs. Cooper.

Mr. Justice McCardie, in giving judgment, said that under the Poor Persons Rules, *prima facie*, Mrs. Cooper would get no costs against Mr. Mirron, and Mr. Mirron was not liable to pay costs in the absence of a special order (Order XVI., rule 28 (1)). If Mr. Mirron had in any way misled the Court he (his Lordship) would not have hesitated to discharge the certificate entitling him to defend as a poor person. The Court must always punish dishonesty, but the statements which Mr. Mirron had made in his application were quite correct, and there was no dishonest suppression of any fact.

The Poor Persons Rules were seriously defective in the respect to which he had referred. They should contain a definite and imperative obligation on every person admitted to sue or defend as a poor person to inform the Court of any change in his income or assets which would take him out of the class of persons for whom the Poor Persons Rules were intended. One would have thought that those who drafted the Rules must have been alive to that point, but the only statement dealing with the matter was the duty of the consulting solicitor to inform the Court of a change of means which had come to his knowledge (Order XVI., rule 31). The view of the draftsman of the Rules clearly was that the Court should be informed at once of any change in the litigant's financial position.

It had been said that there had been a moral obligation on Mr. Mirron to disclose his increased means. But the phrase "moral obligation" was a broad one and in the present case there was no moral obligation which ought to be enforced. His (his Lordship's) own view was that it had never occurred to Mr. Mirron to inform any one of the improvement in his means. No one had ever suggested to him that he should do so. In the circumstances it would not be right or just to "depauperize" him.

No costs, therefore, would be given for or against Mr. Mirron in the absence of a special order. The facts of the present case precluded the application of *Bullock v. London General Omnibus Company* (23 *The Times* L.R., 62; [1907] 1 K.B., 264). He was not satisfied that section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, read in conjunction with Order LXV., rule 1, empowered him to make a direct order of the kind indicated by Mr. Pereira, but, in any event, as a matter of discretion he would not make such an order because of the peculiar circumstances of the case.

His Lordship, therefore, made no special order regarding costs. Judgment was entered for Mrs. Cooper against Mr. Mirron for £150 damages, without any order regarding costs save those appropriate to poor persons' cases. Judgment was entered for Dr. Sinclair.

[Solicitors—Mr. A. C. Kent; Messrs. Peake, Bird, Collins and Co.; Messrs. Le Brasseur and Oakley.]

Chan. Div. (Eve, J.) } 1927. July 5.

IN RE HARRINGTON MOTOR CO., LIMITED.*

Companies — Winding-up — Insurance of company against claims — Judgment against company—Subsequent liquidation—Payment by insurers to liquidator — Whether amount available for general creditors.

The applicant obtained judgment against a limited company for damages for personal injuries and costs. Afterwards the company went into liquidation, and the insurance company with which the company in liquidation was insured paid the amount of the damages and costs to the liquidator.

Held, that the applicant was not entitled to have the amount in question paid to him direct by the liquidator, but it formed part of the assets for distribution among the general creditors, including the applicant.

This was a summons taken out by Mr. Walter Chaplin, of Galleywood, Chelmsford, against the liquidator of the Harrington Motor Company, Limited.

Mr. Chaplin had recovered £324 damages for personal injuries in an action in the King's Bench Division. He now asked for a declaration that that sum, together with the costs—£273—both of which had been paid over to the liquidator by the insurance company in which the motor company was insured, did not form part of the assets of the company available for distribution among the creditors in the winding up.

Mr. W. N. Stable appeared for the applicant; Mr. Bischoff for the liquidator.

Mr. Stable said that the damages which the applicant had recovered had been paid over by the insurance company in which the motor company was insured to the liquidator. The applicant claimed that they were payable to him direct and were not available for the general creditors.

Counsel referred to *In re Richardson* ([1911] 2 K.B., 705); and *British Union and National Insurance Company v. Rawson* (32 *The Times* L.R., 665; [1916] 2 Ch., 476). There were, however, two authorities on the other side—namely, *In re Law Guarantee and Trust Society, Limited—Liverpool Mortgage Insurance Company's* case (30 *The Times* L.R., 616; [1914] 2 Ch., 617); and *In re Law Guarantee and Trust Society, Limited—Godson's Claim* ([1915] 1 Ch., 340). But those cases, he submitted, were distinguishable. When insolvency arose there was an equity to apply this money in a

* Reported by A. W. Chaster, Esq., Barrister-at-Law.

particular way. Again, even though the third party had no legal or equitable right as against the liquidator, it was one of those cases which fell within the principle of *Ex parte James* (L.R., 9 Ch., 609). Moreover, his Lordship had jurisdiction to allow a judgment creditor to levy execution on the assets of an insolvent company, even after the winding-up order.

Mr. BISCHOFF said that the judgment in the King's Bench Division was obtained before the liquidation and the applicant was, therefore, a creditor in the liquidation and entitled to share in the assets. The authorities showed that it was not sufficient to say that this was money recovered with respect to an indemnity. But there was another method of recovery, and that was by appealing to a Court of Equity, when the Court would only act on the footing that justice should be done. That was the case of *In re Richardson* (*supra*) on which the applicant relied. But this case came within the *Liverpool Mortgage Insurance* case (*supra*) ; *Anglo-Baltic and Mediterranean Bank v. Barber and Co.* ([1924] 2 K.B., 410) ; and *Godson's Claim* (*supra*).

Mr. STABLE replied.

MR. JUSTICE EVE, in giving judgment, stated the facts and said that the case had given rise to an interesting discussion, but, in his opinion, the questions involved were concluded by authority. All that *In re Richardson* ([1911] 2 K.B., 705) decided was that a liquidator or trustee who was under an obligation to account to a third party was in no better position than the original party. It was quite impossible here to make out that the applicant, with whom they all must sympathize, had any claim at law or in equity against the moneys in the hands of the liquidator. It was said that it was unfair or unrighteous that this money should be applied for the benefit of others. But the difficulty was that the law stated that the assets, unless subject to a legal or equitable lien, were to be distributed among the creditors. He must assume that the legislature in so directing had considered that less injustice would be worked by a *pari passu* distribution than by giving particular creditors preference. The question was, Was there any special case made out for interfering with that distribution ? He thought not. Having arrived at that conclusion, he would be acting contrary to it were he to say that the applicant should be at liberty to levy execution after the winding up. That might give him a preference to which he was not entitled. He (his Lordship), therefore, had no alternative but to dismiss the summons. It was not a case for dismissal with costs unless the liquidator pressed for them.

Mr. BISCHOFF said that his client did not ask for costs.

[Solicitors—Messrs. W. Hilliard and Ward ; Messrs. Simmons and Simmons.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)

1927. June 23.

MUSMANN v. ENGELKE.*

International Law — Diplomatic privilege — Action to recover rent—Entry of appearance under protest—Plea of privilege by defendant —Evidence—Consular secretary attached to German Embassy — Extent of privilege — Right of cross-examination — Intervention of Attorney-General on behalf of Foreign Office.

In an action for arrears of rent due under a lease of a dwelling-house the defendant entered a conditional appearance under protest, and pleaded that being an official of the German Embassy he was protected by diplomatic privilege. It appeared that he was a "consular secretary" formerly working at the German Consulate, but that he had been transferred to the German Embassy. The Attorney-General upon the instructions of the Foreign Office appeared and informed the Court that the defendant was recognized by the Foreign Office as being on a list comprising the suite of the German Ambassador. The plaintiff disputed the claim of privilege, and obtained an order from Shearman, J., for the cross-examination of the defendant.

Held (Lord Hanworth, M.R., dissenting), that as a consul and a consular official are not within the diplomatic privilege of immunity from process, and the Foreign Office Diplomatic List was not conclusive upon the point, the question was one ultimately of fact, and the exact facts ought to be ascertained by cross-examination, to which the defendant was bound to submit.

Duff Development Company v. Government of Kelantan (40 *The Times* L.R., 566 ; [1924] A.C., 797) distinguished by Scrutton, L.J.

This was an appeal from a decision of Mr. Justice Shearman allowing an appeal from the order of a Master, and ordering the defendant to attend for cross-examination. The action was brought to recover arrears of rent due on the lease of a house in Hampstead. The defendant, Herr Hermann Gustav Constantine Engelke, who entered a conditional appearance, claimed that all proceedings should be set aside on the ground that he was a consular secretary on the staff of the German Embassy, and as such was entitled to the diplomatic privilege of immunity from civil process. Other interlocutory proceedings were taken which are referred to at length in the judgments below. The claim of the defendant was supported by the Foreign Office, which instructed the Attorney-General to appear and argue the case. The defendant's affidavit having been disputed by the plaintiff, who contended that he was merely a consular official doing consular work which had been transferred to the German Embassy, the Master ordered that the defendant should be allowed to put in his affidavits without being cross-examined, and refused an order for cross-examination, which Mr. Justice Shearman allowed. The full facts and arguments appear from the judgments.

Mr. Pritt, K.C., and Mr. W. T. Monckton appeared for the appellant ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Drucquer for the Foreign Office ; and Mr. Giveen and Mr. J. B. Blagden for the respondent.

LORD HANWORTH, M.R.—On July 28, 1926, the plaintiff in this action issued a writ against Hermann Gustav Constantine Engelke, claiming, in the statement of claim upon the back of the writ, arrears of rent due under a lease dated August 18, 1924, made

* Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

between the plaintiff and the defendant whereby the plaintiff let to the defendant certain premises known as "The Oaks," No. 3, Frognal, Hampstead, together with other items stated therein. The writ was served upon the defendant and on July 30, 1926, his solicitors wrote to the plaintiff's solicitors informing them that the defendant is "an official of the German Embassy duly registered on the list of officials kept by the Foreign Office and our client is therefore entitled to diplomatic privilege. May we refer you to the Diplomatic Privileges Act (7 Anne, c. 12) ?" and adding: "Will you kindly inform us that in these circumstances you will withdraw the writ and give notice of discontinuance ?" The plaintiff's solicitors declined to accede to this request and said: "If your client intends to set up the plea of diplomatic privilege we must put him to strict proof." The defendant entered a conditional appearance on August 5, and on August 12 a summons was issued on behalf of the defendant for an order to set aside the writ and all subsequent proceedings "on the ground that the defendant is a consular secretary on the staff of the German Embassy since November 25, 1920, and has been notified as such to the British Foreign Office and that the defendant's name appears in the Diplomatic List issued by the British Foreign Office." This summons was accompanied and supported by an affidavit made by the defendant's solicitor affirming the above facts and exhibiting a certificate to the same effect, dated August 5, under the hand and seal of the German Chargé d'Affaires in London. When the summons was heard on August 26, the Senior Master made an order, as asked, setting aside the writ and all subsequent proceedings. From this order an appeal was taken to Mr. Justice Talbot on October 18, when the learned Judge, acting upon the materials then before him, allowed the appeal and ordered that the plaintiff should be at liberty to proceed with his action. The learned Judge further ordered that the defendant should have leave to appeal, and also ten days' further time to apply to set aside the writ. This latter portion of the order gave the defendant an election. He decided not to appeal, but to make another application to set aside the proceedings and issued a summons the same day, October 26, to set aside the writ and all proceedings "on the ground that the defendant is in the service of the Ambassador of the German Empire at the Court of St. James's, London, since November 25, 1920, and had been notified as such." On November 3 the defendant swore an affidavit stating that he held the position of consular secretary on the staff of the German Embassy; that in all his work he was answerable only to the German Ambassador; and "Further, I perform general duties which fall upon the staff of the Embassy, such as the coding and decoding of telegrams."

On November 9 notice was given on behalf of the plaintiff that on the hearing of this second summons to set aside the writ, application would be made for leave to cross-examine the defendant upon the affidavit sworn by him.

On December 3, 1926, a certificate was obtained from the Foreign Office, signed by an Assistant Under-Secretary of State and sealed with the seal of the Foreign Office, stating that the name of the defendant appeared in June, 1921, in the Foreign Office list of persons composing the diplomatic establishments and households of each Embassy and Legation, and thereafter till 1924, as assistant clerk on the staff of the German Ambassador, and since then as consular secretary on the staff of the German Ambassador.

On December 8 the defendant swore a further affidavit repeating the statements made in his former one, and stating in paragraph 2: "I am exclusively employed on the staff of the Embassy, and have no duties save on the said staff and am not allowed to do any work apart from my duties at the Embassy. I am in every way a regular member of the Embassy Staff and am responsible to the Ambassador for every part of my work." He also exhibited the notification to the British Foreign Office of his having taken the place in the German Embassy of a predecessor, whose return to Germany was therein officially notified. That notification was dated November 30, 1920.

The above affidavits were controverted by the plaintiff, who affirmed that the defendant was a consular secretary, doing consular work only, which had now been transferred to the German Embassy at Carlton House-terrace from 21A, Bedford-place.

On December 9 the Master ordered that the defendant should be allowed generally and without specific attention to their contents to put in his affidavits without being cross-examined upon them; but on appeal Mr. Justice Horridge remitted the matter to the Master again to decide, upon the contents of the affidavits, whether the defendant should attend for cross-examination.

On February 15, 1927, on the matter thus coming before him for further consideration upon the affidavits, the Master refused to order the defendant to be cross-examined, and on March 4 Mr. Justice Shearman allowed an appeal from the Master's order and ordered "that the defendant do attend for the purpose of cross-examination." He has given leave to appeal to this Court, as he considered the matter of such importance that it should be decided after argument in Court, and the defendant has appealed, asking that the order of the Master refusing to order cross-examination may be restored.

The case was heard on April 11 and 12 and May 30. On the first of those days the Attorney-General attended, instructed by the Treasury Solicitor, to give information to the Court. The plaintiff in the action, the respondent to the present appeal, contends that the defendant's duties were and still are consular in their nature, or at any rate of such a kind that he is entitled to subject him to cross-examination in order to ascertain what his duties and position are, although he does not exclude the possibility that after the defendant's position has been ascertained it may be found that he is entitled to diplomatic privilege, for Mr. Giveen does not dispute that if it is properly proved that the defendant does perform diplomatic duties he is entitled to exemption. The appellant in this Court, the defendant in the action, contends that he has adduced materials, reinforced and amplified by the presence of and information given by the Attorney-General, sufficient to entitle him to that privilege without more inquiry.

It is not contended before this Court that the defendant would be entitled to diplomatic privilege if he is to be considered as a consul or merely performing consular duties. Such persons are not within the privilege. See *Heathfield v. Chilton* (4 Burrows, 2016) and *Viveash v. Becker* (3 M. and S., 284).

It is also clear that as to the status of a foreign potentate or foreign Power the proper course is that the Court should apply to his Majesty's Government, and that in any such matter it is bound to act on the information given to it through the appropriate department. "Such information is not in the nature of evidence: it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance." See *per* Lord Finlay in *Duff Development Company v. Kelantan Government* (40 *The Times* L.R., 566;

[1924] A.C. 797, at p. 813) ; and at page 815 he adds : "There is no ground for saying that because the question involves considerations of law these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law."

The same principle applies to the person of an ambassador to the Court of St. James's. Who is to determine who is the ambassador of a foreign country ? Surely that must be decided upon information obtained from the Foreign Office, information which when received cannot be questioned in a court of law. The ambassador is accredited to the Court of St. James's and is presented to and received by his Majesty. It is the home Sovereign who has the power and right of recognition. The reasoning of Lord Dunedin in the above case then applies (p. 820) : "If our Sovereign recognizes and expresses the recognition through the mouth of his Minister that another person is a Sovereign, how could it be right for the Courts of our own Sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own Sovereign had conceded ? "

The present case, however, is not easy to decide upon the above rules. The evidence before the Court offers ground for the contention that the defendant falls within the definition of a consul—a consular secretary—who was at one time employed at the office where the consular work of the Germans was centred, No. 21A, Bedford-place. On the other hand, there is evidence that he is "exclusively employed on the staff of the Embassy and has no duties save on the said staff," and that he performs general duties which fall upon the staff of the Embassy, and in particular the coding and decoding of telegrams. This latter duty was taken as a test in the case of *Parkinson v. Potter* (2 *The Times* L.R., 184 ; 16 Q.B.D., 152), where it was held that diplomatic privilege, if otherwise to be conceded, was not lost because the diplomat was also a consul.

It is not claimed that the certificate of the Foreign Office dated December 3, 1926, is conclusive. If the matter rested upon that certificate alone further information might be required, even though it does appear to state that the defendant is accepted by the Foreign Office as being upon the staff of the German Ambassador, and recognition by the Foreign Office was accepted as establishing immunity in *Macartney v. Garbutt* (6 *The Times* L.R., 214 ; 24 Q.B.D., 368).

Our attention was called to a number of cases where the question whether the claimant was entitled to diplomatic immunity was decided by the Court upon the facts contained in the evidence before it. In *Darling v. Atkins* (3 Wils., 33) a purser of a ship of war was held not to be a bona-fide servant of an ambassador. In *Novello v. Toogood* (1 B. and C., 554), where the servant of an ambassador did not reside in his master's house but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, were not exempt from distress. In *Fisher v. Begrez* (1 Cr. and M., 117) the affidavit as to exemption fell far short of what was required to establish it. The decision in *Magdalena Steam Navigation Company v. Martin* (2 E. and E., 94) was upon a demurrer, so the mode of ascertaining the fact that the defendant was a public minister did not arise. Lord Campbell, however (pp. 103 and 114), pointed out that what was to be avoided was "coactio" to the ambassador.

According to modern procedure cross-examination could and might be allowed to clear up the ambiguity as to the nature of the defendant's duties which appears from the affidavits filed. Whether that course would be satisfactory may be doubtful. More facts might be elicited, and then it would become a question of law whether those facts justified the claim of privilege ; and meantime, if privilege is ultimately accorded, the holder of it would have been subjected to processes from which the comity of international intercourse releases him. However, it may not be possible to avoid it, and the cases cited above seem to show that where doubts arise, and there is no special information afforded to the Court, its usual procedure must be followed, even though by section 3 of the statute of Anne all writs and processes against any public minister and his servants are to be adjudged utterly null and void. This must be so when a simple question of fact has to be decided, such as whether the person in question has, or has not, ceased to hold his position, and ceased, consequently, to preserve his immunity. But the immunity given by diplomatic privilege belongs to the ambassador or minister in whose service it is claimed. It is not the immunity of the particular individual. It is the ambassador who throws his cloak over his attaché or servant and all persons associated in the performance of the duties of the embassy or legation. As Mr. Justice Wills said in *Parkinson v. Potter* (*supra*, at p. 159) : "It is not for us to measure the quantum of the services, either required from or rendered by him," where no question of *bona fides* is raised.

As Lord Sumner says in the *Duff Development* case (*supra*, at p. 824) the Court must act on the best evidence. In reference to the status of a foreign ruler, he says : "It is the prerogative of the Crown to recognize or to withhold recognition from States or Chiefs of States, and to determine from time to time the status with which foreign Powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in his Majesty's name. Accordingly, where such a statement is forthcoming no other evidence is admissible or needed." This reasoning would, in my opinion, apply if the question was, who is the ambassador of a foreign country accredited to this country ?

Diplomatic immunity depends upon the comity of nations. It has often been said that the statute of Anne was declaratory of the common law and did not alter it. How, then, is this immunity to be determined ? It is clear that the Court could ask for and might be given information from a Secretary of State, which would then be authoritative and conclusive. In the present case the Attorney-General, moved thereto by the Foreign Office, has attended and has in his own person informed the Court that the defendant has been, and is, recognized by the Foreign Office as a member of the suite of the German Ambassador. The Foreign Office might have made no intervention, or replied that it is a question of fact that they are unable to determine, and have left the matter to take its course in the King's Courts. But where they have definite information to give, and give it through the Attorney-General, who takes upon himself the responsibility of conveying that information, with full appreciation of the importance of that responsibility, I find it impossible to neglect or pass over such intervention and to hold that in spite of it the matter is left in such uncertainty that cross-examination of the defendant ought to be

ordered. There is before the Court the certificate from the Foreign Office dated December 3, 1926, signed by an assistant under-secretary to the effect that the defendant is one of the persons composing the diplomatic establishment and household and upon the staff of the German Ambassador.

This statement has been rendered unequivocal by the statement of the Attorney-General. What better evidence as to the status of the defendant could be forthcoming? If he were cross-examined, and the Master or Judge or Court before whom the issue was to be determined came to the conclusion that the defendant was not entitled to diplomatic privilege, the divergence deprecated by Lord Dunedin (*supra*, at p. 820), between the decision of the Court and the comity extended by the department charged to exercise such in the name of his Majesty, would become apparent.

In *In re Suarez* (34 *The Times* L.R., 127; [1918] 1 Ch., 176), the Foreign Office afforded information that the defendant had ceased to be the Minister of the Bolivian Government and had lost any title to diplomatic privilege. The certificate of the Foreign Office was treated as conclusive.

The case of *Aksionairnoye Obschestvo A. M. Luther v. Sagor and Co.* (37 *The Times* L.R., 777; [1921] 3 K.B., 532) offers an illustration that the information supplied by the Foreign Office may not be conclusive, but may be information only for the purpose of the Court's deciding upon the materials supplied. But that case and *Fenton Textile Association, Limited v. Krassin* (38 *The Times* L.R., 259) show that the source of information resorted to by the Courts upon the question of diplomatic status was the Foreign Office.

The presentment of the attitude of the Foreign Office by the Attorney-General was treated as correct and authoritative by the Court of Appeal in *The Gagara* (35 *The Times* L.R., 259; [1919] P., 95), and in particular see the observation of Lord Justice Bankes at pages 103, 104 as to the effect of the deliberate statements of the Law Officers of the Crown, which if not accepted and acted upon, "there would be a divergence of action as between the Courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take."

The Attorney-General has stated that his intervention in the present case has been dictated in view of that very possibility and because the German Ambassador made communications to the Foreign Office on behalf of one of his staff, the defendant, who has been recognized as such by that department, and he has claimed their assistance.

The view of Lord Mansfield as to such an intervention has been expressed in *Heathfield v. Chilton* (*supra*, at p. 2017): "I find this is not an application by the Attorney-General by the direction and at the expense of the Crown. That indeed would have shown that the Crown thought this person entitled to the character of a public minister." If *obiter*, that *dictum* is entitled to respect and is in accord with the observations made in this Court quoted above. To act in accordance with such information thus conveyed is not a *petitio principii*, but to adopt the best evidence that can be adduced.

No doubt the Foreign Office and the Attorney-General undertake a serious responsibility in the adoption of this course. The Foreign Office will no doubt have considered that in so doing they might be depriving one of his Majesty's subjects of his ordinary right of suit against one whom he claims to be his debtor, and if the defendant is a debtor to the plaintiff the debt ought to be paid. But while representations might be made to the Foreign Office to withdraw their recognition from the defendant, or to represent to the German Ambassador that exception must be taken to one particular member remaining upon the staff, that does not alter the duty of the Court to act in accordance with the principle of the common law and of the statute of Anne, that so long as that recognition exists international comity requires that effect should be given to it. This is the answer to the argument of Mr. Giveen, that the Foreign Office, or the Attorney-General, may be acting upon insufficient or even incorrect appreciation of the true facts. They need not take action. They might reject the appeal of an ambassador and refuse to intervene. They might submit the facts and leave the Court to draw the inference in law. But if with the responsibility upon them they do intervene and communicate to the Court the status of the diplomat through the Attorney-General, that evidence is conclusive, and as Lord Sumner says: "Where such a statement is forthcoming no other evidence is admissible or needed."

For these reasons, in my judgment, the appeal ought to be allowed and the order of the Master restored, but as I have the misfortune to differ from my colleagues the order of the Court will be that directed by Lord Justice Scrutton.

Lord Justice Scrutton.—This case in form is only an appeal from a discretionary decision under Order XXXVIII., Rule 1, that a gentleman who makes an affidavit in a pending proceeding shall be cross-examined on his affidavit. He appeals, alleging that such an order cannot be made against him, or at any rate that it ought not as a matter of discretion to be made.

Mr. Engelke's name appears in the Diplomatic List furnished by the English Foreign Office to sheriffs under the sixth section of the Act of Anne. It appears in June, 1921, as that of an assistant clerk, and so continues till 1924, when it appears as that of a consular secretary. At some time since the war all or part of the consular service of Germany has been put under the control of the German Ambassador for the country in which the consular service exists. It appears that the German Government contends that as to the consular service so transferred it has now acquired a diplomatic immunity which as consular service it did not before possess. This was the first contention put forward by counsel for Mr. Engelke before Mr. Justice Shearman; before us, another counsel appearing did not insist on this, though he said that the German Embassy attached great importance to the contention, but counsel argued that at any rate Mr. Engelke had diplomatic immunity. The Attorney-General informed us: "His Majesty's Government are not prepared to accept the view that merely because for convenience, or economy of administration, Germany has chosen to amalgamate those two departments, she is thereby entitled to claim immunity for persons who perform purely consular functions." Obviously, therefore, it is important that the exact facts as to Mr. Engelke's position should be ascertained to decide what his exact status is, and whether it confers diplomatic immunity.

Mr. Engelke appears to have rented a house in England. The landlord, Mr. Musmann, alleges that Mr. Engelke has not paid his rent and has broken the covenants of his lease. I understand Mr. Engelke to dispute these allegations, but to take the preliminary point that he is immune in England from any legal proceedings to ascertain whether he has broken his contract. He, however, offers, apparently

seriously, that these questions as to whether an English contract as to a house in England made between persons in England, and depending on English law, shall be decided not by an English Court, knowing the English law, in the place where the witnesses are, but by a German Court which does not know English law except as a question of evidence, in a place where the witnesses are not resident. I appreciate that it is desirable that diplomatic immunity should be maintained, and that the remedy for avoiding legal obligations may be complaint direct or through the English Foreign Office to the Government or Ambassador of the person claiming diplomatic immunity, but it can hardly be desirable that foreign subjects resident in England shall make contracts and then break them without effective remedy.

To understand the question before us it is necessary to state exactly what proceedings have been taken. On July 28, 1926, Musmann issued a writ, alleging that under a lease from him to Engelke, dated August 18, 1924, of premises at Hampstead, rent due had not been paid, and sums were due for dilapidations, and damages for premature termination of the tenancy. On August 12, 1926, the defendant took out a summons to set aside the writ on the ground "that the defendant is a consular secretary on the staff of the German Embassy in London since the 25th November, 1920, and has been notified as such to the British Foreign Office, and that the defendant's name appears in the Diplomatic List issued by the British Foreign Office." It now appears that it was not the fact that he was consular secretary between 1920 and some date in 1923 or 1924. The summons was supported by an affidavit by the solicitor for Mr. Engelke, who is also solicitor to the German Embassy, deposing that he was informed by the Embassy and believed that Engelke had been consular secretary since 1920 and had been notified as such to the British Foreign Office, and that his name appeared in the Diplomatic List issued by the Foreign Office, and exhibiting a certificate from the German Chargé d'Affaires to that effect. As already stated, it now appears that both information and certificate were inaccurate, as Engelke was not consular secretary till some date in 1923 or 1924. On this summons and evidence Master Bonner on August 26, 1926, made the order asked for. An appeal was brought before Mr. Justice Talbot on October 18, 1926, who after being referred to a number of decided cases reversed the Master, but gave the defendant leave to appeal, and in the alternative leave to renew the application on further evidence. The leave to appeal was not used—I think wisely. I understand Mr. Justice Talbot to have decided on the earlier authorities that it is not enough to give immunity (1) that the ambassador claims it for a defendant, or (2) that the name of the defendant having been supplied by the ambassador is put by the Foreign Office on the list issued by the Foreign Office to sheriffs under the Act of Anne. I think the authorities referred to by Mr. Giveen support this view, and that to obtain immunity it must be proved that the actual position occupied by the defendant and the actual work done by him brings him within the class of servants or suite of the ambassador who are immune from legal proceedings, as distinguished from the consular staff, who are not. The description "assistant clerk" or "consular secretary" does not seem to elucidate the question. The correctness of Mr. Justice Talbot's decision is, however, not before us, as the defendant did not use the leave to appeal, but took out another summons on fresh evidence. This summons came before Master Moseley on December 9. Meanwhile Mr. Engelke had sworn an affidavit on November 3, repeating the inaccuracy about his being "consular secretary from 1920," and stating that he performed the duties which before the war were performed by the Consul-General, and other commercial matters, being answerable for his work to the German Ambassador, and that he also performed general duties, such as the coding and decoding of telegrams. Count Bernstorff also filed an affidavit. Thereupon the plaintiff gave notice on November 9 that he would apply for an order for cross-examination of Mr. Engelke and Count Bernstorff on their affidavits. The application was stated to be made under Order XXXVII., Rule 20, which was apparently a mistaken reference to Order XXXVIII., Rule 1. Count Bernstorff's affidavit was thereupon withdrawn. This application came before Master Moseley on December 9, when, we were informed, he took the view that without looking at the contents of the affidavits at all he would refuse to order cross-examination of the defendant. Against this refusal there was an appeal to Mr. Justice Horridge, who on December 20 remitted the matter to the Master to look at the affidavits and decide whether there should be cross-examination. When it went back the Master had before him the following material which had not been before Mr. Justice Talbot: (1) a certificate, dated December 3, from the British Foreign Office that Mr. Engelke's name as returned by the German Ambassador to the Foreign Office appeared in the Foreign Office List of 1921, 1922, and 1923 as assistant clerk to the German Ambassador, and in and since 1924 as consular secretary on the staff of the German Ambassador. It is not a certificate by the Foreign Office that Engelke does in fact hold such a position, or that such a position gives diplomatic immunity, even if such a statement is admissible. This had produced a second affidavit of Mr. Engelke: (1) correcting the mistakes in his previous affidavit and (2) setting out that the duties performed before the war by a Consul or Consul-General were now performed by the German Ambassador and his staff "in all cases where a German Ambassador is appointed," a statement the exact meaning of which is not very clear; that he is employed as a member of the staff of the commercial department of the Embassy and assists the Ambassador in his work in regard to all commercial matters. He does not repeat the statement about coding and decoding telegrams. There was also an affidavit by Mr. Musmann deposing that up to some time in 1926 the German Ambassador carried on work at Carlton House-terrace and that the consular work was carried on at 21A, Bedford-place, and that Mr. Engelke was employed at 21A, Bedford-place, and suggesting that if the defendant is now at Carlton House-terrace it is because his consular work has been transferred from Bedford-place. On these materials Master Moseley refused, on February 15, to allow cross-examination, and appeal was made to Mr. Justice Shearman. Mr. Stuart Bevan for Mr. Engelke argued as his first proposition that now that consular duties were performed by the Ambassador all members of the consular staff had ambassadorial privileges. The learned Judge allowed the appeal and ordered the defendant to appear for cross-examination, taking the view, as I understand, that the claim of privilege was so important that the exact facts as to the work done should be established, and that this could best be achieved by cross-examination of the witness on the affidavit which he proposed to use. From this order an appeal was made to this Court, which is the matter for decision.

The position before this Court is different in two respects. First, Mr. Pritt, now appearing for Mr. Engelke, did not take up the broad position that all consular servants, when transferred to the control of the ambassador, had diplomatic immunity, though they were not immune before the transfer. Though, he said, the German Embassy attached great importance to this position, he as counsel took the responsibility of basing his arguments on the facts relating to this particular case. Those facts, of course, were what cross-examination was intended to ascertain. But, secondly, something happened of much more importance as a general question. The Attorney-General appeared and made a statement to the Court. It is not a case where, as in the case of questions as to an "independent sovereign," the Court had asked for information from the best source of information and treated it as conclusive. In this case the German Ambassador approached the Foreign Office, which thereupon instructed the Attorney-General to attend and give the Court information which appears on page 26 of the Notes. The President of the Court thereupon asked the Attorney-General whether he himself was satisfied as to the information which he had given. He answered that he derived his information from the appropriate department for giving him information and he adopted it as Attorney-General. It appears on page 29 that the information was to the effect that, while the Foreign Office did not accept the position that all consular servants if under the control of the ambassador had diplomatic immunity, the Foreign Office had investigated the line between consular service and ambassadorial service and were satisfied that Engelke did some service on the "right side of the line." The Attorney-General agreed that the fact that the defendant was on the Diplomatic List was not conclusive.

I am not at all satisfied that this procedure was admissible, still less that it is conclusive. In certain matters, notably the status of sovereigns, or of ambassadors, their representatives, the Courts are accustomed to seek information from the Secretaries of State as representing the King and to accept a definite answer as conclusive. I refer to the recent judgments of the House of Lords in *Duff Development Company v. Government of Kelantan* (40 *The Times* L.R., 566 ; [1924] A.C., 797). There was a difference of opinion between Lord Finlay and Lord Sumner as to whether the same principle applied to the boundaries of foreign States, and I respectfully refer to the very instructive remarks of Lord Sumner on the subject. But I am not disposed to enlarge the cases coming within this rule of practice. The Crown and Government know whom they have recognized as independent Sovereigns, though the actual facts in the *Kelantan* case (*supra*) do not strengthen one's belief in the efficacy of the Courts' procedure in eliciting the real position. They know whom they have received or ceased to receive as an ambassador (*In re Suarez*, 34 *The Times* L.R., 127 ; [1918] 1 Ch., 176). But the Foreign Office appear to have no knowledge of the internal arrangements of an embassy, as for instance whether a particular person is a chorister or a cook, or what exact work he does, except such as they derive from statements by the ambassador or his representatives. To say that a British subject, suing on a British contract, is to be deprived of his right to enforce his contract in a British Court because a department of the Government holding an inquiry not on oath, at which the plaintiff is not represented, has arrived at a conclusion that the defendant has immunity from process, and, without being asked by the Court for information, instructs the Attorney-General to inform the Court of the conclusion at which the department has arrived, without the plaintiff's having an opportunity of questioning the decision or ascertaining the facts for himself, in my opinion is a most unsatisfactory position and not warranted by any authority. It appears to be admitted that a mere claim by an ambassador that a particular person is privileged, even if the name of that person is put on the Diplomatic List, is not conclusive. There are embassies and embassies ; a statement by Embassy A may have different weight from one by Embassy B ; the Courts must decide each case on the evidence, and obviously cannot say : "We will accept all statements by all accredited representatives of States as conclusive." If very recent events did not show the impossibility of that position, a reference to the odd claims made unsuccessfully in old cases by various minor embassies and their staffs will prove it. I am quite unable to accept the Attorney-General's statement of the result of the Foreign Office investigation as binding and conclusive on this Court. To do so would be to substitute a department of the Government for the Courts in a class of case where such substitution has never hitherto been recognized. I do not find any case where the Court has asked the Foreign Office for information as to the position of the servant of an embassy, or where the Attorney-General has attended to give the Court such information, and I am not disposed to make a precedent.

What, then, is the position ? The consular service has never hitherto been granted the immunity which applies to the diplomatic service. I am not inclined at present to accept the position that the transfer of control to the Ambassador confers that immunity on the officials transferred. I quite realize that a transferred official may have sufficient diplomatic work given him to confer on him diplomatic immunity. I am inclined to think that colourable or slight transfer would not be sufficient if his principal work is consular. I do not think that it is desirable to extend the class of persons in a country who can disregard the laws without legal consequences. But I should wish to decide any question of the position of a former consular official with full knowledge of the relevant facts. It appears to me that cross-examination on general statements is one of the best means of getting at the exact truth. I see no danger that the Court will allow cross-examination that will drag out diplomatic secrets, and I regard as fantastical the suggestion that Mr. Engelke could be compelled to disclose the contents of any particular cipher telegram which he alleges that he sent.

The case strikes me in this way : Mr. Engelke occupies a position the exact effect of which depends on the facts of his service. To give him immunity it is necessary accurately to ascertain those facts. He files two affidavits containing general statements, one of them containing a substantial and careless inaccuracy. It appears to me to be most desirable to test the generality of his statements by the cross-examination to which any person who makes an affidavit is liable. If once you accept that a mere claim by him or his Ambassador is insufficient, it follows that the accurate facts must be ascertained.

I am not deciding that Mr. Engelke is not entitled to immunity : it is very possible that when the facts are ascertained by regular methods he will be held immune. In that case it is to be hoped that the Ambassador will satisfy himself that one of his staff has not inflicted a legal wrong on a citizen of the country to which he is accredited, for which wrong there is no legal redress in that country. What I am deciding is that the question of immunity shall be

decided only when the relevant facts have been ascertained in the usual way, and that cross-examination of a person who makes an affidavit is in this case necessary for that end. It might be enough to say that Mr. Justice Shearman used his discretion, and there being no relevant change of facts I cannot interfere with it, but as I have come to the same conclusion as Mr. Justice Shearman, I think it my duty to express it. The appeal, in my opinion, should be dismissed with costs in any event.

Lord Justice Sargant.—I have had an opportunity of considering the judgment that has just been read by Lord Justice Scrutton, and I agree with it.

[Solicitors—Messrs. Buckeridge and Braune; Messrs. Waterhouse and Co.; the Treasury Solicitor.]

K.B. Div. (Acton, J.) } 1927. June 29.

LOOKER AND ANOTHER v. LAW UNION AND ROCK INSURANCE COMPANY, LIMITED.*

Insurance (Life)—Proposal—Statement of good health — Acceptance subject to payment of first premium and to health remaining unaffected—Illness of assured—Cheque sent for premium—Acceptance by insurance company —Death of assured—Action on policy.

On July 10, 1926, one L. sent to the defendant insurance company a proposal for an insurance on his life, stating on the form that he was free from disease or ailment. On July 15 the defendants sent him the following acceptance :—"I beg to inform you that the proposal made by you to this company to effect an assurance on the life of yourself (whole world) for the sum of £5,000, with profits, has this day been accepted, and if the health of the life proposed remains meanwhile unaffected, the policy will be issued on payment of the first premium as under, subject to satisfactory evidence of age being furnished. . . . The risk of the company will not commence until receipt of the first premium; and the directors meanwhile reserve the power to alter or withdraw this acceptance." On July 20 L. became ill and on July 22 he signed a cheque for the first premium, but the cheque was not sent that day. On July 23 pneumonia was definitely diagnosed. On July 24 the cheque was sent. On July 26 the defendants received the cheque and sent the following certificate :—"I certify that the proposal made by Dr. W. Looker to effect an insurance on the life of himself for the term of whole life has been accepted by this company for £5,000, and the first quarterly premium having been paid a policy will be delivered in due course." On July 27 L. died of pneumonia, and the bank did not pay the cheque. In an action by L.'s executors on the policy,

Held, that as there had been, between the proposal and the acceptance of the premium, a change in the risk, and as the acceptance was on the faith of the continued truth of the statements in the proposal, the action failed.

This was an action in which Mrs. Rosanna Looker, of 54, Elm Park-gardens, S.W., and Mr. Henry Watkins, of 41, Colehill-lane, Fulham, S.W., administrators with the will annexed of the late Dr. William Looker, an osteopathic surgeon, claimed from the Law Union and Rock Insurance Company, Limited, £5,000 on a policy of assurance on the life of Dr. William Looker.

It was alleged that on or about July 10, 1926, Dr. Looker made a proposal for a policy of life assurance with the defendant company for £5,000 with profits. On July 15 the defendants accepted that proposal at a yearly premium; on July 20, by letter to Dr. Looker's agent, they agreed to accept quarterly payments of £47 18s. 4d. in lieu of annual premiums, the risk to attach from receipt of the first premium. On July 24 a cheque dated July 22 and signed by Dr. Looker was posted (as appeared from the postmark) before 7.30 p.m. It was received by the defendants on Monday, July 26, and on that date they sent a certificate of acceptance of the proposal with a promise to send the policy in due course.

On July 27, before the cheque was cleared, Dr. Looker died, and owing to his death the bank did not pay the cheque. A tender of the premium in cash on August 11 was refused.

In these circumstances the defendants refused payment. They denied the agreement to accept the proposal; they admitted that the cheque was sent, but denied that they accepted it as payment of the premium. They said that if the certificate sent on July 26 was a receipt for the premium it was conditional on the cheque being honoured. They had never, in fact, received the premium.

They further alleged that if they accepted the proposal the acceptance was subject to the express conditions (*a*) that the risk was not to commence till the premium was paid; (*b*) that the health of the assured should remain unaffected between the proposal and the payment of the first premium; and (*c*) that satisfactory evidence of Dr. Looker's age should be furnished. They said, as to (*a*), that the premium was never received because the cheque was returned; as to (*b*), that on or about July 20 Dr. Looker had a severe attack of pneumonia and remained in a precarious condition till his death, and no information was given to the defendants; and as to (*c*), that no evidence of age was given to the defendants. They also alleged that there was concealment of a material fact in the non-disclosure of Dr. Looker's illness.

Mr. Hawke, K.C., and Mr. H. H. Hanworth appeared for the plaintiffs; Mr. Birkett, K.C., and Mr. Harold Murphy for the defendants.

Mrs. Looker, giving evidence, described the progress of her husband's last illness. He went to lie down about 2.30 p.m. on July 20, and about 7.30 said that he did not feel inclined to get up. Dr. Shah was sent for next day, and said that her husband would be all right. He was not told at any time that he had pneumonia, and she did not think pneumonia was mentioned till Sir Bruce Bruce-Porter was called in on July 24.

In cross-examination the witness said that her husband's estate was valued for probate at £873. He left legacies of £250 to a Miss Edith Alice Moore, his secretary, and of £1,000 to her sister, Miss Dora Moore, his bookkeeper. Miss Annie Moore, a third

* Reported by J. W. Hall, Esq., Barrister-at-Law.

sister, was a witness, with Dr. Shah, to the will dated July 17, 1926. Miss Annie Moore, said the witness, was a trained nurse and osteopath, and came on July 23 to help to nurse her husband. She did not remember Miss Annie Moore coming on July 17.

Colonel Lyon, a pupil-assistant to Dr. Looker, gave evidence that he looked after Dr. Looker's patients during his illness. He did not become anxious till July 24; on Sunday, the 25th, Dr. Looker was much worse. He (the witness) thought that pneumonia set in on the Saturday evening about 8.30. He was present at the interview between Dr. Looker and Commander Verner, the defendants' agent, at which the insurance proposal was discussed.

On July 22 he asked Dr. Looker if he had sent the premium. Finding that he had not, he got Dr. Looker to sign a cheque, which the witness filled in, and asked Miss Edith Alice Moore to forward it with a covering letter to the defendants. On Saturday, July 24, the witness asked her if the cheque had gone, and she said that she was sorry that she had forgotten it. She then put the cheque with the covering letter into an envelope and the witness posted it.

In cross-examination the witness said that he posted the cheque before he thought pneumonia had set in. He was under the impression that Dr. Looker was already assured from the acceptance of his proposal. Had he known that Dr. Looker was not assured he would not have dreamt of asking him to sign a cheque in bed for the premium. He would have regarded it as tricking the insurance company.

Re-examined, the witness said that he did not have any fear for Dr. Looker's life till the Sunday night or Monday morning.

Miss Annie Moore gave evidence that she called at 54, Elm Park-gardens on Friday, July 23, and was told that Dr. Looker was not well, as he had a cold. She saw him and thought that he was not looking his usual self. He asked her to stay and look after him. She did so, and he seemed to get a little worse on the Saturday afternoon.

Cross-examined, she said that the will was signed in the bed room on July 24 about 2 p.m. Dr. Looker held the pen without assistance. He became delirious late the same evening.

His Lordship.—I want to know who wrote the date "July 17" when the will was in fact made on July 24.

Counsel said that they would take the necessary steps to secure the production of the original will from Somerset House.

The witness said that Dr. Looker asked her if she would mind witnessing the will, and she thought that it was brought up by her sister, the secretary. She did not know why it was dated July 17. Nor did she know that her sisters were to receive legacies, or that, apart from the insurance money, there was not enough to pay them.

When Nurse Morriss came on the Saturday evening the witness said to her that pneumonia was suspected. She said that Dr. Looker was very ill, but did not remember saying that she thought he would never recover. The doctor ordered cupping on the Saturday. She thought that Dr. Looker was suffering from influenza, not pneumonia.

Dr. Abdul Majid Shah said that he knew Dr. Looker as a friend, and was called in professionally on July 21. Dr. Looker was not suffering from pneumonia on that day, nor on Thursday, July 22. The witness thought that it was influenza. He began to suspect pneumonia on Friday, July 23. During the course of that morning he was certain.

Cross-examined by Mr. Birkett, Dr. Shah said that the will was signed in his presence in Dr. Looker's bed room on Saturday, July 24, 1926. Dr. Looker simply asked him to sign, and he signed. Dr. Looker signed quite easily, though he was lying down. He was not propped up for the purpose. Dr. Looker read the will through, and appeared to alter it here and there, and then signed it. The witness was unable to remember whether Miss Annie Moore was present. She did not sign at the same time as the witness. "Dr. Looker signed it, then I signed it, and no one else signed it at that particular moment. Nurse Moore may have signed possibly three or four hours later."

He did not speak to Dr. Looker about the gravity of his illness or of putting his affairs in order. He just told Mrs. Looker that his condition was very serious. When Nurse Moore came on the Friday, he told her that it was a case of pneumonia, but might not have told her that it was serious at that time. Delirium did not set in till the Saturday night.

Mrs. Looker, recalled, said that the first time that she was told that her husband's condition was serious was on the Sunday, after Sir Bruce Bruce-Porter had seen him. Dr. Shah did not tell her on the Saturday.

Mr. Hawke said that he must withdraw the statement that there were sufficient assets at the bank to meet the cheque. Dr. Looker's passbook, which he now had before him, showed a balance of £43 against the cheque for £47 18s. 4d.

Mr. Birkett said that the defendants would call no evidence. He submitted that the material date was July 26, 1926. Down to that date the company could refuse to go on with the matter. Till then the representations must be treated as continuing, and if Dr. Looker was not in fact in good health it was immaterial that he did not know it. Secondly, there was a duty to inform the defendants of any change in Dr. Looker's health. Thirdly, it was a condition of acceptance that between July 15 and July 26 the health of Dr. Looker should remain unaffected. Fourthly, it was an express condition that the risk should not attach till the first premium was received, and it never was received.

Mr. Justice Acton.—I am troubled by the question whether Dr. Looker, who intended to send a cheque on July 22, authorized the sending of it on July 24. If by that time he realized his condition he would presumably have acted as an honourable man, just as Colonel Lyon had said that he would not have posted the cheque had he known that Dr. Looker had pneumonia.

Mr. Birkett.—If he knew of his condition, it was fraud; if he did not know, the cheque was sent without authority. If necessary, he would ask leave to amend the pleadings to cover that issue.

Continuing his submission, Mr. Birkett referred to *Canning v. Farquhar* (2 *The Times* L.R., 386; 16 Q.B.D., 727), and *Harrington v. Pearl Life Assurance Company, Limited* (30 *The Times* L.R., 613). On July 26 the real question for the insurance company was, "Shall we enter into this contract, or not?" Manifestly, if they had known the facts, they would not. That they completed the contract showed that they were relying on the truth of the representations made in the proposal accepted on July 15.

Mr. Hawke opposed any amendment. The authority given by Dr. Looker, who signed the cheque, had not been withdrawn, and his agent was entitled to act on it. As to non-disclosure, Dr. Looker did not know of the fact which was alleged to be material: if he did, admittedly it did not matter whether he knew it to be material. If Dr. Looker had continued in good health and on the morning of

July 27 had been run over by an omnibus and killed, would the company have been able to say that there was no contract? The representation as to health in the proposal form could only relate to the date at which it was made—*i.e.*, July 10. As Lord Esher said in *Canning v. Farquhar* (*supra*), no one could make representations as to his health a month hence.

MR. JUSTICE ACTON.—Lord Esher is saying that the representation is a continuing representation up to the time when the contract is made.

MR. HAWKE.—Down to the acceptance of the premium the defendants were entitled to decline to go on because there was no contract. But by acceptance of the premium they waived the condition as to the continuing state of health. *Canning v. Farquhar* (*supra*) had nothing to do with a case where the contract was completed. The sole decision in that case was that there was no contract. He asked that there should be judgment for the plaintiffs.

MR. JUSTICE ACTON, in his considered judgment, said that Dr. Looker, a man about 44 years of age, and of exceptionally strong physique, had American degrees in osteopathy and medicine, and practised as an osteopathic surgeon. On July 10, 1926, he sent a proposal for life assurance to the defendants. One of the questions on the proposal form was: "Are you now free from disease or ailment?" and this was answered, "Yes." It also contained the usual declaration as to the truth of the answers, which were to be the basis of the contract. On July 15 the company sent Dr. Looker a conditional acceptance in the following form:—

"Sir,—I beg to inform you that the proposal made by you to this company to effect an assurance on the life of yourself (whole world) for the sum of £5,000, with profits, has this day been accepted, and if the health of the life proposed remains meanwhile unaffected, the policy will be issued on payment of the first premium as under, subject to satisfactory evidence of age being furnished. . . . The risk of the company will not commence until receipt of the first premium; and the directors meanwhile reserve the power to alter or withdraw this acceptance."

On Wednesday, July 21, Dr. Looker began to feel indisposed. He worked in the morning as usual. It was not his practice to work on Wednesday afternoon, but on this occasion he lay down because he felt ill. About 4 p.m. a friend and pupil, Colonel Lyon, called, and spoke about the payment of the premium of assurance, in which he had a financial interest. He thought, as he said, that the assurance was already effected. About 8 p.m. a doctor was sent for.

On July 22 Colonel Lyon, who saw Dr. Looker in bed and again spoke about the premium, filled in a cheque, which Dr. Looker signed in bed, and gave it to the secretary to be sent. For some reason it was not sent till July 24. On Friday, July 23, Dr. Shah came with Dr. Barber. Pneumonia was then quite definitely diagnosed, and it grew steadily worse till it terminated in the death of the patient. From July 23, then, he was suffering from pneumonia. On that afternoon Miss Annie Moore, a sister of the secretary, and a trained nurse, called, and Dr. Looker asked her to stay and nurse him. Dr. Shah took a grave view of the case on July 23 and 24.

On the afternoon of July 24 Dr. Looker, who was then in such a state of health that he could not be propped up, had a will brought to him and signed it lying down. It was witnessed by Dr. Shah and Nurse Moore. Dr. Looker's signature was very shaky—a strong contrast to the signature on the cheque. The date inserted in the will was erroneous—July 17 instead of July 24. He (his Lordship) regarded that incident as significant from every point of view. About 6.30 p.m. on the same day Dr. Taylor, another friend, called and suggested a second opinion, and mentioned Sir Bruce Bruce-Porter.

About 6 p.m. Colonel Lyon asked the secretary if she had sent the cheque, and, finding that she had not, he posted it himself. Colonel Lyon, who gave his evidence with great candour, said that he would certainly not have done so had he realized that the assurance was not already effective. Dr. Looker had given no authority to anyone to send the cheque on July 24. On that evening he became delirious, and Nurse Morriss was sent for.

On Sunday, July 25, Sir Bruce Bruce-Porter saw the patient and told Mrs. Looker that he was suffering from pneumonia and ordered oxygen. Early on Monday morning there was a very severe crisis which was almost fatal, but the patient pulled through it. On that same morning, July 26, the cheque was received by the defendants in the ordinary course of post, and they sent the following certificate:—

"I certify that the proposal made by Dr. W. Looker to effect an insurance on the life of himself for the term of whole life has been accepted by this company for £5,000, and the first quarterly premium having been paid a policy will be delivered in due course."

On the following morning Dr. Looker died of pneumonia, from which he had quite definitely been suffering since Friday, July 23. He (his Lordship) had no doubt that from that time Dr. Looker himself and those with him knew that he was seriously, but not necessarily that he was dangerously, ill.

This was one of those cases in which, between the proposal and the acceptance of the premium, there was a change in the risk, in that at the date of the proposal Dr. Looker was, as he truly stated, in good health, while at the date of the acceptance of the premium he was in a critical state.

Mr. Birkett said that the acceptance was made on the faith of the continued truth of the statements in the proposal. The authority for that was to be found in *Canning v. Farquhar* (2 *The Times* L.R., 386; 16 Q.B.D., 727), and in *Harrington v. Pearl Life Assurance Company, Limited* (30 *The Times* L.R., 613). It was also said that the position of the defendants was strengthened by the terms of their acceptance of July 15 and by the fact that on July 26, when they accepted the risk, the assured was dying and they would not have dreamed of accepting the risk had they known. Mr. Birkett also claimed that there was non-disclosure by Dr. Looker. Reference might usefully be made to the judgment of Mr. Justice Channell in *Yager v. Guardian Assurance Company, Limited* (29 *The Times* L.R., 53; 108 L.T., 38), where he said:—

"I think it is clearly settled that the law as to fire insurance and life insurance is the same as it is in reference to marine insurance, and that is that a policy is not binding if any material fact is not disclosed, and that that is so whether or not the person who does not disclose it knows that it is material. . . . The question depends upon whether the fact is material or not, and not upon whether the person supposed it to be material. Then the time up to which it must be disclosed is the time when the contract is concluded. Any material fact that comes to his knowledge before the contract he must disclose."

In his opinion, Mr. Birkett's contention on that point also was sound, but in this case the insurance company had protected themselves by express terms, which rendered it unnecessary to consider whether, if these terms had been absent, the principle laid down by Mr. Justice Channell would have applied.

Other points which had been taken, and which he would only mention and leave them to be dealt with elsewhere if necessary, were :—(1) That the first premium was never in fact received by the defendants; (2) that Dr. Looker's bank balance was not in fact sufficient to meet the cheque ; (3)—a point which was taken by his Lordship himself—that there was no authority from Dr. Looker for the sending of the cheque on July 24.

In these circumstances there must be judgment for the defendants, with costs.

[Solicitors—Mr. R. A. Kendrick ; Messrs. Kendall, Price, and Francis.]

Judicial Committee of the Privy Council.. (Viscount Haldane, Viscount Sumner, Lord Shaw of Dunfermline, Lord Darling, and Lord Warrington of Clyffe.) 1927. July 4.

LAFFER v. GILLEN.*

Australia—Crown lands for discharged soldiers—Conditions and forfeitures—Ejectment for arrears.

If a person holding Crown land in South Australia under the Australian Discharged Soldiers' Settlement Act, 1917, and amending Acts fail to carry out the conditions laid down in his agreement with the Government, he can be ejected without a judicial or quasi-judicial inquiry.

This was an appeal from a judgment of the High Court of Australia of December 17, 1925, reversing a decree of the Full Court of South Australia and restoring the judgment of Mr. Justice Poole, the Trial Judge.

Mr. Maugham, K.C., and Mr. F. Villeneuve Smith, K.C. (of the Australian Bar), appeared for the appellant ; Sir Herbert Cunliffe, K.C., and Mr. A. Andrewes-Uthwatt for the respondent.

Lord Warrington of Clyffe, delivering their Lordships' judgment, said :—

By the Crown Lands Act, 1915, of South Australia it was provided (section 9, xiii.) that the Commissioner of Crown Lands might authorize any person to take possession of lands, messuages, or tenements belonging to the Crown whereon any person is in unauthorized possession or occupation and forcibly eject every person therefrom.

Early in May, 1923, the appellant, as Commissioner, purporting to act under the aforesaid statutory power, authorized certain constables to take possession of the lands now in question and forcibly eject the respondent therefrom ; they took possession of such lands accordingly, and ejected the respondent therefrom.

Shortly afterwards the respondent, as plaintiff, instituted the present action against the appellant, as defendant, claiming damages for the entry and ejectment, alleging that it was wrongful.

The appellant pleaded the above-mentioned statute, alleging that the respondent was in unlawful possession or occupation of the lands in question.

The question, then, is whether the respondent at the time of his ejectment therefrom was in lawful possession or occupation of the lands.

The action was tried, on the question of liability only, by Mr. Justice Poole, who by his judgment dated April 17, 1924, decided in favour of the respondent.

On appeal to the Full Court this judgment was reversed by Chief Justice Murray and Justices Angus Parsons and Napier, who by their judgment dated August 12, 1924, allowed the appellant's appeal and ordered the respondent to pay the costs of the action.

The respondent appealed to the High Court of Australia, who, on December 17, 1925, by a majority (Mr. Justice Higgins dissenting), allowed the appeal with costs and restored the judgment of Mr. Justice Poole.

The present appeal is brought by special leave of his Majesty in Council, the appellant undertaking to pay the respondent's costs of the appeal as between solicitor and client in any event.

There has thus been a very considerable difference of opinion in the Courts of the State and Commonwealth, and even those Judges who came to a conclusion favourable to one side or the other were by no means unanimous in their reasons for their decisions.

At the conclusion of the war the Government of South Australia was faced with the problem of dealing with numbers of discharged soldiers, and determined, amongst other things, to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled, and for this purpose obtained the passing of the Discharged Soldiers' Settlement Act, 1917, and subsequent amending Acts. The administration of these Acts was entrusted to the Minister of Repatriation, a corporation sole created by the Act of 1917.

The appellant at all material times held the two offices of Commissioner of Crown Lands and Minister of Repatriation.

It is obvious that for the success of such a scheme two main objects were in view—the proper cultivation and development of the land and the advantage of the men settled thereon. Superintendents and inspectors were appointed whose duty it was to inform themselves of the conduct and prospects of the settlers and to report thereon to the Minister.

The respondent, a discharged soldier, who had had some training on a Government training farm, by a letter dated February 9, 1918, applied for a grant of the lands in question, and on February 25, 1918, he was informed by letter of the Minister that his application was granted and of the conditions on which the land would be held. Except that the letter stated that for the first 12 months his occupancy of the land would be strictly probationary, it is unnecessary to set out its terms, inasmuch as they were embodied in the formal agreement to be presently mentioned.

The respondent appears to have been let into possession of the lands on March 1, 1918. On April 25, 1920, he made a formal application for the grant to him of an agreement over the land.

The agreement is dated March 1, 1919, the day on which the probationary period expired, but it was not actually sealed by the Minister or signed by the respondent until February 26, 1921. It was treated before this Board as common ground that for purposes of construction and effect the date of the agreement is March 1, 1919.

The agreement purports to be made between the Minister of Repatriation of and for the State of South Australia contracting for and on behalf of his Majesty the King (thereinafter called the vendor) of the one part and the respondent (thereinafter with his

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

executors, administrators and assigns called the purchaser) of the other part. It may be observed in passing that it is clear from the contract that in every passage material to the case "the vendor" means the Minister and not his Majesty himself.

The agreement was to be for a term of 65 years, and thereby the vendor agreed to sell and the purchaser to purchase the land as therein described for £2,106, subject to a reservation of minerals.

It is desirable to set out the provisions for payment of purchase money and interest. They are as follows :—

"3. The purchaser shall pay the said purchase money and interest thereon by instalments as follows :—

"(i.) No instalments shall be payable for the first year of the term of this agreement.

"(ii.) During the succeeding four years of the term of this agreement the purchaser shall pay interest on the said purchase money at the following rates :

"For the second year at the rate of £2 10s. per cent., for the third year at the rate of £3 10s. per cent., for the fourth and fifth years at the rate of £5 per cent. per annum.

"Such interest shall be payable by equal half-yearly instalments of £26 6s. 6d. during the second year, of £36 17s. 1d. during the third year, and of £52 13s. during the fourth and fifth years of the said term, such instalments to be paid on the 31st and 28th days of the months of August and February respectively in each year.

"(iii.) During the remainder of the term of this agreement the purchaser shall pay the said purchase money and interest on the balance thereof for the time being unpaid at the rate of £5 per cent. per annum by half-yearly instalments of £55 10s. 11d., such instalments to be paid on the days of the months lastly hereinbefore mentioned in each and every year until the whole of the said purchase money and interest shall have been paid."

Then follow certain conditions as to residence, the proper cultivation and improvement of the land, and other matters not material to be set forth in detail.

Clause 22 is as follows :—

"If at any time within the period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself, or that the purchaser has neglected to work the land satisfactorily or has been guilty of serious misconduct during his occupation thereof, the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit [and] upon the expiration of three months from the giving of such notice, this agreement and the right of the purchaser to complete the purchase and to possession of the said land shall cease and determine and be void, anything in this agreement to the contrary notwithstanding."

After a provision in clause 23 for return in the event of surrender or forfeiture of instalments of purchase money already paid and for certain allowances for improvements, clause 24, so far as it is material, is as follows :—

"And it is hereby declared that if any of the instalments hereby reserved shall be unpaid and in arrear for more than six months after the day whereon the same is hereby made payable the purchaser having had at least three months' previous notice in writing demanding its payment this agreement may be cancelled by the vendor . . . and the vendor may thereupon insert a notice in the Government Gazette declaring this agreement to be forfeited and such notice appearing in the Government Gazette shall in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that this agreement has been legally cancelled and forfeited."

The respondent never paid any of the instalments of interest payable under clause 3 (ii.) of the agreement, and on December 21, 1921, there remained due the following, viz :—

The payment due on August 31, 1920, £26 6s. 6d. ; that due on February 28, 1921, £26 6s. 6d., and that due on August 31, 1921, £36 17s. 1d. It will be observed that of these payments the first two only were then six months in arrear.

On December 21, 1921, the Assistant Secretary for Lands wrote and sent to the respondent the following letter :—

"I am directed by the Hon. Commissioner for Crown Lands to advise you that it is intended to cancel Soldiers' Acquired Agreement No. 30 and to re-offer the land unless all arrears are paid within two months from this date.

"In the event of forfeiture taking place as indicated, you will be liable for payment of amounts due up to the date of actual cancellation."

Payment due 31/8/20 .. £26 6s. 6d. }
„ 28/2/21 .. £26 6s. 6d. } and interest thereon.
„ 31/8/21 .. £36 17s. 1d. }

Agreement No. 30 is the agreement in question.

After some correspondence the Secretary for Lands on November 15, 1922, wrote to the respondent a letter in which he informed him that the agreement had been cancelled and the land was then Crown land and would be dealt with at an early date.

In the *Government Gazette* of December 7, 1922, there was published the following notice dated December 6, 1922 :—

"Notice is hereby given that the lease and agreements mentioned and described at the foot hereof have been cancelled by the Commissioner of Crown Lands in terms of section 63 of the Crown Lands Act of 1915 and are hereby declared forfeited."

"(Signed) GEO. R. LAFFER.

"Commissioner of Crown Lands and Immigration."

There then follows a reference to the agreement in question and the words "non-payment of arrears."

Finally, to complete this part of the story, on December 22, 1922, the appellant, as Commissioner of Crown Lands, signed a notice addressed to the Registrar-General and expressed to be given in pursuance of section 94 of the Real Property Act, 1886, that the Crown lease therein mentioned, being the agreement in question, had been lawfully and wholly determined.

This notice was sent to the Registrar-General on January 9, 1923, and on January 17, 1923, a memorial thereof, as provided by section 94 above mentioned, was duly entered in the Register of Crown Leases as provided by section 94 above mentioned, by being endorsed on the copy of the agreement filed in such Register as provided by section 93 of the same statute. Section 94 is in the following terms :—

"The Registrar-General on receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the Register of Crown Leases, and such forfeiture or determination shall thereupon have effect."

On January 11, 1923, the appellant, having been informed by the respondent's solicitors that in their opinion the notice of cancellation was not in order,

consulted the Attorney-General, and was advised that it would be unsafe to rely on the document of December 21, 1921, either as a notice in writing demanding payment within clause 24 of the agreement or as a notice in writing within the meaning of clause 22. He thereupon sent the respondent the following notice :—

"The Minister of Repatriation of and for the State of South Australia for and on behalf of H.M. King George the Vth, hereby gives you notice that he is satisfied upon evidence which he deems sufficient that you have neglected to work satisfactorily the land which by agreement for sale and purchase, No. 30, Register Book, vol. 645, fo. 10, you have agreed to purchase, namely, block 372 in the Hundred of Wongyarra, and block 340 in the Hundred of Gregory, and the said Minister accordingly hereby determines the said agreement, and gives you notice that upon the expiration of three months from the giving of this notice the said agreement and your right to complete the purchase and to possession of the said land will cease and determine and be void.

"Dated the 24th day of January, 1923.

"(Signed) GEO. R. LAFFER,

"Minister of Repatriation.

"To Francis Arnold Gillen."

This notice was duly posted, addressed in accordance with the provisions in that behalf of the agreement, and was registered at the Post Office. The respondent refused to take it in, and it was ultimately returned through the Dead Letter Office.

After the three months had expired the appellant, as already mentioned, caused possession to be taken of the land, and ejected the respondent therefrom.

On these facts the appellant makes the following submissions :—

1. That the letter of December 21, 1921, was a sufficient three months' previous notice in writing demanding payment of the arrears, and that as default was made in such payment he was, as vendor, justified in cancelling the agreement, which was accordingly lawfully forfeited or determined.

2. That whether it was so or not such forfeiture or determination had effect under section 94 of the Act of 1886 upon the entry above mentioned being made in the Register of Crown Leases pursuant to the notice of December 22, 1922.

3. That whether the agreement had already determined or not it was so determined at the expiration of three months from the date of the notice of January 24, 1923.

4. That if he establishes any one of these submissions the respondent was on May 1, 1923, in unauthorized possession of the land in question and his ejectment therefrom was justified by section 9 (xiii.) of the Crown Lands Act, 1915.

As the appellant's final proceedings were based upon the provisions of clause 22 of the agreement and the notice of January 24, 1923, their Lordships propose to deal with this point first.

The contention of the respondent on this point is that before deciding to terminate the agreement it was incumbent upon the appellant to institute some judicial or quasi-judicial inquiry, or at the least to communicate to the respondent the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto.

The question is entirely one of construction, and in common with all such questions can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed.

In the present case the transaction to which the agreement related was effected under the provisions of Acts of Parliament specially passed for the purpose of providing for discharged soldiers, and in particular by settling them on unoccupied lands for the twofold purpose of developing such lands and at the same time affording to the soldier settlers the opportunity of making good in life.

The administration of the Acts was entrusted to a special Minister called the Minister of Repatriation, who was, of course, responsible to Parliament for his conduct in the matter.

The clause in question was inserted in the agreement in pursuance of an imperative regulation made under the Acts in question and having the force of an Act of Parliament (*see* Record, p. 169, Regulation 13 (*h*)).

It is obvious that the authorities contemplated that amongst the more or less experimental cases there would be a certain number of failures, and it seems not unreasonable to conclude that they intended to put into the hands of the responsible Minister means whereby such cases might be readily dealt with, and, if necessary, a fresh start made.

Turning to the words of the clause, it is provided that the power in question may be exercised by the vendor, viz., the Minister acting on behalf of his Majesty the King. The only conditions are that it must be exercised within the first ten years, and that the vendor is satisfied on such evidence as he deems sufficient that one or the other of the specified grounds exists. There is nothing in the words used to suggest as essential to the satisfaction of the vendor any particular form of inquiry, judicial or other. It may fairly be assumed that those who required the clause to be inserted in every agreement of the kind were well aware that the vendor would be assisted by officers whose duty it would be to ascertain and report to him the conduct and prospects of the soldier settler, and that he would thereby be furnished with evidence which he might well deem sufficient to enable him to form a judgment. Merely to inform the person affected of what was in contemplation would be useless unless he was also given some particulars of the information on which the vendor proposed to act and to give such information, if it consisted, as it probably would, of reports from the Minister's officers, would render their position impossible, and the knowledge that such might be the result would tend to defeat the object with which they were appointed, viz., the obtaining of honest and true reports. Their Lordships agree with Mr. Justice Higgins in thinking "that nothing is further from the intendment of this clause than a judicial or quasi-judicial inquiry." They also agree with the following passage in his judgment :—

"The power is confined to the first ten years, as years of probation ; the contract is one in which the chief object of the vendor is to benefit the purchaser because the purchaser is a man who has served the country in the Great War ; the facts of which the Minister is to be satisfied involve issues of such a character as might lead to endless debate ; and the Minister as administrator is under a duty to other returned soldiers to see that the first holder is not blocking them without advantage to himself and under a duty to the State to see that its generosity is not wasted."

In their Lordships' opinion the cases referred to in argument have no bearing on the present case. The

vendor is under this clause exercising a merely administrative function, and is entitled to form an opinion on such materials as he himself thinks sufficient.

There is no suggestion that the appellant in the present case acted otherwise than in absolute good faith.

There appears at page 23 of the Record at line 24 a passage of the appellant's evidence in which he gives a general description of the materials before him, and this shows that he acted with great care and deliberation.

On the whole, their Lordships are of opinion that on this point the appellant is entitled to succeed.

The Board having come to this conclusion, it may be said that a decision on the other points is unnecessary. But they have been argued and various opinions thereon have been expressed in the Courts below, and their Lordships therefore think it right to state their own views upon them.

On the first point their Lordships have no hesitation in saying that the letter of December 21, 1921, was not a sufficient demand in writing within clause 24 of the agreement. It was, moreover, open to other attacks: it only purported to give two months for payment instead of three, one of the three sums for default in payment of which cancellation was threatened was not six months in arrear, and no distinction was made between it and the other sums, so that if the letter was, in fact, a demand, it would require payment of a sum to which the clause did not apply at all. Counsel for the appellant hardly pressed his submission on this point.

As to the effect of section 94, this is a more difficult question, but their Lordships are of opinion that the appellant's contention is correct. The Registrar is directed to make the entry in the Register by which effect is given to the forfeiture or determination on receipt of the notice from the Commissioner that the Crown lease in question has been lawfully forfeited. In this respect the Crown lease is placed in a different position from that occupied by an ordinary lease. In this case the lessor, seeking to have registered the fact of re-entry, has to prove the fact, and that it has taken place in manner prescribed by the lease to the satisfaction of the Registrar. The Registrar is then to make an entry in the Register, and the estate of the lessee in the land is then to determine (see Real Property Act, 1886, section 126).

If the view of the appellant is not correct, then the Crown is in a less favourable position than the ordinary person. In the latter case when once he has satisfied the Registrar and the necessary entry has been made in the Register, the validity of the re-entry cannot be questioned, for the statute provides that the estate of the lessee in the land shall thereupon determine, whereas in the case of a Crown lease, if the respondent is right, the validity or otherwise of the forfeiture or determination might remain an open question until it should be decided whether it was lawful or not. It is more reasonable to suppose that in this case the duty of deciding the point was cast upon the responsible Minister, whose view was to be taken as final so far as the Register is concerned. The two cases would then be on the same footing, except only that in the one case the decision affecting the Register would be that of the Registrar, in the other that of the Commissioner.

The Judges in the Courts below who decided against the appellant on this point did so on the ground that the forfeiture or determination which is to have effect is a lawful forfeiture or determination. Their Lordships cannot agree with this view; the forfeiture or determination is that above referred to, viz., one which the Commissioner in his notice *says* has been lawfully effected. It may be worth noticing that this is apparently the view taken by the Registrar, for in the endorsement on the agreement he says that it "has been lawfully determined as appears by the notice from the Commissioner."

It has been suggested by the appellant that any hardship to individuals deprived of land by erroneous entries on the Register is met by the provision in the Act contained for compensation either by the person responsible for an erroneous entry (section 203) or out of the assurance fund (section 208). Beyond saying that there appears to be something in the suggestion, their Lordships express no opinion on the matter, as the point was not really before them.

In their Lordships' view, therefore, the appellant fails on his first point but succeeds on his second. As he also succeeds on the third point he establishes his case on the fourth. Their Lordships are, therefore, of opinion that this appeal should be allowed and the order of the High Court of Australia discharged, the order of the Full Court of South Australia being thus restored. As to the costs of this appeal the appellant, pursuant to his undertaking, must pay the costs of the respondent as between solicitor and client. Their Lordships will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Sutton, Ommanney, and Oliver; Messrs. Syrett and Sons.]

Prob., Divorce, and Adm. Div. (Hill, J.) — 1927. July 4.

IN THE ESTATE OF CAIE.*

Will—Probate—Motion to exclude clauses—Alleged offensiveness—No defamation of an individual—Motion refused.

This was a motion by the widow of William James Caie, a medical practitioner, late of Highbury House, Bury St. Edmunds, to exclude certain clauses from the probate copy of his will.

Mr. Talbot-Ponsonby, who appeared for the applicant, said that the clauses contained no testamentary dispositions and were offensive and objectionable to persons professing the Christian religion.

Mr. Justice Hill.—Is that a ground for omitting them from the probate? Suppose that a convinced Mahomedan writes in his will:—"I am convinced that every other religion is false," can I omit the words? Can I leave out part of a man's will because I do not like it?

Mr. Talbot-Ponsonby referred to *In the Estate of White* (30 *The Times* L.R., 536; [1914] P., 153).

Mr. Justice Hill.—That case merely decides that the Court has power to omit from the probate copy words which are scandalous and defamatory. In the present case there is nothing of the kind. In the first clause which I am asked to omit the testator merely states the age at which he would like his children to choose the Christian body to which they belong. Another clause is merely an exhortation to become a Freemason. In the clauses sought to be omitted the testator expresses various views on religious subjects, but there is nothing defamatory of any individual. The applicant apparently desires their omission from the probate because the views expressed do not happen

* Reported by Clifford Mortimer, Esq., Barrister-at-Law.

exactly to coincide with hers. She appears quite to have misunderstood the law on the subject. The motion will be dismissed.

In another motion, in which the words were highly defamatory of a living individual, his Lordship directed that they should be omitted from the probate.

[Solicitors—Messrs. Whites and Co., for Messrs. Greene and Greene, Bury St. Edmunds.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Viscount Sumner, Lord Shaw of Dunfermline, Lord Merrivale, and Lord Warrington of Clyffe.)

1927. July 5.

THE YURI MARU. THE WORON.*

Canada—Admiralty jurisdiction—Claims under charterparties—No local residence of parties impleaded—No cause of suit arising within the local jurisdiction—Whether process *in rem* competent—Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict., c. 27), s. 2 (2).

Under s. 2 (2) of the Colonial Courts of Admiralty Act, 1890, apart from local legislation, a Court of Admiralty in Canada cannot, irrespectively of the residence of the defendant or place of origin of the alleged cause of action, be called upon by arrest of a vessel within its area to adjudicate upon all claims of plaintiffs suing under any charterparty made in respect of the vessel. Similarly, throughout the Empire, outside England, litigants in Courts of Admiralty jurisdiction have, apart from local legislation, no right of proceeding by process *in rem* in respect of like claims, in like circumstances of the absence of local residence of parties impleaded and the non-existence of any cause of suit arising within the local jurisdiction. The above Act defines as a maximum of jurisdictional authority for the Courts to be set up thereunder the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed. The Act therefore does not include in such jurisdictional authority the jurisdiction in claims on charterparties which was for the first time conferred on the Admiralty Division of the High Court in England by s. 5 of the Administration of Justice Act, 1920.

These were appeals by the plaintiffs from judgments of the Exchequer Court of Canada in Admiralty, which raised important points in regard to Admiralty jurisdiction throughout the Empire.

Sir John Simon, K.C., and Mr. Wilfrid Barton appeared for the first appellants and Mr. W. Martin Griffin (of the Canadian Bar) for the second. The respondents were respectively represented by Mr. Porter, K.C., and Mr. W. Lennox McNair, and by Sir Leslie Scott, K.C., and Sir Robert Aske.

Lord Merrivale, in delivering their Lordships' judgment, said:—These appeals are brought against judgments of the Exchequer Courts of Canada in Admiralty by plaintiffs who had sued out in the District Court of British Columbia writs *in rem* and warrants of arrest with a view to the trial at Victoria of claims for damages under charterparties made and alleged to have been broken outside the local area of jurisdiction by parties not resident within that area.

In the case of the s.s. Woron the arrest was in respect of damages stated at about $18,000. The plaintiffs are the Canadian American Shipping Company, Limited, a Canadian company. The owners of the ship appear to be a joint-stock company registered in England. The Woron was said to have been chartered for a voyage from ports in British Columbia to Yokohama, and it was alleged that her master had wrongfully deviated upon the agreed voyage and thereby caused loss to the plaintiffs.

In the case of the s.s. Yuri Maru the plaintiffs are an Italian corporation, Snia Viscosa Società Nazionale Industria Applicazioni Viscosa. The vessel is Japanese, registered at Kobe, the property of owners domiciled in Japan, who have alleged (*inter alia*) that they became owners since the accrual of the alleged cause of action of the plaintiffs and that judgment in respect thereof had already been recovered by the plaintiffs against their predecessors in title. The claim of the plaintiffs in respect of which the arrest was made was $290,000 for damages for breaches of a charterparty for nine months made in December, 1919.

In each case the owners of the arrested ship moved to set aside the writ and warrant of arrest for want of jurisdiction. These motions respectively were dismissed by Mr. Justice Martin in the District Court, but upon appeal were allowed in the Exchequer Court of Canada.

In view of the fact that the substantial question for argument was the same in each of the appeals, counsel for both appellants and both respondents were heard by their Lordships in the course of one hearing. The question which is immediately raised in both cases is whether, irrespectively of residence of the defendant or place of origin of the alleged cause of action, a Court of Admiralty in the Dominion may by arrest of a vessel within its area be called upon to adjudicate upon all claims of plaintiffs suing under any charterparty made in respect of the vessel.

Incidentally, the further question arises whether, throughout the Empire, there is a like right of litigants in Courts of Admiralty jurisdiction of proceeding, by process *in rem*, in respect of like claims, under like circumstances of absence of local residence of parties impleaded and non-existence of any cause of suit arising within the local jurisdiction.

The claim of the appellants is that by virtue of the Colonial Courts of Admiralty Act, 1890, which provides for the establishment in British possessions overseas of Courts of Admiralty jurisdiction in lieu of the Vice-Admiralty Courts theretofore existing, and the Canadian statutes which have brought that Act into operation in the Dominion and invested with Admiralty jurisdiction thereunder the Exchequer Court of Canada, whatever jurisdiction in Admiralty is from time to time exercisable in the High Court of Justice in England is exercisable in Canada in the Exchequer Court. The jurisdiction of the Exchequer Court of Canada in Admiralty is exercised in the maritime provinces of Canada by district Judges, of whom the Judge sitting in British Columbia is one.

By the Act of 1890 every Court of Law in a British possession, which (*a*) is declared by the local legislature to be a Court of Admiralty or (*b*) has unlimited civil jurisdiction, is constituted a Court of Admiralty,

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

with the jurisdiction defined in the Act in terms the meaning of which is now in question. The Act provides further (section 17) for the abolition, on the "commencement" of the Act in any British possession, of every Vice-Admiralty Court in the possession which theretofore had exercised Admiralty jurisdiction.

The due investment of the Exchequer Court of Canada in Admiralty with the jurisdiction defined in the Act of 1890 and the competence of the district Judge in British Columbia to exercise that jurisdiction are not in dispute.

The jurisdiction in Admiralty of the High Court of Justice in England did not extend to claims upon charterparties at the time when the Colonial Courts of Admiralty Act, 1890, became law. Jurisdiction over such claims was given in the first instance by the Administration of Justice Act, 1920, section 5, in terms which have no apparent reference to Courts out of England, since a proviso in the section limits the costs of actions recoverable thereunder in certain events by the amount of the costs which "might have been recovered if the proceedings had been brought in a County Court." The Act of 1920 was among the numerous jurisdictional statutes extending in date from 1873 onward which are consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925. The jurisdiction so conferred on the High Court in England is that on which the appellants rely.

In the statutes of 1920 and 1925 there are no words indicative of any express intention on the part of the Legislature of conferring any extended jurisdiction on Admiralty Courts overseas.

The words for construction in the Act of 1890 are these, in section 2 (2):—"The jurisdiction of a Colonial Court of Admiralty shall . . . be over the like places, persons, matters, and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise." The appellants claim that these words can only be understood as applying to conditions which are to come into being upon and after the passing of the Act. They offer, in effect, to make the meaning clear by reading into the sentence before the word "existing" the words "from time to time." The respondents, on the other hand, contend that the jurisdiction defined by the section is sufficiently and indeed unmistakably described as the jurisdiction of the High Court in Admiralty "existing" at the point of time when the Colonial Courts of Admiralty Act, 1890, became law.

Inasmuch as the use of words in the English tongue is not so rigidly governed by rule as to render impossible either of the alternative constructions of the parties, counsel on both sides properly discussed the subject-matter, origin, and scope and apparent policy of the Act of 1890, with a view to demonstrate the true intent of the language used.

The establishment, in the overseas dominions of the Crown, of Courts of Admiralty jurisdiction under one common system, in place of the pre-existent Vice-Admiralty Courts called into being as occasion dictated in course of two or three centuries at the discretion of the home authorities, is the most prominent of the facts in question. In a material passage in the judgment of Mr. Justice Martin in favour of the appellants the view taken by the learned Judge as to the nature and scope and apparent intention of this transaction is thus stated:—

"The Vice-Admiralty Courts in Canada were abolished upon the coming into force of this Court as established under the Canadian Act of 1891, but if those former Courts were still in existence and exercising locally the jurisdiction of the High Court of Admiralty, it would, I apprehend, be clear that their jurisdiction would march with that of the said High Court and increase or decrease as the case might be in accordance with Imperial legislation affecting that Imperial Court. Such being the case, it follows, to my mind, that the present Admiralty Court of Canada . . . likewise marches in the same jurisdiction, and it would require clear language to the contrary to deprive it of the same continuous jurisdiction as is cumulatively possessed by the Imperial Court for the local exercise of whose jurisdiction it is in reality the local machinery and nothing more."

To appreciate the extent to which the jurisdiction of the old Vice-Admiralty Courts was subject to automatic enlargement in harmony with an expanding jurisdiction in the High Court of Admiralty in England it is necessary to bear in mind the relation of the Vice-Admiralty Courts to the High Court during their period of development, the circumstances under which the ambit of the authority of the High Court and of the overseas Courts has been enlarged, and the mode in which as to each the process of expansion has gone on.

The extension of the powers of the High Admiral and his lieutenants or deputies in order to meet the needs which resulted from the growth of the Empire does not need to be described with particularity. (See Marsden, Law and Custom of the Sea, Vol. I., xiii.) Selden gives the early form of the commission of the High Admiral, when the jurisdiction had been centred in one officer of State under this title. (Mare Clausum, p. 196.) Marsden sets out the first commission which, in 1643, extended beyond "England, Ireland, and Wales, and the Dominions and Isles of the same." It included "all the islands and English plantations within the bounds and upon the coasts of America." (Marsden, p. 531.)

The creation of Vice-Admiralty Courts overseas is also dealt with by Marsden (Marsden, Law and Custom of the Sea, Vol. II., pp. xiv., xv.); and Brown's Civil Law and Admiralty, published in 1802, presents from the standpoint of a learned civilian a broad view of the then existing system of Vice-Admiralty Courts constituted under commission of the High Admiral or the Lords Commissioners of the Admiralty. The substance of the matter, as things stood before 1890, is concisely presented by an experienced public servant, Sir Henry Jenkyns, in these terms (Jenkyns, British Rule and Jurisdiction Beyond the Seas, p. 33):—

"In civil matters, the most important branch of extra-territorial jurisdiction, that of the Admiralty Court, was, until 1890, mainly exercised by Vice-Admiralty Courts established by an instrument under the seal of the office of Admiralty, issued in pursuance of authority given to the Commissioners of the Admiralty in England by a commission under the Great Seal of the United Kingdom. In practice, a Judge of the Superior Court of the possession was always made Judge of the Vice-Admiralty Court, but he held that office by virtue of an appointment from the British Admiralty and not by virtue of his position as Judge of the possession. His jurisdiction was vested in him personally, and not in the colonial court."

The jurisdiction exercised by the Vice-Admiralty Courts was commonly that of the High Court of Admiralty. The area of the exercise of the jurisdiction was enlarged as the Empire grew. Its juristic extent was not. For centuries that had been stabilized and strictly limited so far as the High Court of Admiralty was concerned by the vigilant supervision

of the Court of King's Bench. The High Court of Admiralty never shared the inherent capacity for development which marked the English Courts of law and equity.

Great extensions of the Admiralty jurisdiction in England were made during the nineteenth century, before the passing of the Colonial Courts of Admiralty Act, 1890. Notable extensions had also been made during the same period by Acts of the Imperial Parliament in the jurisdiction of the Vice-Admiralty Courts. It would be wholly incorrect, however, to suppose that these were extensions of jurisdiction granted to the High Court of Admiralty here and thereupon automatically operative in the Courts overseas. Parliament made its separate grants to the High Court of Admiralty as an English Court. Dr. Lushington, as Judge of the Court, pointed out as early as 1859 that the extensions so made had no effect in the Vice-Admiralty Courts. (See *The Rajah of Cochin,* Swabey, 473.) At this Board in the same year the conclusion was stated (*The Australia,* 13 Moore, P.C., 132, at p. 160). Parliament in fact legislated for the High Court and the overseas Courts by numerous unconnected statutes.

The Admiralty Court Acts of 1840 and 1861 conferred specific powers, carefully identified and limited, upon the High Court in England. The Vice-Admiralty Courts Acts of 1863 and 1867 (26 and 27 Vict., c. 24 ; 30 and 31 Vict., c. 45) extended the powers of the Admiralty Courts overseas, not by reference to the powers of the High Court in England, but by scheduled statement of the causes of action in respect of which jurisdiction was newly conferred and specification of other amendments.

So far as the appellants' case rests upon a theory that without statutory action there was before 1890 a historic and progressive growth of Admiralty jurisdiction which was common to the High Court and the Vice-Admiralty Courts, or upon a supposition that any statutory enlargement of the jurisdiction of the High Court in England operated automatically to enlarge the jurisdiction of the Vice-Admiralty Courts, it cannot be sustained.

How then did Parliament, by the Colonial Courts of Admiralty Act, 1890, deal with the condition of affairs which had grown up under the old law ?

The Act has three outstanding characteristics. So far as the "instance" jurisdiction is concerned, its plain intent is the establishment as part of the machinery of self-government within each autonomous area of Courts locally constituted wherein Judges locally nominated should exercise such a measure of jurisdiction in Admiralty within prescribed limits as the Government on the spot might think convenient. Subject to specific reservations the statute applied to the Empire, and it provided that on the commencement of the Act in any British possession, and subject to its provisions, every Vice-Admiralty Court in the possession should be abolished.

By section 2 (1) and section 3, the Legislature of an overseas possession is enabled, at its will, to declare a Court of unlimited civil jurisdiction within its area to be a Court of Admiralty ; to limit territorially or otherwise the extent of the jurisdiction in Admiralty to be exercised in such Courts ; and to confer partial or limited jurisdiction in Admiralty upon subordinate or inferior Courts. In the absence of local legislative action, a Court of "original unlimited civil jurisdiction" in any possession is constituted a Court of Admiralty. And by section 2 (1), "Where in a British possession the Governor is the sole judicial authority, the expression 'Court of law' for the purposes of this section includes such Governor."

Incidentally to the fact that the Act of 1890 empowers self-governing communities to decide for themselves within defined limits what shall be the ambit of the jurisdiction to be exercised by their Courts by means of process *in rem,* it is necessary to bear in mind that, even in England, conflict of opinion long existed as to the advantage of extending the availability of this process, and that the right of trial within a local jurisdiction of actions arising elsewhere is not always an unmixed benefit. Opinion may well differ between State and State as to whether, *e.g.,* a port which is chiefly a port of call will be benefited by the existence of a power in all and sundry to arrest vessels found within its limits in order that strangers may litigate in the local Court questions which have arisen elsewhere.

The Act of 1890 empowers the Legislature in any of the dominions to determine by its own statute, subject to the Royal Assent on the prescribed special reservation, what shall be the extent of the Admiralty jurisdiction of the Courts for which the local legislation provides. Yet, if the contention of the appellants in this case is sound, an Act of the Imperial Parliament, purporting on the face of it to apply to England and the High Court in London, has without any choice of the self-governing States in the Empire peremptorily enlarged the jurisdiction of their Courts in Admiralty, subject only to a power in them under section 3 of the Act of 1890 to limit such jurisdiction anew by a new local law, after compliance with the conditions of section 4 whereby such a law, unless previously approved by a Secretary of State, must be "reserved for the signification of her Majesty's pleasure thereon, or contain a suspending clause."

The present case arises upon an enlargement by the Imperial Parliament of the Admiralty jurisdiction of the High Court in England. But the fact cannot be overlooked that during the last half-century the distribution of business in the High Court in England has been the subject of very numerous enactments, and there is involved in the question now presented for determination the further question whether the withdrawal of any cause of action from Admiralty process in England would *ipso facto* operate a corresponding diminution in Admiralty jurisdiction in the Courts overseas. A construction of the statute of 1890, which would have the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self-governing dominions, with possible power in the local Legislature by a cumbrous process to revoke an extension of jurisdiction *in rem,* but no power to undo an unwelcome abatement, manifestly could not be adopted unless the words of the statute should be found to leave no alternative.

Neither the early history of the overseas Courts, the course of modern legislation, continuity of policy, nor practical convenience appear to their Lordships to require that the jurisdiction defined in the Act shall be declared to be that "from time to time existing" in the High Court in England.

On the whole, the true intent of the Act appears to their Lordships to have been to define, as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time be added or excluded is left for independent legislative determination.

Their Lordships will humbly advise his Majesty that in their opinion these appeals fail. The costs of the respondents must be paid by the appellants.

[Solicitors—Messrs. Stephenson, Harwood, and Tatham; Messrs. W. and W. Stocken; Messrs. William A. Crump and Son; Messrs. Botterell and Roche.]

Judicial Committee of the Privy Council. (Viscount Cave, L.C., Viscount Haldane, Lord Blanesburgh, and Lord Darling.) 1927. July 5.

METROPOLITAN MEAT INDUSTRY BOARD v. SHEEDY AND OTHERS.*

New South Wales—Debts due to the Crown—Claim to priority.

The Metropolitan Meat Industry Board was constituted in 1915 under an Act of the New South Wales Legislature, and it performed certain functions on behalf of the Government. It claimed from a company in liquidation sums for telephone services and sanitary and inspection fees, and submitted that the debt was one due to the Crown and had the right of priority of payment over the debts due to the general creditors of the debtor.

Judgment of the Equity Judge in New South Wales affirmed, as the debt could not be recognized as due to the Crown.

This was an appeal from an Order of Mr. Justice Long Innes, of the Supreme Court of New South Wales (Equitable Jurisdiction).

Mr. W. A. Greene, K.C., and Mr. A. C. Nesbitt were counsel for the appellant; Mr. J. H. Stamp appeared for the respondents.

VISCOUNT HALDANE, delivering their Lordships' judgment, said:—

The only question before their Lordships is whether a portion of a debt of £1,554 14s. 6d., due to the appellant Board from a company in liquidation named J. Carpenter Hales and Co., Limited, is a debt due to the Crown. If it is, the entire debt may have priority over the debts due to all other unsecured creditors of this company, but if it is not a debt due to the Crown no question of priority arises. There was another question as to whether the appellant Board as landlord is entitled in priority over other unsecured creditors to money due for rent, but this further question is not raised on this appeal. The first respondent is the liquidator of the company, and the other respondents have been appointed by order in the liquidation proceedings to represent all unsecured creditors of the company other than the appellant Board.

Their Lordships have arrived at the same conclusion as Mr. Justice Long Innes, from whose decision this appeal is brought, and who was the Judge of the Supreme Court of New South Wales in its Equitable Jurisdiction. They think that the debt cannot be recognized as a debt due to the Crown.

The whole of the amount due represented money owing to the appellant Board for telephone services and for sanitary and inspection fees. The real question is whether this amount is owing to the Crown, for as to the debt itself there is no doubt as to its validity. The appellant Board contends that if the debt is due to the Crown it is entitled to priority under the law of New South Wales relating to companies in liquidation. As the learned Judge who heard the case decided that the debt was not due to the Crown it was not necessary for him to go into this question, and he did not decide it.

The appellant Board was constituted under the Meat Industry Act of New South Wales, 1915. This Act provides for the maintenance and control of abattoirs and slaughter-houses, cattle sale yards, and markets in the County of Cumberland in which the City of Sydney is situated, and so extends to a part of the State around that city. The Act vests certain properties in the appellant Board, and provides for the regulation of the slaughter of cattle and for other ancillary purposes. Before 1915 the business of slaughtering animals for food in the State had been in the main carried on by private enterprise, subject to the control of a number of local authorities. The Act of 1915 altered, and in a large measure superseded, two statutes of 1902. One of them, No. 37, related to the area of the City of Sydney and three miles round it. The other, No. 36, related in the main to all parts of the State of New South Wales not being within the City of Sydney. Under these statutes the slaughtering of cattle, the supervision of abattoirs, the prevention of nuisances, and other cognate matters were provided for. The powers conferred by the two statutes were to be put into force in places outside Sydney by the Council of the Municipality where there was a municipality, and by the senior police officer of the district in other places. The statute No. 36 provided by section 4 that the Council of the City of Sydney might appoint inspectors of slaughter-houses and of cattle intended for slaughter. Elsewhere within the State such inspectors were to be appointed by the municipalities or by the Government, as the case might be. Under both the Act relating to Sydney and that relating to the rest of the State the existing Board of Health constituted by the Public Health Act, 1902, was to have a power of supervision and inspection, and was to make regulations and to appoint its own inspectors.

So far as the City of Sydney and the County of Cumberland were concerned, the Meat Industry Act, 1915, almost completely superseded this system. A new Board, called the Metropolitan Meat Industry Board, was established and incorporated. On its recommendation inspectors and other officers were to be appointed by the Governor of the State for the administration of the Act. This Board was to have power to hold and sell or purchase land and to adapt buildings, and to manage and maintain abattoirs and sale yards, and to deal, by purchase or sale, in cattle or meat. It was to regulate the slaughter and sale of cattle. By-laws were to be made by it and penalties were imposed for their breach. Many of the powers of the Municipal Council of Sydney relating to these matters were transferred to this new Board. Its powers were more extensive than those formerly exercised by the Board of Health.

The question in the present case is whether the debt is one due to the Crown so that it falls within the prerogative right of the Crown to priority of payment as against the general creditors of the debtor. If it does so this can only be on the footing that the prerogative of the Sovereign extends to a body such as the appellant Board. It is thus necessary to consider somewhat closely the scope of the Act of 1915, for this Act keeps alive, by section 4, the powers already vested in the Board of Health as at the date of the passing of the new Act, and also,

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

instead of making expenses payable out of money to be provided by the Legislature, directs the levy of tolls and fees, to be levied by the new Board, and their payment into a fund out of which the expenses of carrying this Act into effect are to be met. In dealing with the question of liability to statutory poor law rate, the House of Lords, in *Jones v. Mersey Docks* (11 H.L.C., 443), laid down the principle of exemption in virtue of the prerogative in words which are important in this case because of the analogy they present to the principle involved here. Lord Cranworth, at page 508, says that when the Crown is not named in a taxing statute imposing a rate it is not bound by it, and that it follows that lands or houses occupied by the Crown, or by servants of the Crown, for purposes of the Crown, are not liable to the rate. There has been confusion, he adds, between property occupied for public purposes and property occupied by servants of the Crown. This principle, he goes on, exempts from rates, not only Royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. And on the same ground police courts, county courts, and even county buildings occupied as lodgings (for the Judges) have been held exempt.

But these decisions have all gone on the ground that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some respects the shield of the Crown to what might more fully be described as the public government of the country. In *Coomber v. Justices of Berks* (9 App. Cas., 61) the House of Lords reaffirmed the principle where the justices of the county had, under statutory powers, erected assize courts, with the usual rooms and offices, and a county police station, with the usual accommodation for constables living there and for prisoners, and the buildings formed one block and were used for the administration of justice and for police purposes, and also for holding county and committee meetings, and various other occasional purposes, from which, however, no rent or profit was derived, that no income-tax was payable. The administration of justice, including police powers, was treated as belonging to the Crown. The language used by Lord Cairns as Lord Chancellor in moving the judgment of the House in the earlier case of *Greig v. University of Edinburgh* (L.R., 1 H.L. Sc., 348, at p. 350) was cited with approval :—

"The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the poor."

In delivering his opinion in *Coomber v. Justices of Berks* (*supra*), Lord Blackburn indicated that if the question had not been covered by authority, there would, in his view, have been considerable force in the argument that as the county might be occupying property in order to fulfil a duty to the Crown which the county was required to fulfil at its own expense, it was not occupying it for the Government or in its service. But he thought that this question was in such instances settled by a stream of authorities which should not be disturbed. It will be observed that the ground of the decision was simply the principle that if the Sovereign is not named in the statute it does not apply to the Crown or to the servants of the Crown acting in its service. The opinion of Lord Watson makes this clear.

But as the exemption was thus attributed to the quality of the prerogative, it is clear that each case had to be scrutinized in order to ascertain whether it really came within the scope of the principle so laid down. In *Fox v. Government of Newfoundland* ([1898] A.C., 667) such a question was brought before the Judicial Committee. It was held that balances in the books of a bank to the credit of the various local boards administering education in the Colony were not debts to which the priority applied that had been given to debts due to the Crown or the Government as revenues of the Colony. The reason was that the various Boards of Education were not mere agents of the Government for the distribution of money entrusted to them, but were to have, within the limits of general educational purposes, uncontrolled discretionary power in expending it. The service, in other words, was not treated as being the service of the Sovereign exclusively within the meaning of the principle, but their own service. *Gilbert v. Trinity House Corporation* (2 *The Times* L.R., 708 ; 17 Q.B.D., 795) further illustrates this aspect of the question.

In the statute before their Lordships they think it not immaterial to observe that under the previous legislation of 1902 the local authorities entrusted with the powers which the Act of 1915 readjusts were certainly not constituted servants of the Crown under the then existing Acts. Their Lordships agree with the view taken by the learned Judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service.

For these reasons their Lordships will humbly advise his Majesty that this appeal should be dismissed, with costs.

[Solicitors—Messrs. Light and Fulton ; Messrs. Ashurst, Morris, Crisp and Co.]

K.B. Div. (McCardie, J.) — 1927. July 1.

DE FREVILLE v. DILL.*

Lunacy — Certification—Negligence—Detention under summary reception order — Form of action—Doctor employed by relative of alleged lunatic—Duty to take care in certification—Whether certificate cause of detention — Lunacy Act, 1890 (53 Vict., c. 5), ss. 16, 330 (1).

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

The defendant, a medical practitioner, was called in by the husband and/or the father-in-law of the plaintiff to examine her mental condition. He formed the view that it was serious and he sent for the relieving officer, on whose arrival he filled up a certificate under section 16 of the Lunacy Act, 1890, in which he stated that he had come to the conclusion that the plaintiff was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. The plaintiff was then taken by the relieving officer to a justice of the peace, who saw her but did not ask her any questions, and made a summary order for her reception in a mental hospital. In two days the plaintiff was released from the hospital on the ground that there was no cause for her detention.

The plaintiff accordingly brought this action, in which she claimed from the defendant damages for negligent certification. The jury found that the defendant had not acted with reasonable care—his good faith was admitted—and they assessed the damages at £50.

Held, that the plaintiff's action was in form an action on the case for negligence in certification causing her damage through detention in a mental hospital without just cause. On the balance of the authorities, (*a*) the defendant owed to the plaintiff the duty to take reasonable care in coming to the conclusion that she was of unsound mind, although no contractual relationship existed between them; and (*b*), the certificate given by the defendant was the cause of the plaintiff's detention in the mental hospital. The plaintiff was, therefore, entitled to judgment.

Hall v. Semple (3 F. and F., 337); *Everett v. Griffiths* (36 *The Times* L.R., 491; [1920] 3 K.B., 163; 37 *The Times* L.R., 481; [1921] 1 A.C., 631); and *Harnett v. Fisher* (42 *The Times* L.R., 486, 745; [1927] 1 K.B., 402; 43 *The Times* L.R., 567) examined and discussed.

In this action Mrs. May de Freville, of Lowther-road, Wokingham, Berkshire, the wife of Mr. Geoffrey Philip Herbert de Freville, son of the Rev. Frederick de Freville, of Oakridge Vicarage, Stroud, Gloucestershire, claimed from Dr. Alfred Vincent Dill, a medical practitioner, of The Bourne, Brinscombe, Stroud, damages for his alleged negligence in certifying her to be a lunatic on June 9, 1926. Damages were also claimed for alleged assault and false imprisonment.

Dr. Dill pleaded that he signed the certificate in good faith and that he acted with reasonable care.

Mrs. de Freville's case was that on June 9, 1926, she returned to Oakridge Vicarage after a visit to her father, and her husband put her out of the house. She was very angry and, as she wanted to see her little boy, she got into the house by the servants' entrance. Her father-in-law kept her in the servants' hall while he telephoned to Dr. Dill, who came and certified her as suffering from acute mania, with the result that she was taken to Gloucester County Asylum. On being examined next day she was declared to be of sound mind and was discharged.

Mr. J. W. J. Cremlyn and Mr. Comyn Maitland appeared for the plaintiff; Mr. Singleton, K.C., and Mr. W. H. Gattie for the defendant.

Mr. Justice McCardie, in summing up, said that any suggestion of bad faith that might have been made against Dr. Dill had been wholly withdrawn, and the only issue which the jury had to consider was whether he had exercised reasonable care. The action was important from the point of view of Mrs. de Freville because it involved the liberty of the subject. It was important from the point of view of Dr. Dill because it affected his character and reputation as a medical man; but it was also important from the point of view of the public, to whom the administration of the lunacy law was of vital concern. Litigation of the character of the present case had not been infrequent in recent years, and it might be that, as a result of it, many medical men had refused to take any part in certifying patients under the Lunacy Acts. It might be, whatever was the verdict of the jury in the present case, that many more medical men would decline to give certificates if they might be made subject to litigation because they had become embroiled in embittered family strife with which they had nothing to do.

It was a serious matter that the Lunacy Acts contained no definition whatever of insanity, of unsoundness of mind, or of lunacy. They provided no test, they set no standard, they gave no guidance with regard to these matters. The keynote throughout the Act was, first, the welfare of the patient, and, secondly, the public safety, which might require that the patient should be put under care and treatment.

From the medical point of view, no text-book gave any definition of insanity, unsoundness of mind, or lunacy, and he had never, in the course of his experience at the Bar and on the Bench, known a doctor who was able to give a definition of these things. That illustrated the grave considerations which should be present to the mind of a jury who had to decide whether or not a doctor had acted with reasonable care. A doctor who was called in to deal with an alleged lunatic was dealing with the most difficult subject known to the medical profession. The forms taken by unsoundness of mind were many, diagnosis and classification were difficult, and not only did the forms and symptoms vary, but each varied in degree, in gravity, and in intensity. Symptoms and outbreaks might be intermittent, and might vary year by year, month by month, and day by day.

What was the position of a doctor who was dealing with a question such as that? He (his Lordship) felt that the matter had been put in the best and most practical working form for the consideration of a jury by Lord Haldane in *Everett v. Griffiths* (37 *The Times* L.R., 481; [1921] 1 A.C., 631, at p. 654), when he said of the plaintiff in that case: "To-day he is sane in his conduct, and probably was so very soon after the occurrences in question. But the point is whether at the time of these occurrences he had so lost his capacity for self-control as to be, temporarily at least, to all appearance of unsound mind within the meaning of a statute which takes account of his relations to others as well as to himself." The jury must remember that the Lunacy Acts had to be administered and certificates had to be given not only by London specialists and other experienced practitioners in great cities, but also often by ordinary country doctors.

It was one thing to come to a decision whether or not a certificate should have been given in the present case after a seven days' hearing of the evidence on both sides and the addresses of counsel; it was another thing to come to a decision in a room in a country vicarage. A general medical practitioner gave no warranty of special skill or knowledge. He was bound to exercise due care having regard to the skill and knowledge which he actually possessed.

After an absence of just over an hour the special jury gave a verdict in favour of Mrs. de Freville, assessing the damages at £50.

After Mr. CREMLYN had formally applied for judgment,

Mr. SINGLETON submitted that the giving of the certificate by Dr. Dill was not the cause of Mrs. de Freville's detention. The first requirement of section 16 of the Lunacy Act, 1890, under which the order for Mrs. de Freville's detention was said to have been made, and which provided that a lunatic who had been brought before a justice might be sent to an institution, was the appearance of the alleged lunatic before the justice. Thereafter there was a duty on the justice to call in a medical practitioner and to examine the alleged lunatic and to make such inquiries as he thought advisable. Then, if he were satisfied and if the medical practitioner who had been called in signed a certificate, the justice might take steps which would result in the detention of the lunatic in an institution. But, unless the conditions precedent had been fulfilled, the justice could not legally make a detention order. Throughout the authorities was found again and again the necessity for the justice to examine the alleged lunatic personally and, still more, to call in a medical practitioner of his own selection.

The question how far a certificate given under the Act brought about the detention of an alleged lunatic had been discussed, particularly in *Everett v. Griffiths* (in the Court of Appeal, 36 *The Times* L.R., 491; [1920] 3 K.B., 163; in the House of Lords, 37 *The Times* L.R., 481; [1921] 1 A.C., 631) and *Harnett v. Fisher* (42 *The Times* L.R., 486; in the Court of Appeal, 42 *The Times* L.R., 745; [1927] 1 K.B., 402; in the House of Lords, 43 *The Times* L.R., 567). In each of these cases the provisions of the Act had been complied with—in each case the doctor who gave the certificate was a person whose duty it was to do so under an order of the justice. In the present case Dr. Dill was not called in by the justice. No doctor was ever called in by the justice, and the justice, therefore, could not in law make an order for Mrs. de Freville's detention.

What Dr. Dill wrote on the certificate which he signed was merely an opinion, and it mattered not that that opinion was given on a form which was used for the purposes of the Lunacy Act, 1890. Nor did it matter what Dr. Dill's views or intentions were so long as he acted in good faith, which it was admitted he did. It was open to the relieving officer who was called in, (*a*) to take Mrs. de Freville before a justice under section 15 of the Act; (*b*) to take her to a workhouse or similar institution under section 20; or (*c*) to take no action in the matter. But Dr. Dill's opinion was not necessary before the relieving officer could take action if he chose to do so, and no order could legally be made by the justice on Dr. Dill's certificate alone.

In these circumstances Dr. Dill's opinion, whether given in the form of a certificate or not, could not be the *causa causans* of Mrs. de Freville's detention. Dr. Dill could not have foreseen that the justice would act without reference to the terms of section 16.

Counsel also referred to *Thompson v. Schmidt* (8 *The Times* L.R., 120); *Reg. v. Whitfield* (15 Q.B.D., 122); *Morris v. Atkins and Brooker* (18 *The Times* L.R., 628); *Latham v. Johnson and Nephew, Limited* (29 *The Times* L.R., 124); [1913] 1 K.B., 398); *Hall v. Semple* (3 F. and F., 337); and *Harnett v. Bond* (41 *The Times* L.R., 509; [1925] A.C., 669).

Counsel submitted that where there was the intervention of a responsible person between an act and a result no damage could result from the act if it were negligent. In the present case the relieving officer who was charged with duties under the Lunacy Act, 1890, acted on his own responsibility. If that was not so the justice certainly did.

Mr. SINGLETON further submitted that Dr. Dill owed no duty to Mrs. de Freville.

Mr. CREMLYN said that from the earliest times persons who had exercised certain callings of a public nature, including doctors, had been, by the common custom of the Realm, under a duty to take care. Quite apart from the Lunacy Act, 1890, Dr. Dill owed a duty at common law to take care in his treatment of Mrs. de Freville. It was an extraordinary proposition that, if Mrs. de Freville's husband or father-in-law called in Dr. Dill to treat her, they would be able to maintain an action against Dr. Dill arising out of breach of contract by him, but Dr. Dill could be as negligent as he liked in his treatment of Mrs. de Freville without her having any remedy against him. Mrs. de Freville would have an action on the case against Dr. Dill if he were negligent, irrespectively of the question who employed him and of the question who paid him: *Pippin v. Sheppard* (11 Price, 400). If Dr. Dill undertook voluntarily to make a proper and real examination of Mrs. de Freville and did so improperly, he was guilty of negligence at common law (see *per* Mr. Justice Willes in *Skelton v. London and North-Western Railway Company*, L.R., 2 C.P., 631, at p. 636), and his negligence was the direct cause of Mrs. de Freville's detention. In the circumstances of the case, however, the relationship of doctor and patient might well have arisen between Dr. Dill and Mrs. de Freville.

A third party might sue for the breach of a contract to which he was not a party where he had suffered a wrong for which he would have had a right of action although no such contract had been made: *Longmeid v. Holliday* (6 Ex., 761, at p. 767).

With regard to section 16 of the Act, counsel submitted that the provisions of that section had been substantially complied with because, although the justice did not call in a doctor late in the evening, in effect he called in Dr. Dill when he communicated with him earlier before Dr. Dill had signed the certificate. Mrs. de Freville's detention was due to Dr. Dill's certificate as much as to the order of the justice. A doctor's certificate was at least of considerable aid in assisting a justice to decide whether or not a reception order should be made.

Dr. Dill's own evidence showed that he certainly contemplated that Mrs. de Freville should be put in an asylum when he signed his certificate, and that he gave that certificate that she might be put in an asylum because he believed it to be necessary. He clearly contemplated that the justice would act on the certificate which he gave. *Weld-Blundell v. Stephens* (36 *The Times* L.R., 640; [1920] A.C., 956) was referred to.

Mr. SINGLETON replied.

MR. JUSTICE MCCARDIE read the following considered judgment:—The plaintiff is the wife of Mr. Geoffrey de Freville. The defendant is a medical

man practising in the county of Gloucester. On June 9, 1926, the defendant certified in writing that the plaintiff was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. The plaintiff alleged (in substance) that the defendant was negligent in giving his certificate, and she further alleged that as a result of his negligence she was taken, although sane, to the Gloucester County Hospital on the night of June 9 and was detained at that institution for two days ere she was discharged. Hence her claim for damages.

In the earlier stages of the trial there was a suggestion by the plaintiff of bad faith on the part of the defendant. I am glad to say that before the conclusion of the trial the plaintiff's counsel fully and frankly admitted the absolute honesty and integrity of the defendant in all respects.

At the conclusion of the evidence it was agreed by counsel that one issue only (apart from damages) should be considered by, and left to, the jury, namely : Did the defendant act with reasonable care ? To that question the jury answered "No," and they assessed the damages at the sum of £50. Points of law had arisen during the hearing, and therefore, after the verdict had been given, I adjourned the case to a future day so that the arguments of counsel might be presented in the light of the decision of the House of Lords in *Harnett v. Fisher* (43 *The Times* L.R., 567).

With the prolonged family history and countless details of this unhappy case I need not deal. It is, however, necessary to state a few of the main facts in order that the points of law may be appreciated. The plaintiff married in 1917 the son of a Gloucestershire vicar. The marriage at first was a happy one. Grounds of difference, however, arose later. It was alleged by the defence that before 1926 the plaintiff had shown signs of serious mental and nervous disorder. This was denied by the plaintiff and her witnesses. Dr. Dill acted as the medical attendant of the vicar (the Rev. Frederick de Freville) and his wife, who was an invalid. It is well to state that the defendant was wholly unconcerned with and dissociated from the family differences and asperities which were revealed in Court.

In May, 1926, the vicar's wife (without the knowledge of the plaintiff) telephoned to the defendant to come to the Vicarage to see the plaintiff. He went, and at the Vicarage he had an interview with the plaintiff, although she resented his presence. He formed a view regarding her state later. He prescribed some simple sedative medicine for her which was sent to the Vicarage. On May 15, 1926, the defendant had a prolonged interview with the plaintiff's husband, who gave him certain information about the plaintiff's health and condition. On June 8 the defendant visited the Vicarage again and had a further long interview with the husband, who gave him further information. At this time the plaintiff was not staying at the Vicarage.

On June 9 the plaintiff returned to the Vicarage, and shortly before six o'clock the defendant received more than one urgent telephone message (from some member of the family other than the plaintiff) to go to the Vicarage. In response to the message the defendant went as asked, and he spent about five hours with the plaintiff. The evidence is conflicting about the condition of the plaintiff and about many other matters and incidents. The defendant honestly formed the view that the state of the plaintiff was serious. Therefore, shortly before nine o'clock, he telephoned to the relieving officer to come to the Vicarage. That official came soon after 10 o'clock, and he and the defendant had a conversation. A policeman, I may mention, had been at the Vicarage since seven o'clock that evening. The relieving officer brought with him a form of certificate appropriate to section 16 of the Lunacy Act, 1890. The defendant filled it up and signed it. The certificate states that the defendant had personally examined the plaintiff, and that he had come to the conclusion that she was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. It then proceeds to state : (*a*) the grounds observed by the defendant himself, and (*b*) the facts communicated to him by others. It added that the plaintiff appeared to the defendant to be in a fit condition of bodily health to be removed to a mental hospital. Such was the certificate. After it had been signed the plaintiff was led by the relieving officer and the police constable to a waiting motor-car. The plaintiff and the relieving officer entered the car with a female servant whose presence was, for obvious reasons, deemed desirable. The car then drove with its three passengers to the house of a Justice of the Peace, who was a judicial authority within the Lunacy Act, 1890. The Justice of the Peace saw the plaintiff, but apparently did not ask her any questions. Shortly afterwards he (the magistrate) signed the following order : "Order for reception of a pauper lunatic. I, Joseph William Alldridge, having called to my assistance Alfred Vincent Dill, of The Bourne, Brinscombe, a duly qualified medical practitioner, being satisfied that Muriel de Freville, of The Vicarage, Oakridge, in the county of Gloucester, married woman, is in such circumstances as to require relief for her proper care and maintenance, and that the said Muriel de Freville is a person of unsound mind and a proper person to be taken charge of and detained under care and treatment, hereby direct you to receive the said Muriel de Freville as a patient into your hospital. Subjoined is a statement of particulars respecting the said Muriel de Freville. (Signed) J. W. Alldridge, a Justice of the Peace for the county of Gloucester. Dated the 9th of June, 1926. To the Medical Superintendent of the Mental Hospital for the county and city of Gloucester." Appended to the order of the Justice of the Peace was a statement of particulars containing various details about the plaintiff. I need not set them out. That statement is signed by the relieving officer. After the magistrate had signed the order the motor-car, with the plaintiff, the relieving officer, and the female servant, drove to the Gloucester Mental Hospital. They reached it about midnight, and the plaintiff was received by the matron and two nurses.

The next day the plaintiff was examined by the medical superintendent of the hospital and also by another medical member of the staff. These gentlemen took the view that no ground existed for the detention of the plaintiff, and they decided that she ought at once to be taken from the hospital. On the evening of June 11 the plaintiff's father arrived at the hospital and took the plaintiff away.

Such are the facts, so far as I need state them for the present purpose. I have given them in brief outline only. A large body of evidence was given by and on behalf of the plaintiff. An equally large body of evidence was given by and on behalf of the defendant. It is not my function now to examine that evidence or to weigh the verdict of the jury. I held that there was evidence for the jury of a want of reasonable care by the defendant, and the jury have found against him. They are the tribunal on questions of fact. It is right to add that counsel for the plaintiff and defendant conducted the case and addressed the jury

with clearness, force, and moderation. It is also right to add that, in my view, the verdict of the jury must be taken to indicate their opinion that the plaintiff was not in such a state of mental or nervous disorder on June 9, 1926, as to require her detention at a mental hospital.

There is one other thing I should say ere I deal with the points of law raised before me. It is, I think, clear upon the evidence that the defendant was never employed by the plaintiff. She never contracted with him. She never consented that he should be her medical adviser. She had never invited him to attend or to treat her. The defendant, in examining the plaintiff and forming his opinion on June 9, 1926, was acting on behalf of her husband, or her father-in-law (the vicar), and not on behalf of the plaintiff herself.

I now take the points of law. The first contention on behalf of the defendant was that he owed no duty of care to the plaintiff. This point has been raised and often discussed in well-known litigation during the past seven years, and almost all the relevant decisions and *dicta* have been, from time to time, cited. Many exhaustive judgments have been given which touch, either directly or indirectly, on the point. To review these judgments in detail would make my present judgment one of undesirable length. I shall, therefore, deal with the matter somewhat broadly and without citing in undue detail from the various reports. The question is one of great importance, for it stands on the threshold of such actions as the present. It is singular, therefore, that it has not received express and clear decision from the final appellate tribunal. I feel myself that it would have been desirable, long ago, to pronounce the exact causes of action (if any) in such cases as the present.

In the action now before me the statement of claim asks damages : (*a*) for negligent certification, (*b*) for false imprisonment, and (*c*) for assault. The case, however, at the trial before me was confined to head (*a*), and by agreement of counsel the only question left to the jury was, as I have said, whether the defendant had been guilty of a want of reasonable care.

In *Hall v. Semple* (3 F. and F., 337), it is worth noting, the two counts were (*a*) for assault, and (*b*) for that the defendant, without reasonable and probable cause and with intent to cause the plaintiff to be imprisoned and put under bodily restraint, did sign a certain certificate. Mr. Justice Crompton (who tried the case) seems to have felt the difficulty of formulation, but told the jury (at p. 354) that the true ground of complaint was "the negligence of the defendant and the want of due care in the discharge of the duty thrown upon him." The jury seems to have found (*a*) that the defendant acted negligently, (*b*) that he acted without probable cause, and (*c*) that the plaintiff had been sane, in point of fact, at the time when the defendant gave his certificate. They awarded damages, and the plaintiff got his judgment (see p. 368), apparently, as Mr. Justice Crompton said, "on the ground of culpable negligence and want of reasonable care or probable cause." *Hall v. Semple* (*supra*) is, in my view, somewhat ambiguous and unsatisfactory, but it appears to decide (*a*) that a doctor when certifying is bound, though not employed by the alleged lunatic, to use reasonable care, and (*b*) that the basis of a plaintiff's claim for wrongful certification is a particular form of action on the case. It seems clear from the facts in *Hall v. Semple* (*supra*) that the doctor who there certified was not under any contract with the plaintiff.

In *Everett v. Griffiths* (36 *The Times* L.R., 491 ; [1920] 3 K.B., 163 ; 37 *The Times* L.R., 481 ; [1921] 1 A.C., 631) the statement of claim apparently formulated two grounds of claim against the doctor concerned, namely (1) false imprisonment, and (2) negligence causing imprisonment, and the latter issue alone was left to the jury. See *per* Lord Justice Atkin (36 *The Times* L.R., at p. 498 ; [1920] 3 K.B., at p. 200).

Lord Justice Scrutton refers to a claim for "negligent arrest and imprisonment" (36 *The Times* L.R., at p. 497 ; [1920] 3 K.B., at p. 197). Lord Haldane said (37 *The Times* L.R., at p. 481 ; [1921] 1 A.C., at p. 640) : "It is therefore an action for damages for false imprisonment, based on alleged breach of duty. The real legal question is not whether the appellant was actually of unsound mind when he was so certified, but whether the respondents committed a breach of any obligation to be careful in so certifying." (See, too, [1921] 1 A.C., at p. 658.)

Upon the question of the cause of action I need only refer to one more case—namely, *Harnett v. Fisher* (*supra*). Two questions were there left to the jury—namely (1), Was Mr. Harnett of unsound mind on November 10, 1912, when he was certified by Dr. Fisher, and (2) Did Dr. Fisher act with reasonable care in certifying him ? So far as I can see, there was on appeal no challenge of the sufficiency or propriety of those two questions. I infer from the many dicta in the opinions delivered in the House of Lords and also from the decision itself that such an action as the present is to be regarded as an action on the case for negligence in certification causing damage through detention in a mental hospital without just cause.

I do not pause to analyse the curious and somewhat anomalous feature of this comparatively recent form of action on the case. I am not free to write upon a *tabula rasa*. I am beset by and subject to decisions and dicta.

If the cause of action be of the nature which I have indicated, and if, as I hold, there was no contract at all between the defendant and the plaintiff in the present case, did the defendant owe to the plaintiff the duty of care with respect to certification and the matters that preceded and surrounded it ? It is plain that a surgeon who operates negligently on the body of a patient is liable in damages, although there be no contract between the patient and himself. So, too, of a physician who administers medicine to the body of a patient. But here the defendant performed no operation at all, nor did he, on June 9, administer any medicine to the plaintiff. He only expressed in a certificate (the substance of which I have given) his honest view that the plaintiff was a "person of unsound mind, and a proper person to be taken charge of and detained under care and treatment." (See on this point *per* Lord Esher in *Thompson v. Schmidt*, 8 *The Times* L.R., 120.) Did, then, the defendant here owe the duty of care to the plaintiff with respect to certification ? If the answer be "Yes," then the singular result seems to follow that he would, apparently, have been liable to the plaintiff for not certifying if the plaintiff had been in fact of unsound mind and a proper subject, therefore, for detention in a mental hospital. Suppose that in the latter case the plaintiff, through the absence of certification and restraint, had inflicted injury on herself ? Could she have sued the defendant for damages ? "If not, it is curious" (as Lord Justice Scrutton has pointed out) "that when he (the doctor) has undertaken to examine he is liable for carelessness which certifies, but not for carelessness

which does not certify." (See *Everett v. Griffiths*, 36 *The Times* L.R., at p. 497 ; [1920] 3 K.B., at p. 196.) It may also be pointed out that if a doctor be liable in such a case as that now before me it might follow that a petitioner who frames and signs a petition under section 4 of the Lunacy Act, 1890, may also be liable for negligence in supplying the particulars required by the statutory form. (See *per* Lord Atkinson in *Harnett v. Fisher* (43 *The Times* L.R., at p. 573). But, as I have said before, I am not, I fear, in spite of the statements made to me by counsel on both sides on the point, free to express an independent opinion of my own.

How, then, do the authorities stand ? I take the House of Lords decisions first. In *Everett v. Griffiths* (*supra*) the opinions were uncertain and somewhat opposite. Lord Haldane says ([1921] 1 A.C., at p. 657) : "I only wish to say that while I think it probable that if the matter were argued out Anklesaria" (the doctor there concerned) "would be found to have been under a duty to the appellant to exercise care, the precise nature of this duty would require consideration before it could be exactly defined." Lord Finlay said (37 *The Times* L.R., at p. 486 ; [1921] 1 A.C., at p. 669) : "For the purpose of this case your Lordships assume without deciding that the defendant Anklesaria owed to the plaintiff the duty of ordinary care." Lord Cave said ([1921] 1 A.C., at p. 679) : "Upon the conclusion of the argument of the appellant your Lordships were of the opinion that, assuming that this defendant might in law be sued for want of reasonable care in examining and certifying the plaintiff, there was no evidence of such want of care to go to the jury." His Lordship added ([1921] 1 A.C., at p. 680) that he did not wish to cast any doubt upon the correctness of the opinion of Mr. Justice Crompton in *Hall v. Semple* (*supra*) "that a medical man who negligently signs a certificate of insanity upon which an order of detention is founded may be made liable in damages for any injury so caused, though," as the noble Lord added, "I express no final opinion upon that point." Lord Atkinson said (37 *The Times* L.R., at p. 486 ; [1921] 1 A.C., at p. 681) : "Even assuming the duties alleged and relied upon existed, which I am far from admitting, there is not, in my view, sufficient evidence to show that either of the respondents neglected to perform fully the duty he was alleged to owe to the appellant." Lord Moulton said ([1921] 1 A.C., at p. 697) : "I propose to assume in the plaintiff's favour that such negligence and want of care and skill would give to the plaintiff a good cause of action against such defendant, though I do not decide the point." Thus it will be seen that the House of Lords expressed no definite opinion on the point of law now before me.

In *Harnett v. Bond* (41 *The Times* L.R., 509 ; [1925] A.C., 669) the question of duty to take reasonable care in certification did not call for consideration.

In *Harnett v. Fisher* (*supra*), when in the House of Lords, the point ultimately turned on the Statute of Limitations. Incidentally, however, the question of the duty of reasonable care was mentioned. Lord Sumner said (43 *The Times* L.R., at p. 569) : "The respondent has not for present purposes disputed that a cause of action would arise at common law as for breach of duty towards the appellant [Harnett] if the respondent was actually wanting in reasonable care in his examination and in forming his conclusion as to the appellant's state of mind. I need therefore express no opinion on this question." Lord Atkinson said, at page 573 : "It may well be that a medical man who treats a patient, or purports to express an opinion on that patient's bodily or mental state of health, is bound to do the work he has undertaken to do with reasonable care and skill. . . . Negligence is a breach of duty, but the question is to whom this duty to use reasonable skill and care is owed. This action is founded on the assumption that it was owed to the appellant." Lord Carson and Lord Wrenbury agreed with Lord Sumner. Lord Blanesburgh, however, appears, at page 575, to have taken the view that the correctness of the ruling of Mr. Justice Crompton in *Hall v. Semple* (*supra*) was no longer challenged. As to *Harnett v. Fisher* (*supra*) I may say, as I said of *Everett v. Griffiths* (*supra*), that it contains no definite opinion on the question of the duty of reasonable care in certification.

I now turn to the views expressed in the Court of Appeal. Those views are to be found in *Everett v. Griffiths* (*supra*). I can summarize them in a sentence or two. Lord Justice Bankes held definitely that the defendant in such a case as the present owed a duty of reasonable care. Lord Justice Atkin expressed a clear opinion to the like effect. Lord Justice Scrutton, however, took a wholly opposite view and ruled that in a case such as that before me no duty of care existed. I deem myself free to say that the reasoning, the authorities and the allegations given by Lord Justice Scrutton carry a strong appeal to my own mind. His view, however, was the dissenting and not the majority view. Practically all the relevant decisions were cited before the Court of Appeal in *Everett v. Griffiths* (*supra*), and the interesting authorities quoted to me in the present case by Mr. Cremlyn, including the dictum of Mr. Justice Willes in *Skelton v. London and North-Western Railway* (L.R., 2 C.P., 631, at p. 636) do not carry the matter further. In *Harnett v. Fisher* (*supra*) the very point before me was argued before and expressly decided by my colleague, Mr. Justice Horridge. He definitely ruled that a doctor in such a case as the present owes the duty of reasonable care. In the Court of Appeal (*supra*), and in the House of Lords (*supra*), the case turned on other points. Whatever my own view, therefore, might have been, I feel that I must bow to the weight of opinion. I must follow the rulings of Lord Justice Bankes and Lord Justice Atkin in *Everett v. Griffiths* (*supra*), of Mr. Justice Crompton in *Hall v. Semple* (*supra*), and of Mr. Justice Horridge in *Harnett v. Fisher* (*supra*). I can find in the House of Lords opinions nothing which is definitely adverse to those rulings. On the contrary, some of the opinions seem inferentially to favour them. I ought not perhaps to omit mention of the fact that section 330 of the Lunacy Act, 1890, seems to be based on the assumption that the ruling of Mr. Justice Crompton in *Hall v. Semple* (*supra*) was correct. The material words of section 330 (1) are : "A person . . . shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care."

I must, therefore, hold in the present case that the defendant owed to the plaintiff the duty of reasonable care. The House of Lords alone can give, I feel, an opposite decision. I would like to add an observation. During the past seven years a number of medical men, who acted in perfect good faith, have been exposed to the most prolonged, harassing, and costly litigation upon the allegation that they acted without reasonable care in a matter which is the most difficult, delicate, and indefinite in the whole range of medical practice. It may well be, as was stated at the trial before me, that as a result of past litigation many doctors have refused and will refuse to take any part whatever in the work of certification

because of the perils and anxieties of litigation which may follow. I am not, however, concerned with consequences. I have only to deal with the points of law before me. Perhaps some further protective legislation is needed in view of recent cases.

I now turn to the second contention of the defendant—namely, that the defendant's certification was not the cause of the plaintiff's detention. Here I must set out the section of the Lunacy Act, 1890, under which the plaintiff was received at the Gloucester County Hospital. It is this : Section 16 : "The justice before whom a pauper alleged to be a lunatic or an alleged lunatic wandering at large is brought under this Act shall call in a medical practitioner ; and shall examine the alleged lunatic and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied in the first-mentioned case, that the alleged lunatic is a lunatic and a proper person to be detained, and, in the secondly-mentioned case, that the alleged lunatic is a lunatic, and was wandering at large, and is a proper person to be detained, and if in each of the foregoing cases the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order, and the relieving officer, overseer, or constable who brought the lunatic before the justice, or in the case of a lunatic wandering at large, any constable who may by the justice be required so to do, shall forthwith convey the lunatic to such institution." Such is the section, and I will assume for the purpose of the present point that the sequence of steps indicated in the section was duly followed. Now, was the certificate of the defendant the cause of the plaintiff's detention upon such assumption ? If I had been freed from authority I should have thought myself that the effective cause of that detention was the order of the justice and not the certificate of the doctor. The decision lay with the justice and not with the doctor. The justice could decide as he pleased, whatever the certificate stated. He was possessed of judicial authority and judicial discretion, and his adjudication was decisive *pro tempore* upon the matter before him. The doctor's certificate, though an essential requirement, was a mere opinion. It possessed of itself no operative force.

I could wish that in the recent decisions upon the Lunacy Acts consideration had been given to the words of Mr. Justice Willes in *Austin v. Dowling* (L.R., 5 C.P., 534, at p. 540). He there pointed out, in a non-lunacy case, the significance of "the opinion and judgment" of a judicial officer. Those words, when taken in conjunction with the decision of the Court of Appeal in *Hodson v. Pare* (15 *The Times* L.R., 171 ; [1899] 1 Q.B., 455), are well worthy of close attention. It cannot be pointed out too emphatically that in *Hall v. Semple* (*supra*) there was no order whatever by any judicial person. The order for admission to the asylum was there signed by the wife alone. Considerations such as those I have indicated were doubtless present to the mind of Lord Reading when he gave his ruling in *Everett v. Griffiths* (*supra*).

I confess that on the point now before me the judgment of Lord Justice Scrutton in *Everett v. Griffiths*—(See 37 *The Times* L.R., at p. 495, *et seq.* ; [1920] 3 K.B., at p. 191, *et seq.*), strikes me as weighty in reasoning. That case, like this, turned on section 16. But am I free to express an independent view ? I fear not. The position stands as follows. In *Everett v. Griffiths* (*supra*), Lord Justice Bankes expressed no view upon the point before me. Lord Justice Scrutton ruled that the doctor's certificate was not the cause of the plaintiff's detention. Lord Justice Atkin, however, ruled that it was in fact and law the cause of that detention. When *Everett v. Griffiths* (*supra*) went to the House of Lords the House did not, in the majority of opinions, deal expressly with the point, for they held that there was no evidence of a want of reasonable care. Lord Haldane does not deal with it. Lord Cave inclined, I think, to favour the view of Lord Justice Atkin. Lord Atkinson expressed no clear view. Lord Moulton expressed no actual opinion. Lord Finlay, however, expressly concurred with the view stated in the Court of Appeal by Lord Justice Atkin. The balance of opinion so far, therefore, favours the view that in the present case the doctor's certificate must be taken to be the cause of the plaintiff's detention in the Gloucester County Asylum. This balance is substantially increased by reason of the recent decision of Mr. Justice Horridge in *Harnett v. Fisher* (*supra*). The facts there, so far as they concern the present point, cannot be distinguished from those in the case before me. My learned colleague held expressly that the negligent giving of the doctor's certificate was the direct cause of the magistrate's order and the consequent detention of the plaintiff. The decision in *Harnett v. Fisher* (*supra*) when before the Court of Appeal rested upon the Statute of Limitations only. In the House of Lords (*supra*) the ultimate decision also turned on the Statute of Limitations. On the point now before me, however, I see that Lord Sumner said (43 *The Times* L.R., at p. 570) : "Any principle on which this cause of action could be sustained would be equally applicable if the defendant had signed nothing but had given his opinion to the magistrate orally. The rest is either a separate cause of action under the Lunacy Act, 1890, for which no damage could be recovered since the detention order was the order of the justice and not of the doctor, or is a mere item in the damages claimed for the negligence." The judgment of Lord Sumner was, as I have earlier said, concurred in by Lord Wrenbury and Lord Carson. See, too, the somewhat similar observations of Lord Atkinson at page 573, where he says : "This reveals the true nature and function of the medical certificates. They are pieces of evidence, just as the statements of the petitioner are pieces of evidence, and are supplied to the judicial authority to help it to decide on the matter of the petition." From Lord Blanesburgh's opinion (see p. 575) I infer, however, that he was in accord with the view expressed by Lord Finlay in *Everett v. Griffiths* (*supra*).

In this state of opinion I feel that I ought to follow the clearly expressed rulings of Lord Justice Atkin, of Lord Finlay, and of Mr. Justice Horridge, supported, as I think they are, by the view of Lord Blanesburgh just cited. I find no decision opposite to those rulings save in the judgment, forcible though it was, of Lord Justice Scrutton in *Everett v. Griffiths* (*supra*). I must, therefore, hold in the present case, simply on the balance of authority, that the certificate of Dr. Dill was the cause of the plaintiff's detention in the Gloucester Mental Hospital.

I hope that it is permissible for me to express the view that, if possible, the House of Lords will ere long give a clear and final decision both on the question of the duty of care and also on the question of the certificate as a "cause" of detention. Each is a matter of grave importance, both from a legal and from a practical point of view. It is regrettable that so great a difference of opinion should exist and

that a trial Judge should be beset with difficulty and doubt. I desire also to express the hope that when the question of the certificate as a cause of detention is finally considered the case of *Harnett v. Bond* (*supra*) will receive a full measure of attention. I doubt if the importance of that case with respect to "causation" and the nature of a *novus actus interveniens* has been fully realized. It was not even cited in *Harnett v. Fisher* (*supra*). The weighty observations in *Harnett v. Bond* (*supra*) should be contrasted with the well-known passage in the judgment of Lord Sumner in *Latham v. Johnson and Nephew, Limited* (29 *The Times* L.R., 124 ; [1913] 1 K.B., 398).

I must now deal quite briefly with the third (and a most ingenious) point raised by Mr. Singleton in his able argument for the defendant. Concisely put it is this : After referring to the provisions of sections 13, 14, and 15 of the Lunacy Act, 1890 (as to summary reception orders), Mr. Singleton points out that the steps required by section 16 are (1) that the justice shall call in a medical man ; (2) that the justice shall himself examine the lunatic and make such inquiries as he thinks fit ; (3) that, if he is satisfied that the alleged lunatic is a lunatic and proper to be detained, the justice should obtain a medical certificate ; and then (4) make an order for detention if he thinks it right to do so. That is the sequence of steps required by section 16. Mr. Singleton then points out that in the case now before me this sequence was not followed. In the present case the justice had not called in Dr. Dill, but, on the contrary, it was Dr. Dill who may be said to have called in the justice. The section, moreover, assumes that the certificate shall be signed after and not before the justice has called in the medical man. Here it was signed before the justice had taken any actual part in the matter. This being so, Mr. Singleton contends, in substance, that the provisions of section 16 were not complied with as they should have been, and he further contends, in substance, that Dr. Dill was entitled to assume (*a*) that his certificate was a mere and unessential preliminary, and (*b*) that the justice would, when the matter was brought before him, call in another and an independent doctor for the purposes of certification under section 16.

This third point was never raised at all by Mr. Singleton while the case was before the jury. It was first submitted by him during the argument before me several weeks after the jury had given their verdict. Upon the whole I do not think that it is open to Mr. Singleton to raise it now. If it had been put to me when the jury were in the box I should most probably have left to them other questions besides that of reasonable care. Both counsel, as I have said, had agreed that the only issue to be considered by the jury was the question of reasonable care in certification, together, of course, with the matter of damages should they find for the plaintiff.

But even if the point be open to Mr. Singleton there is a further objection. It is this. Upon the evidence of Dr. Dill himself, who gave his evidence with the utmost frankness, it is clear that he did not contemplate in fact that any other doctor would be called in by the magistrate. He expressly stated on the evening of June 9, in reply to a question by the relieving officer, that no second doctor was necessary. It is plain that Dr. Dill assumed that the magistrate, if he made any order at all, would act upon his (Dr. Dill's) certificate and upon no other certificate.

I, therefore, see nothing in the facts here which takes this case outside those opinions and rulings upon which I have felt bound to rely in giving my decision on the second point in this case. It may well be indeed that the special facts here tell more strongly against Mr. Singleton's client than would have been the case if the sequence of steps required by section 16 had been strictly followed. I need not examine the decisions in *Morris v. Atkins and Brooker* (18 *The Times* L.R., 628) and *Reg. v. Whitfield* (15 Q.B.D., 122) cited by Mr. Singleton. They do not, I think, affect my decision.

It is right to point out that section 330 of the Lunacy Act, 1890, provides, in substance, that persons carrying out the statute and signing orders or medical certificates shall not, if they act in good faith and with reasonable care, be liable to civil or criminal proceedings whether on the ground of want of jurisdiction or any other ground.

I must rule against the defendant on the third point also. The result is that judgment must be entered for the plaintiff for the £50 damages awarded to her by the jury.

Mr. SINGLETON.—May I ask your Lordship for a stay as to damages and costs on such terms as your Lordship thinks proper ?

MR. JUSTICE MCCARDIE.—Yes, I think so. To my mind it is desirable, if possible, that the first two points I have dealt with should be not only finally, but also clearly, decided so that the Judge may know in a case of this sort the direction that he is to give to the jury regarding the degree and character of the care required by the doctor in such cases.

Mr. SINGLETON.—It is regarded by those instructing me as important in the interests of the medical profession.

Mr. CREMLYN.—I do not object to a stay on the ordinary terms.

MR. JUSTICE MCCARDIE.—Then the money had better be paid into Court within a fortnight, and the costs of the plaintiff will be taxed and paid by you, Mr. Singleton, on the usual undertaking to return them in accordance with the ultimate result.

[Solicitors—Mr. H. Coulson ; Messrs. Le Brasseur and Oakley.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1927.
June 29.

HARDIE AND LANE, LIMITED v. CHILTON AND OTHERS.*

Trade Unions—Representative action against members—Requirement of common interest—Definition of trade union—Trade Disputes Act, 1906 (6 Edw. VII., c. 47), s. 4 (1)—Trade Union Act, 1913 (2 and 3 Geo. V., c. 30), ss. 1 (2), 2—Rules of the Supreme Court, Order XVI., r. 9.

The plaintiffs, who were motor-car dealers and agents, brought an action against the defendants, sued on their own behalf and on behalf of all other members of the Motor Trade Association, an unregistered trade union, having as its object the imposing of restrictive conditions on the conduct of the motor trade. The claim was substantially for conspiracy. No member of the Association incurred any liability beyond payment of his subscription, and each member was

* Reported by G. T. WHITFIELD-HAYES and H. LANGFORD LEWIS, Esqrs., Barristers-at-Law.

expressly exempted from liability for the acts of the officers and the other members. The Association was a shifting body, some entering and some leaving it. On the defendants' application the Master made two orders, (1) dismissing the action against the defendants in a representative capacity on the ground that the claim was not sustainable in law, and (2) amending the writ and subsequent proceedings by striking out the words which stated that the defendants were sued on behalf of the Association.

Held, that since the persons to be represented had no common interest with the defendants, as required by Order XVI., r. 9, the orders of the Master were right.

Held, further, that the immunity conferred by s. 4 (1) of the Trade Disputes Act, 1906, upon trades unions, "whether of workmen or masters," in respect of torts, is not confined to unions of workmen or masters, but extends to any union which has the object of imposing restrictive conditions on the conduct of a trade, since such an object is a "statutory object" under s. 1 (2) of the Trade Union Act, 1913, and the definition of "trade union" in s. 2 of the Act of 1913, as including "any combination . . . the principal objects of which are under its constitution statutory objects," applies to a trade union under the Act of 1906.

Decision of Fraser, J. (43 *The Times* L.R., 477), affirmed.

These were appeals by the plaintiffs, Hardie and Lane, Limited, agents for the sale of, and dealers in, motor-cars, of 24, Woodstock-street, W., from a decision of Mr. Justice Fraser (43 *The Times* L.R., 477), who dismissed the plaintiffs' appeals from two orders of Master Jelf made on the application of the defendants, John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer, sued on their own behalf and on behalf of the Motor Trade Association.

The Motor Trade Association was an unregistered trade union, and on June 3, 1914, it was certified by the Registrar of Friendly Societies to be a trade union under section 2 (3) of the Trade Union Act, 1913.

One order dismissed the action against the defendants in a representative capacity on the grounds, (1) that the statement of claim disclosed no claim sustainable in law or cognizable by the Court; and (2) that it disclosed no matters giving ground for an action against the defendants as representing the Motor Trade Association or against the members thereof as represented by the defendants. The other order was (*a*) that the writ and all subsequent proceedings in the action should be amended by striking out from the title of the action the words: "And the said John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer sued on their own behalf and on behalf of all other members of the Motor Trade Association"; and (*b*) that certain portions of the statement of claim should be struck out.

The statement of claim alleged that the association purported to carry on business for the purpose of encouraging and protecting the motor industry in the United Kingdom and throughout the world and to watch over and protect the interests of manufacturers, &c. The statement of claim continued:—

"The defendants Chilton, Bennett, and Denyer substantially own and control the business and undertaking of the association, and such business is in truth and in fact carried on for their profit and benefit.

"Further, or alternatively, the association is an unregistered association of motor dealers and of motor manufacturers. The defendants Chilton, Bennett, and Denyer are and were at all material times members of the said association and also are and were members of a committee conducting the affairs of the association on the members' behalf and are sued as representing the general body of the members. The said defendants are and were at all material times the trustees of the association and the funds of the association were vested in them as such trustees. The said funds were at all material times the property of the members of the association and vested in the said trustees upon trust for the members."

The statement of claim then stated that the plaintiffs became members of the association, and alleged a conspiracy between the defendants and one Neale to induce the plaintiffs by fraudulent representations to break a by-law of the association with regard to the maintenance of prices. As the result of the alleged conspiracy the plaintiffs were induced to pay to the defendants the sum of £332 and to give an undertaking to maintain the protected prices. On March 17, 1926, the present defendants issued a writ claiming from the plaintiffs a further £100. The plaintiffs in that action were described as "John Chilton and Harry Arnold Bennett suing on behalf of themselves and all other members of the Motor Trade Association." That action was discontinued.

In upholding the decision of Master Jelf Mr. Justice Fraser held that the defendants could not be sued in a representative capacity—namely, as representatives of the trade union, since there was no common interest as required by Order XVI., Rule 9, which states:—

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

The plaintiffs appealed, by leave.

Sir Henry Slesser, K.C., and Mr. Harold Simmons appeared for the plaintiffs; Sir John Simon, K.C., and Mr. Giveen for the defendants in their representative capacity, as representing the Motor Trade Association; Mr. Merriman, K.C., and Mr. St. John Field for the defendants, as individuals.

The Master of the Rolls, in the course of his considered judgment, said that the statement of claim had declared three causes of action—(*a*) conspiracy; (*b*) libel; and (*c*) money had and received. Sir Henry Slesser, during the argument, had decided to abandon all claims for libel, and, if the action proceeded, the statement of claim would have to be amended accordingly. The third claim, for money had and received, depended on whether the plaintiffs could abandon the conspiracy declared by the statement of claim, which was said to be the basis of the acts done by the defendants, and whether they could base their claim for that sum upon an *indebitatus* count alone. For the reasons given by the Court in the case of *Brocklebank, Limited v. The King* (40 *The Times* L.R., 869; [1925] 1 K.B., 52), the plaintiffs could not vary their claim in that way.

On the facts alleged, the cause of action stood upon conspiracy and duress, and the plaintiffs could not dissociate their claim from those facts and rest it upon a money basis only. As a result, therefore, the claim for conspiracy alone remained.

After carefully reading the judgment of Mr. Justice Fraser, he (the Master of the Rolls) thought that that Judge had dealt fully with the question whether the defendants, in their alleged capacity as representatives of the Motor Trade Association, were within the ambit of Order XVI., Rule 9. He desired to associate himself with Mr. Justice Fraser's reasoning. He would only add that, by regulation 14, no member of the Motor Trade Association incurred any liability beyond payment of his subscription, and, by later words, every member was expressly exempted from liability for the acts of other members or officers of the association. The association was a shifting body, some members coming in and some leaving it. The words of Lord Parker in *London Association for Protection of Trade v. Greenlands, Limited* (32 *The Times* L.R., 281 ; [1916] 2 A.C., 15), and of Lord Justice Swinfen Eady in *Mercantile Marine Service Association v. Toms* ([1916] 2 K.B., 243), indicated that in the present case there was no ground for saying that the members of the association had the same interest in the action, or the same defence to it, as the three named persons, or that they came within the ambit of Order XVI., Rule 9. The appeals must, therefore, be dismissed upon that ground.

There had been an earlier question raised by the defendants which had been argued by both sides. The action was for conspiracy, and section 4 (1) of the Trade Disputes Act, 1906, said :—

"An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court."

Those words were clear and direct. In *Vacher and Sons, Limited v. London Society of Compositors* (29 *The Times* L.R., 73 ; [1913] A.C., 107) it was held that the section was not limited to tortious acts committed in contemplation or furtherance of a trade dispute, but extended to all torts. Sir Henry Slesser had presented an ingenious argument, to the effect that the words "whether of workmen or masters" were words of limitation and limited the unions entitled to ask for immunity to those composed of workmen or masters, which did not include the Motor Trade Association, whose object was "the imposing of restrictive conditions on the conduct of any trade or business." But that was a "statutory object" under section 1 (2) of the Trade Union Act, 1913, and the definition of "trade union" under section 2 of the Act was "any combination . . . the principal objects of which are under its constitution statutory objects." That definition applied to a trade union under the Act of 1906. The Motor Trade Association was within it, and was entitled to the immunity given by the section.

In the plain meaning of the English used he found great difficulty in construing the words "whether of workmen or masters" as words of limitation.

The tests of a trade union were its objects, not its *personnel*. As a matter of caution, it might have been thought wise to insert words to make it clear that unions of masters, not less than of workmen, were covered by the immunity provided, but the House of Lords in *Vacher's* case (*supra*) had rejected the attempt to give the section a restricted meaning. The speeches of the Lords all indicated that the section was to receive the wide meaning that its words appeared to carry. The appeals must, therefore, be dismissed, with costs.

Lord Justice Sargant said that he was of the same opinion. Notwithstanding the elaborate argument of Sir Henry Slesser, the reasoning of Mr. Justice Fraser was unshaken, and he clearly could not here come to any other conclusion without disregarding the plain practice of the Court in representative actions, and casting wholly unwarranted liabilities on a great number of persons who had done nothing to render themselves responsible, and would have no proper opportunity of defending themselves. The present action was not to enforce a right against a fund in which all members of the Motor Trade Association had a common interest, or to declare the interpretation of regulations binding them in common—a class of case to which Order XVI., Rule 9, was, at any rate primarily, applicable ; it was to enforce a strictly personal liability against the named defendants and the whole of the members of the association. Whether the liability so sought to be enforced were in contract, as in *Walker v. Sur* (30 *The Times* L.R., 171 ; [1914] 2 K.B., 930), or in tort, as in *Mercantile Marine Service Association v. Toms* ([1916] 2 K.B., 243) and the present case, the judgments of the Court of Appeal in both those cases showed clearly how impossible it was that the named defendants could adequately represent, for the purposes of defence, the different individual members of the association, as these might have defences separate and distinct from those of the named defendants, and of each other. Moreover, of all torts that of conspiracy would seem the least capable of being properly defended by certain named defendants on behalf of the members of a large and fluctuating unincorporated association.

It might be desirable to add, though the matter was perhaps one of form rather than of substance, that it was incorrect to make any individual a defendant twice over because he happened to fill two capacities, or to have two different interests. The question often arose in actions in relation to trusts, and the practice was invariably to the contrary. With regard to the point raised under section 4 of the Trade Disputes Act, 1906, he (Lord Justice Sargant) agreed with the judgment of the Master of the Rolls, and thought that the words "whether of workmen or masters" were not words of limitation, but were intended to operate by way of comprehension, or rather, perhaps, by way of negation of restriction.

Lord Justice Lawrence said that two separate sets of counsel had been briefed for the three defendants, one set to represent them in their personal capacity, and another set to represent them in their alleged representative capacity. In his opinion that double naming on the record and double representation by counsel were altogether irregular. It might be stated in the writ or statement of claim that the defendants were sued in a personal and also in a representative capacity ; but he knew of no case where the Court had permitted the parties to be named twice over on the record, or to be represented by two separate sets of counsel. That, however, was a technical point.

Upon the main question, Sir Henry Slesser had placed reliance on the dicta of Lord Macnaghten and Lord Lindley in *Taff Vale Railway Company v.*

Amalgamated Society of Railway Servants (17 *The Times* L.R., 698 ; [1901] A.C., 426), but since that case was decided there had been cases in the Court of Appeal, binding upon the present Court, those of *Walker v. Sur* (30 *The Times* L.R., 171 ; [1914] 2 K.B., 930) and *Mercantile Marine Service Association v. Toms* ([1916] 2 K.B., 243). The principles in those two cases were in his (Lord Justice Lawrence's) opinion directly applicable in the present case, and established conclusively that in an action like the present the Court ought not to pronounce a judgment which would bind the absent members of the association and make them liable for damages for conspiracy, or for money had and received to the use of the plaintiffs. If further authority were needed to support that conclusion it could be found in the judgment of Lord Parker in *London Association for Protection of Trade v. Greenlands, Limited* (32 *The Times* L.R., 231 ; [1916] 2 A.C., 15), in which it was shown clearly that an action such as the present did not come within the purview of Order XVI., Rule 9.

Another fatal objection to the action, in so far as it claimed relief against the defendants as representing the members of the association, was section 4 of the Trade Disputes Act, 1906. In his (Lord Justice Lawrence's) view, the words "whether of workmen or masters" were obviously not intended to limit the expression "trade union" as had been suggested. The phrase was not perhaps very aptly chosen, but it was clearly used comprehensively, in order to emphasize the fact that the expression "trade union" included unions both of workmen and masters. The appeals failed on both grounds, and must be dismissed with costs.

[Solicitors—Mr. C. S. Tomlinson ; Messrs. Kenneth Brown, Baker, Baker.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927.
July 6.

PAGE v. LIVERPOOL VICTORIA FRIENDLY SOCIETY.*

Contract—Agent of friendly society—Alteration of rules—Amendment providing for compulsory retirement—Whether binding on agent appointed before amendment.

The plaintiff was appointed an agent of the defendants, a friendly society, whose rules, though subject to alteration, provided at that time for the retention of agents in office so long as their conduct was satisfactory. After the plaintiff reached the age of 65 the defendants altered their rules by providing that agents should be compulsorily retired at the age of 65, and in accordance with the amended rules the defendants terminated the plaintiff's employment. In an action for a declaration that the defendants were not entitled to do so,

Held, that as the rules, on the face of them, were alterable, the plaintiff was not entitled to the declaration claimed, and the action failed.

Decision of Rowlatt, J. (43 *The Times* L.R., 375) affirmed.

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

This was an appeal by the plaintiff, Mr. Walter Wright Page, of Nicholl-road, Harlesden, from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 375) holding that the defendant society was entitled by virtue of its rules to require him to retire from the position of district manager of the society at the age of 65.

The plaintiff, who was now 69 years old, had been employed as the society's agent or manager for Willesden since December, 1896, until he was compulsorily retired in October, 1925, solely in consequence of a new rule of the society that officers should be so retired with a pension at the age of 65. His reputation with the society stood very high, and although, according to the computations of the society, he was only entitled to a pension of £8 per week, the society had increased it to £8 10s.

At the time of the plaintiff's appointment the rules stated that agents should remain in office so long as their conduct was satisfactory to the managing committee. The rules had been altered from time to time, but on the occasion of each alteration provision was made that "the existing . . . officers . . . shall hold their offices as of their appointment under any former rules."

On March 31, 1925, the society amended its rules by adding a clause that all the servants, except the collecting staff, should be compulsorily retired at the age of 65 as and from October 1, 1925, subject to the granting of what, in the opinion of the committee of management, was an adequate pension. The plaintiff was 65 on February 2, 1923.

By a letter dated May 30, 1925, the society terminated the employment of the plaintiff and dismissed him as from October 1, 1925. The plaintiff claimed that he was not bound by the new and amended rules ; that the terms of his engagement were not and could not be altered by the making of the amendments by the society, and did not, on their true construction, enable the society compulsorily to retire him.

The defendants contended that it was an implied term of the agreement that the rules could and might be amended or rescinded at any time, and that the plaintiff's employment terminated in accordance with the provisions of the rules.

Mr. Justice Rowlatt held that the action was misconceived and dismissed it. He said that the plaintiff took office under a rule of the society, but the rules, on the face of them, were subject to alteration. The rule under which the plaintiff claimed what was equivalent to a freehold tenure was alterable, and it was duly altered, and the plaintiff was retired in accordance with the rule as altered. His Lordship said that he could not accept the contention that the rule as to compulsory retirement at 65 could not relate to the plaintiff because he was 65 before that new rule was made.

The plaintiff appealed.

Mr. Rayner Goddard, K.C., and Mr. James Wylie appeared for the appellant ; Mr. Maugham, K.C., Mr. Artemus Jones, K.C., and Mr. Bertram Long for the respondents.

The Court did not call on counsel for the respondents.

The Master of the Rolls, in giving judgment, said that the plaintiff was appointed a collector for the society as early as 1878, and in 1896 was made a district manager at Willesden.

His Lordship read the letter terminating the plaintiff's employment, and continued :—It was argued

that the letter could not properly be sent to the plaintiff under the rules of the society. It was also argued that the altered rule could not apply to him because he had passed the age of 65 when the alteration was made. Mr. Justice Rowlatt had sufficiently dealt with that suggestion. But it was said that the appointment which the plaintiff received was a freehold appointment for the term of his life so long as his conduct was satisfactory to the society. It was plain from the terms of the letter under which he was appointed that he was not expressly appointed for such a term, nor did the letter refer to the rules of the society. Rule 15 provided for the appointment by the society of an unlimited number of agents, who could hold office so long as their conduct was satisfactory. It was argued that there was an implied condition in the plaintiff's contract, derived from Rule 15, entitling him to hold his office for life. He (his Lordship) could not accept that view of the contract. Each committee had power to appoint persons to hold office for a period longer than their own period of office, but the rule did not mean that the committee must make appointments for life. Then it was said that the plaintiff, being a member of the society, knew the rules, and must have contracted in accordance with the rules. But the same difficulty applied.

If Rule 15 was incorporated, so was Rule 27, which gave the committee power to alter the rules. Indeed, the Friendly Societies Acts gave powers to societies to alter their rules and provided for the registration of amendments to them. If the contract was made on the basis of the rules, then both Rules 15 and 27 were imported and it must be taken to have been contemplated that the rules might be changed. It was suggested that the action of the amending rule was stayed by the proviso to it, and that the servants, appointed before the new rule as to retirement at 65 came into force, were not subject to it. But the proviso was necessary simply for the purpose of avoiding the troublesome task of reappointing all the officers and servants of the society on the basis of the new rules.

The plaintiff had not succeeded in establishing that the contract under which he was appointed manager was one to endure for the whole of his life. Both parties contemplated that if the rules were to be imported into the contract the rule giving power to amend the existing rules, and the amendments thereof, must be included. The result was that the plaintiff's claim failed. The decision of Mr. Justice Rowlatt must be affirmed and the action dismissed with costs.

Lord Justice Scrutton and Lord Justice Sargant delivered judgment to the same effect.

[Solicitors—Messrs. Pierron and Morley ; Messrs. J. Tickle and Co.]

K.B. Div. (Acton, J.) 1927. July 7.

PARSONS v. BURGESS.*

County Court—Jurisdiction—Breach of promise of marriage — Action for return of articles given during engagement—Alleged bailment.

The respondent brought a County Court action against the applicant for the return of certain money and articles, alleging that the parties had promised to marry one another and that the applicant had broken the promise. The applicant applied for a writ of prohibition to be directed to the County Court on the ground that the action was really one for breach of promise of marriage and that therefore the County Court had no jurisdiction. The respondent contended that the action was brought on a bailment, which was within the County Court jurisdiction.

Held, that in substance the claim was for damages for breach of promise of marriage and the writ must issue.

Hunt v. North Staffordshire Railway Company (2 H. and N., 451) followed.

This was a summons for a writ of prohibition to be directed to the Judge of the Clerkenwell County Court to prohibit him from further proceeding in an action in which the plaintiff, in his particulars of claim, alleged that he and the defendant had engaged to marry one another ; and that in contemplation of their marriage he gave her £40, a sewing machine, and an engagement ring. He further alleged a breach of the engagement by the defendant, and as a result claimed the return of the £40, the sewing machine or its value, and the ring or its value.

The defendant obtained leave from Mr. Justice Talbot to issue the summons, which was subsequently adjourned into Court under Order LIV., Rule 22, of the Rules of the Supreme Court.

Mr. Reginald T. Sharpe appeared for the applicant, the defendant in the action ; Mr. E. B. Calvert for the respondent, the plaintiff.

Mr. Sharpe contended that the plaintiff would have to prove not merely that there was no marriage, but that there was a wrongful breach of promise. He referred to the judgment of Mr. Justice McCardie in *Cohen v. Sellar* (42 *The Times* L.R., 409 ; [1926] 1 K.B., 536) and also to *Hunt v. North Staffordshire Railway Company* (2 H. and N., 451) ; *Foster v. Reeves* ([1892] 2 Q.B., 255) ; *Smith v. Smith* ([1925] 2 K.B., 144) ; and *Crossingham v. Park* (43 *The Times* L.R., 647). He contended that the action was really one for damages for breach of promise.

Mr. Calvert referred to the particulars, which set out that the plaintiff was formerly engaged to the defendant, and during the course of the engagement deposited £40 with the defendant as bailee to be utilized when they were married. The action depended on bailment, which was within the jurisdiction of the County Court.

Mr. Justice Acton said that, in his opinion, the case was concluded by authority. On the authority of the cases cited by Mr. Sharpe, and especially of *Hunt v. North Staffordshire Railway Company* (2 H. and N., 451), it seemed to him that Mr. Sharpe was quite right in his contention that the claim was really in substance one for damages for breach of promise of marriage, and that the inquiry must involve the question of breach.

The particulars of claim, which set out a promise of marriage and gifts of chattels, and that the defendant broke the promise, asked the Court to draw the conclusion that a right arose to damages with a right to the return of the chattels. In substance, this was an action for breach of promise of marriage and was excluded from the jurisdiction of the County Court. In his view, the writ of prohibition should issue.

[Solicitors—Messrs. Colman and Knight ; Mr. Geo. A. Godfrey.]

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Chan. Div. (Russell, J.) 1927. July 7.

IN RE LANYON—LANYON v. LANYON.*

Will—Construction—Condition against marrying a blood relation—Avoidance—Probable prohibition of marriage—Public policy.

A testator left his residuary estate to his son for life, with remainder to his son's children provided that he did not marry a blood relation ; and there was a gift over in the event of the son's doing so.

Held, that the proviso was not annexed to the gift of the life interest, and that the condition as to the defeat of the interest of the son's children, in the event of the son's marrying a blood relation, was void on grounds of public policy, as leading to a probable prohibition of marriage, since it would be almost impossible to ascertain definitely that any particular woman was not a blood relation.

In this case Mr. Justice Russell decided that a provision in a will that if a testator's son married a blood relation any children of theirs should lose all interest under his will was void as likely to lead to prohibition of marriage.

The testator, James Lanyon, made his will on June 15, 1922, and died on June 18, 1924.

After giving certain annuities he directed that his trustees should stand possessed of his residuary estate "upon trust to pay the income to my said son James Lanyon for his life and on his decease upon trust to pay the capital to his child or children and equally between them if more than one provided he does not marry a relation by blood as I wish to mark my great objection to marriage between blood relations. And in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years or in the event of his marrying a blood relation then upon" certain other trusts.

Mr. Rawlence appeared for the trustees ; Mr. Farwell, K.C., and Mr. C. Harman for James Lanyon ; Mr. Beebee for the testator's widow ; and Mr. Bennett, K.C., and Mr. Harold Christie for the residuary legatees.

Mr. Justice Russell, in the course of his considered judgment, said that the son was anxious to have his position clearly defined. He was a bachelor, aged 37. He not unnaturally wished to know (1) whether, if he should knowingly or unknowingly marry a blood relation, he would lose his life interest ; and (2) whether the provisions of the will in regard to his marrying a blood relation were void, or whether his future choice of a bride was to be fettered by the risk of a subsequent discovery that he and his wife had a common ancestor who, say, landed in Pevensey Bay with William the Conqueror.

As to the first question, there was no difficulty. The proviso was in no way annexed to the gift of the life interest. The proviso and the gift over in the event of his marrying a blood relation were included in and applied only to the trusts declared to take effect on the son's decease. The result was that if the provisions were valid in law they only operated to defeat the interest of children of James Lanyon, not to defeat his life interest.

The second question was more difficult. The meaning of blood relationship was clear. It could not refer to statutory next-of-kin. It described the relationship existing between two or more persons who stood in lawful descent from a common ancestor. The chain of descent might be broken by illegitimacy, but, with that qualification, all persons descended from a common ancestor, however remote, were blood relations.

On behalf of the son it was argued that the proviso and condition were intended to defeat the vested interests previously given to the children ; that for such a provision to be valid it must be possible at any given time to know its limits and to know whether there had in fact been a breach of the condition or not ; and that it was impossible for the son so to know the limits and be certain that the person he married was not a blood relation.

The authorities cited in support of these contentions were *Clavering v. Ellison* (3 Drew., 451) ; *In re Exmouth* (23 Ch. D., 158) ; and *In re Sandbrook* ([1912] 2 Ch., 471). In his opinion, they only supported the proposition that such a provision must indicate in clear terms what the event was on which the defeasance of a vested estate was to take effect, not that a difficulty in ascertaining whether the defined event had or had not occurred would render the provision void for uncertainty. The condition must be clear and certain not only in the expression of the creation of the limitations but also in its operation. The person affected need not be in a position at all times to know whether he was committing a breach of a provision the nature of which was clearly expressed. In this case the prescribed event was quite clear, but it was sought to avoid the clause because it was said that it was difficult and probably impossible for the son to ascertain whether a particular marriage would be, or had been, a breach of the provision. The authorities cited did not justify him in declaring the provision to be void on that ground. It was open to a testator to make, within legal limits, any disposition of his property, however unreasonable or whimsical it might appear to others. He might, within perpetuity limits, take property away from A and give it to B upon the happening of any event, but the event must be clearly defined, and must not violate considerations of public policy.

The son sought to add another qualification to a testator's right to dispose of his property—namely, that the event must be of such a nature that at any point of time limited for its occurrence it must be possible to know whether it had occurred or not. He was aware of no legal principle on which he was at liberty so to hold. In this case the very difficulty which the son might have in ascertaining that he and his bride did not have legal descent from a common ancestor would affect the persons on whom would lie the onus of proving that the specified event had happened. If the difficulty amounted to impossibility, the defeasance could never operate. If the defeasance ever did operate, it could only do so because it was possible to know within the limited time whether the event had occurred or not. In his opinion, although uncertainty as to what was the prescribed event upon which a defeasance was to occur would avoid the provision for defeasance, it was impossible to hold that, because it might be uncertain from time to time whether a clearly defined event had or had not occurred, the provision was void.

It was next argued on behalf of the son that the provision for defeasance was void on grounds of

* Reported by J. B. B. MacMahon, Esq., Barrister-at-Law.

public policy, as being in restraint of marriage. By the law of this country the doctrine of the civil law, which avoided all conditions in wills restraining marriage, had not been adopted. Many such conditions had been held valid. Thus, in *Perrin v. Lyon* (9 East, 170), a condition against marriage with any person born in Scotland or of Scottish parents was held good. In *Hodgson v. Halford* (11 Ch.D., 959) a clause was upheld which provided for forfeiture in the event of marriage with a person who did not profess the Jewish religion or was not born a Jew. In *Jenner v. Turner* (16 Ch.D., 188) a condition for defeasance in the event of marriage with a domestic servant was held valid. It was pointed out that the whole female world, except only domestic servants, was open as a field of choice.

In his opinion, however, all partial restraints of marriage were not necessarily valid because they were partial only. It was not enough to say that a particular restraint was not general restraint, but left open a field of choice and was, therefore, valid. Considerations of public policy required more than that. There still remained to consider in each case whether the particular restraint was reasonable from the point of view of public policy. A restraint which, from its nature, although in its terms partial, would or might lead in practice to a probable prohibition of marriage would, in his opinion, fall within the mischief which public policy required should be prevented. This view was established by a decision of the High Court of Parliament in Ireland in the old case of *Keily v. Monck* (3 Ridgeway, 205). The provision for defeasance there was the event of a daughter marrying a person not being at the time of the marriage seised of an estate in fee, or of a freehold perpetual, of the clear yearly value of £500 sterling. The restraint was in terms partial, but the House held the provision to be void as leading to a probable prohibition of marriage.

Although in the case before him no one could say how large or small a portion of the female world the restraint left open to choice, it was still, in terms, a partial restraint. But its nature was such that it would be difficult, almost impossible, to ascertain definitely that any particular woman was not a blood relation—that a Pevensey Bay or an even more remote common ancestor could not be found. No marriage with a supposed stranger in blood could be contracted except subject to the risk that should a common ancestor be traced the condition for defeasance would operate. The son could only be certain that he *was* marrying a blood relation, he could never be certain that he *was not*. A provision which, by its nature, produced these results was a provision leading to a probable prohibition of marriage, and was void accordingly.

There was one novel feature in the case—namely, that the penalty was inflicted not on the son who violated the provision, but upon his children. No property was taken away from the son. In his opinion that made no difference. It might well be that a provision taking away property from A in the event of a breach of condition by B, would not operate *in terrorem* as regards B, if A were a stranger. He was clearly of opinion that when the victims were B's children and the prohibited event was B's marriage there was ample scope for operation *in terrorem* as regards B.

He declared that "relations by blood" included all persons deriving lawful descent from a common ancestor, and that the gift over was void altogether.

[Solicitors—Messrs. Patersons, Snow and Co., for Messrs. Hare and Son, Much Hadham.]

Court of Criminal Appeal. (Avory, Sankey, and Salter, JJ.) 1927. July 11.

REX v. STUART. REX v. LEONARD. REX v. MAPLES. REX v. TANNEN. REX v. TAYLOR.*

Criminal Law—Threatening to accuse of certain crime with intent to extort money—Use of words capable of meaning some offence not within the enactment—"Improper conduct"—Larceny Act, 1916 (6 and 7 Geo. V., c. 50), s. 29 (2) (*b*).

The appellants were convicted under s. 29 (2) (*b*) of the Larceny Act, 1916, of threatening to accuse of a crime within that section with intent to extort money. The evidence was that they enticed a man into a compromising situation with one of themselves and then threatened to accuse him of "improper conduct."

Held, that the mere fact of the words being capable of being understood to mean some offence not within the section was no defence, as it was a question for the jury what was the effect on the mind of the man on whom they were intended to operate, and as there was evidence on which the jury could properly come to the conclusion that the threat was a threat to accuse of the particular crime mentioned in the indictment; and that therefore the convictions must be affirmed.

These were appeals by a gang of blackmailers who were convicted before the Lord Chief Justice at the Central Criminal Court on May 24, 1927.

The five appellants were all convicted on counts charging them with threatening to accuse of a crime with intent to extort money under section 29 (2) (*b*) of the Larceny Act, 1916. The indictment also contained counts under section 29 (1), for uttering a threatening letter; for demanding money with menaces; for obtaining money by false pretences; and for conspiracy.

The names of the five appellants with the terms of penal servitude to which they were sentenced on the counts under section 29 (2) (*b*) of the Larceny Act, 1916, were:—Norman Stuart, 12 years; Frank Leonard, 10 years; Joseph Maples, 15 years; Alfred Tannen, 10 years; George William Taylor, for life. Each of the men was also sentenced to concurrent sentences of five years' penal servitude for demanding money with menaces and of two years' hard labour for conspiracy. Maples and Taylor, who were also convicted on a count charging them with uttering a threatening letter, received respectively concurrent sentences of 15 years' penal servitude and penal servitude for life.

The case against the appellants was that they, in company with another man named Brown, who did not appeal, enticed a man referred to as "The Captain" into a compromising situation with Stuart, whereupon Taylor and Leonard came in and threatened to accuse him of improper conduct, and that by that threat they obtained from him then £50. Down to 1927 the gang had obtained from "The Captain" £10,754.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Mr. G. D. Roberts appeared for Stuart, Leonard, Maples, and Tannen ; Mr. E. F. Lever for Taylor ; Sir Travers Humphreys and Mr. Gerald Dodson for the Crown.

Mr. Roberts, in opening the appeal, said that the only question on which he proposed to add anything to the statements made by the prisoners in their notices of appeal was with regard to the counts under section 29 (2) (*b*) of the Larceny Act, 1916.

Mr. Lever.—The same applies to Taylor.

Mr. Roberts said that the charge of uttering a threatening letter, of which Maples was convicted, could also carry the sentence of 15 years, so that in his case the appeal was academic. But the point which he raised was that the evidence given was equally consistent with a threat to accuse either of one of the felonies specified in section 29 (2) (*b*) of the Larceny Act, 1916, or of a less serious offence which was not within the section. If there were a doubt, the prisoners were entitled to the benefit of it. As an ancillary point he would submit that the Lord Chief Justice misdirected the jury in not fully explaining the alternatives open to them.

He referred to *Rex v. Girdwood* (2 East's Pleas of the Crown, 1,120). The true test, in his submission, was not : " Can the words bear the meaning put upon them by the prosecution ? " but " Can the words bear any other meaning ? " In view of the ambiguous matter here, it was dangerous to leave the counts under section 29 (2) (*b*) to the jury at all.

Mr. Justice Avory referred to *Reg. v. Cooper* (3 Cox, 547).

Mr. Roberts.—That case, in my submission, is inconsistent with *Reg. v. Middleditch* (2 Cox, 313). He also cited *Rex v. Hickman* (1 Moody C.C., 34) ; *Rex v. Tucker* (1 Moody C.C., 134). *Reg. v. Middleditch* (*supra*) was the only decision of the Court of Crown Cases Reserved on the point. *Reg. v. Braynell* (4 Cox, 402) was again a *nisi prius* case, as was *Reg. v. Gilgannon* (63 J.P., 457).

At any rate, there was no evidence against Maples and Tannen, who came into the conspiracy very much later.

Mr. Lever adopted Mr. Roberts's argument and said that he did not desire to add to it.

Sir Travers Humphreys submitted that it was sufficient if a prisoner did in fact threaten to accuse the prosecutor of a crime with intent to defraud. The difficulty in some of the cases cited was that, after the threat, the person accused had in fact accused the prosecutor of something much less. Unless the Court were prepared to say that there was no evidence here on which a jury could find that the threat was a threat to accuse of a crime within section 29, the question was for the jury and the proper direction was that given by the Lord Chief Justice—that they should consider what the words in fact meant, not what they might mean. He referred to *Reg. v. Kain and Nugent* (8 C. and P., 187).

Dealing with the sentence on Taylor, Mr. Lever said that he could not deny that it was a very serious case of blackmail, but against that must be set the terrible nature of the sentence. The question seemed to be whether this was in the most serious category of offences of this type. There were some cases where the blackmail had gone on during the whole of a person's life : here it was only for about three years. Some victims had been reduced to penury : " The Captain " was a wealthy man and not so seriously embarrassed. It was not a case of checking a crime which was on the increase. The greater facility for prosecution afforded by non-disclosure of names rendered exemplary sentences less necessary.

Mr. Justice Avory, delivering the judgment of the Court, said that no argument had been addressed to the conviction on the charges other than those under section 29 (2), but it was said that the convictions under that subsection were wrong. The argument which Mr. Roberts had presented with admirable lucidity and succinctness was :—(1) There was no evidence to go to the jury of the offence which was charged in the indictment ; (2) even if there were, technically, some evidence, nevertheless, the verdict was unreasonable ; and (3) if words were used which were consistent with a threat to accuse of something less than the specific crime mentioned in that section, then there was no case upon which a jury could convict. The words here were merely a threat to accuse of " improper conduct," which was quite consistent with a threat to accuse only of gross indecency, which was not a crime within the section. (His Lordship read the definition of " crime " for the purposes of section 29.)

The Court had to determine in the first place whether a threat was made to accuse the prosecutor of the particular crime mentioned in the indictment. If there was evidence, the Court was clearly of opinion that the mere fact that the words might be capable of being understood to mean something else afforded no defence, since all the authorities were agreed that it was a question for the jury what was the effect on the mind of the man on whom they were intended to operate. It was important to bear in mind the circumstances in which the threats were uttered.

His Lordship described the events leading up to the " discovery " of " The Captain " and Stuart by Taylor and Leonard and their accusation " You are here for some improper purpose," and continued. The words " You are here for some improper purpose " might not, in other circumstances, have meant a threat to accuse of any crime whatever and it was for the jury to say whether they did so mean.

It was not necessary to consider the distinction between " endeavour " and " attempt " to commit the crime, as the Court was satisfied that there was evidence to justify the jury's verdict, especially after the admissions of Stuart in cross-examination. They were therefore of opinion that there was evidence on which the jury could properly come to the conclusion that the threat was a threat to accuse of that particular crime and, when once that conclusion was arrived at, there was no ground for saying that the verdict was unreasonable.

It was further complained that there was misdirection by the Lord Chief Justice, but he directed the jury's mind to the right question and there was no misdirection.

No distinction could be made in favour of Maples and Tannen. They took advantage of the threat that had already been made and the persecution went on for three-and-a-half years, culminating with a demand for £3,000 under a threat to publish posters accusing " The Captain " of this crime.

In view of the character given to Taylor as a professional blackmailer and associate of thieves, importuners and prostitutes, the Court saw no reason to interfere with his sentence.

All the appeals were, accordingly, dismissed.

[Solicitors—The Registrar of the Court of Criminal Appeal ; Messrs. Croft and Russell ; Messrs. Edmond O'Connor and Co. ; the Director of Public Prosecutions.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) } 1927. June 21.

ROWLAND AND MACKENZIE-KENNEDY v. AIR COUNCIL.*

Crown—Patent—Alleged user—Compensation—Action against Air Council—Whether competent—Air Force (Constitution) Act, 1917 (7 and 8 Geo. V., c. 51), s. 10—Patents and Designs Act, 1907 (7 Edw. VII., c. 29), s. 29—Patents and Designs Act, 1919 (9 and 10 Geo. V., c. 80), s. 8.

The plaintiff Mackenzie-Kennedy, who was a consulting engineer and designer of aeroplanes, designed an aeroplane with a tail gunpit, and under a contract of July, 1916, with the Director-General of Military Aeronautics he agreed to carry out the work of its construction for the War Office, and it was alleged for the plaintiffs that it was an implied term of the contract that the specifications and designs were not to be disclosed to rival designers but were to be used only by the Directorate of Military Aeronautics, the Admiralty, and the Air Board. The plaintiffs further alleged that the Air Board disclosed the designs in 1917 to an aeroplane company, with the result that the company fitted a tail gunpit to an aeroplane of their own. In 1918 the company applied for a patent for it, and thereupon Mackenzie-Kennedy applied for a patent, which was granted, subject to a reference to the company's patent. The plaintiffs alleged that in 1917 and 1918 orders were given by the Government to the company for aeroplanes fitted with Mackenzie-Kennedy's tail gunpit and that but for the disclosure of his designs the orders must have been given to him. In an action by Mackenzie-Kennedy and his trustee in bankruptcy against the Air Council the plaintiffs claimed a declaration that Mackenzie-Kennedy's patent was valid, damages, and royalties, and a declaration that he was entitled to have compensation determined in pursuance of the Patents and Designs Acts, 1907 and 1919.

Held, that the Air Council was not liable to be sued on any contract made on behalf of the Crown, and that under s. 29 of the Patents and Designs Act, 1907, as substituted by s. 8 of the Patents and Designs Act, 1919, an action was not the proper procedure, and therefore the action failed.

Decision of P. O. Lawrence, J. (41 *The Times* L.R., 545), affirmed.

This was the plaintiffs' appeal from the judgment of Mr. Justice P. O. Lawrence (41 *The Times* L.R., 545) in an action brought by Mr. Chessborough Mackenzie-Kennedy against the Air Council. Mr. Rowland, as Mr. Mackenzie-Kennedy's trustee in bankruptcy, was afterwards added as a plaintiff.

* Reported by T. W. Morgan and E. J. M. Chaplin, Esqrs., Barristers-at-Law.

Mr. Chessborough Mackenzie-Kennedy was a consulting engineer and designer of aeroplanes. It was alleged that under a contract dated July 8, 1915, between one Mr. Hamilton Edwards and the Secretary of State for War the War Office agreed to take an aeroplane designed by Mr. Mackenzie-Kennedy in accordance with the terms set out in the schedule to the contract. The aeroplane had a novel feature, which was the invention of Mr. Mackenzie-Kennedy—namely, a tail gunpit with accommodation for guns and gunners. It also had engines mounted on the wings, and it was the first "multi-engined" aeroplane designed and constructed in Great Britain.

In July, 1916, the Director-General of Military Aeronautics transferred the benefit of the contract to Mr. Mackenzie-Kennedy, who agreed to carry out the work with such variations as might be ordered from time to time. The plaintiff alleged that it was an implied term of the contract that the specifications and designs for Mr. Mackenzie-Kennedy's aeroplane were not to be disclosed to rival designers of aeroplanes, and were to be used only by the Directorate of Military Aeronautics, the Admiralty, and the Air Board.

In the autumn of 1917 the Air Board lent their designing and technical staff to Messrs. Handley Page, Limited, and, as the plaintiff alleged, disclosed to that firm Mr. Mackenzie-Kennedy's confidential reports and the designs and drawings of his aeroplane. The result of the disclosures was that the Handley Page V.1,500 machine was fitted with Mr. Mackenzie-Kennedy's invention of the tail gunpit, and on March 15, 1918, Mr. Frederick Handley Page, the chairman of the company, applied for a patent for it.

On March 16, 1918, Mr. Mackenzie-Kennedy applied for a patent for his invention, which was accepted subject to a reference to the Handley Page patent. In 1917 and 1918 the plaintiff alleged that large orders were given by the Government to Handley Page, Limited, for aeroplanes fitted with Mr. Mackenzie-Kennedy's tail gunpit, orders which, but for the disclosure of his designs to that firm, must have been given to Mr. Mackenzie-Kennedy. The plaintiff asked for a declaration that Mr. Mackenzie-Kennedy's patent of 1918 was valid, and claimed as damages £156,506, the profit made by Handley Page, Limited, on the manufacture of the aeroplanes, and £171,000 royalties on the invention. He also claimed a declaration that the making, use, and exercise of the machines constructed by Handley Page, Limited, entitled the patentee to have compensation determined pursuant to the Patents and Designs Acts, 1907 and 1919. The plaintiff contended that the Air Council had taken over the rights and liabilities of the Directorate of Military Aeronautics, of the Admiralty Air Department, and of the Air Board.

The Air Council set up in their defence :—(1) That they were not liable to be sued on any contract made on behalf of the Crown ; (2) that as the alleged contract had been made by servants of the Crown other than the defendants, no liability had ever attached to the defendants or had been transferred to them so as to give any right against them ; and (3) that under section 29 of the Patents and Designs Act, 1907, they were entitled to use the alleged invention, the subject of Mr. Mackenzie-Kennedy's patent, and that in default of agreement between the parties the sum, if any, to be paid by the defendants for the user should be settled by the Treasury under the Act.

In February, 1920, Mr. Mackenzie-Kennedy brought an action against the defendants in respect of his

alleged rights under the contract of July 8, 1915, and that claim was settled and discharged by the payment of £31,000 to, and accepted by, Mr. Mackenzie-Kennedy. That was an action in the King's Bench Division claiming £42,459 4s. for work and labour done, materials supplied, and money expended for the defendants or their predecessors in office.

Mr. Justice Russell, on February 21, 1923, in *Rowland v. The Air Council* (39 *The Times* L.R., 228), decided that no action would lie against the defendants on a contract by a servant of the Crown, and that section 10 of the Air Force (Constitution) Act, 1917, by which the defendants were established, which provided that "the Air Council may sue and be sued, and may for all purposes be described by that name," did not give a right of action.

On appeal from that decision, the Court of Appeal (39 *The Times* L.R., 455) took the view that it was not satisfactory that the matter should be disposed of in that way, and an order was made, by consent, discharging the order of Mr. Justice Russell, though the Court did not profess to decide whether Mr. Justice Russell was right. The Court thought that the case ought to go back, and the result of that order was the action from the result of which this appeal was brought.

Mr. Justice P. O. Lawrence dismissed the action on the ground that there was no implied condition of secrecy and that, in any event, there had been no communication to Mr. Handley Page of the drawings of any of the Mackenzie-Kennedy aeroplanes. He held, moreover, that the action would not lie against agents of the Crown. His Lordship also declined to make a declaration that Mr. Mackenzie-Kennedy's letters patent were valid, and held that there were no special circumstances to justify a departure from the ordinary rule that the Crown neither paid nor received costs.

The plaintiffs appealed.

Mr. Mackenzie-Kennedy appeared in person to argue the appeal; the Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), Mr. Giveen, and Mr. Trevor Watson were for the respondents.

Lord Justice Bankes.—I do not think we need trouble you, Mr. Solicitor, on the particular point we propose to decide. It will only be a preliminary decision, and there may be other matters afterwards we shall have to deal with, but in order to make plain exactly what we are deciding, I must go back to the commencement of this action. It is an action brought by Mr. Rowland, the trustee in bankruptcy of Mr. Mackenzie-Kennedy. In the action the trustee combined more than one cause of action, but one cause of action, and an important cause of action, was a claim for damages for an alleged breach of contract, a contract originally made by a Mr. Edwards with the Secretary of State for War. I ought to say that the action was against the Air Council. To that cause of action the defendants pleaded that they were a public department of the Government and that the contract which the plaintiff had set up and was relying upon was a contract which was made by servants or agents of his Majesty on behalf of his Majesty, and that the Air Council were not liable to be sued, and the plaintiff's remedy, if any, was by way of petition of right against the Crown. That point was taken as a preliminary point, and it has a somewhat curious history in this sense, that the point has been twice tried by a Judge of first instance. It was tried in the first instance before Mr. Justice Russell upon an order made by Mr. Justice Astbury that this point should be tried as a preliminary point, and Mr. Justice Russell, after going into the matter very fully and very carefully, decided in favour of the Crown that the action so far as this particular claim was concerned was not maintainable (39 *The Times* L.R., 228). In his judgment he particularly points out that he takes the facts in the statement of claim as being established facts for this purpose merely, and decides the preliminary point on that footing. From that judgment there was an appeal to the Court of Appeal, and an argument was put forward on behalf of the appellant which it is obvious from the interlocutory observations which fell from the learned Judges in the course of the discussion made a certain amount of impression upon them, and to such an extent that, although they refrained from expressing any opinion at all upon the point, they thought that Mr. Justice Russell's judgment should be set aside in order that the point should be further investigated at the trial when the plaintiff had had an opportunity of more fully explaining his case, if I may use that expression, by amended pleading, and the opportunity of bringing forward any facts upon which he relied in support of his alleged cause of action. The plaintiff did amend his statement of claim, and upon the amended claim so put forward the case came for trial before Mr. Justice P. O. Lawrence (as he then was), and he again decided in the same way as Mr. Justice Russell did. He accepted Mr. Justice Russell's judgment, and he expressed in terms his view that the judgment was quite right, and he went on to point out one of the further reasons why, in his opinion, the action was not maintainable (41 *The Times* L.R., 545). That is the history of the litigation down to the present stage.

From Mr. Justice P. O. Lawrence's judgment there is this appeal, and in the appeal a number of points are raised, because Mr. Justice P. O. Lawrence decided not only this preliminary point, but he decided that, even assuming the plaintiff to be right on this preliminary point, he failed in establishing any cause of action, because he failed to establish the implied contract which he alleged had been broken. He went on further to say that, even assuming that the implied contract was proved, there was no proof of any breach of it.

Now we are only dealing with the preliminary point, the question whether or not the present action in reference to this cause of action for damages for breach of the alleged contract is maintainable, and for that it is only necessary to state very few facts and a very few dates. The contract which is the foundation of the plaintiff's cause of complaint was a contract made on July 8, 1915, between a Mr. Edwards and the Secretary of State for War, and that contract had reference to the construction of an aeroplane designed by Mr. Mackenzie-Kennedy. That was in 1915, and it is not disputed that that was a contract made by a servant or agent of the Crown on behalf of the Crown, and was a contract in respect of which no action would lie against the Secretary of State for War. It was a contract in respect of which any remedy for breach must be sought by way of petition of right. That contract was in July, 1915. In July of the next year, 1916, by arrangement between the Secretary of State for War and Mr. Mackenzie-Kennedy the contract was transferred from Edwards to Mr. Mackenzie-Kennedy, who gave an undertaking to the Secretary of State for War to complete the original contract. That first step was merely a substitution of Mr. Mackenzie-Kennedy for Edwards, leaving the contract one with the Secretary

of State for War. As I have said, the contract had reference to the construction of an aeroplane, and it appears to have been widened and increased to contracts in reference generally to the designing, if not the construction, of further aeroplanes besides the one originally intended. In February of 1917 the Air Board was established, and the plaintiff seeks to establish a liability upon the Air Council by tracing that liability up to the Air Council through the Air Board, and in some way connecting it with the original contract with the Secretary of State for War. In the amended statement of claim, which was delivered in pursuance of the leave given by the Court of Appeal, the plaintiff sought to establish a liability on the part of the Air Council by steps which were set out in paragraph 7 of the amended statement of claim. In that he alleges that the Air Board "and its members became assignees of the rights, duties, and liabilities of the Secretary of State for War under the said contract and with notice of the conditions became bound to the said Mackenzie-Kennedy to observe and fulfil the same in the manner following." Then first of all he says: "By Order in Council pursuant to the New Ministries and Secretaries Act, 1916, the date and particulars whereof are unknown to the plaintiff, there was transferred to the Air Board the contract and the rights, duties and liabilities aforesaid." That was set up in the hope, probably, of being able to establish the existence of such an Order in Council, but it turns out that there never was one, or at any rate no proof of one was ever given. Then the second ground was: "By agreement between the said Mackenzie-Kennedy, the Secretary of State for War and the President and members of the Air Board, the Secretary of State for War was discharged from the said contract, and the Air Board or the President or the members thereof were substituted in his place and the Air Board and the said Mackenzie-Kennedy agreed that the said contract should be carried out as between the Air Board and the said Mackenzie-Kennedy as from the 6th February, 1917"—that was the date when the Air Board was established—"and in pursuance of the said agreement the Secretary of State for War ceased to act in or about the said contract and the Air Board in his place carried on all correspondence, issued all orders, demanded and received reports, plans, specifications, designs, drawings and other confidential documents, appointed officers to supervise and control work, and enforced against the said Mackenzie-Kennedy with the said Mackenzie-Kennedy's consent the rights and duties of the Secretary of State for War." In my opinion that statement puts the plaintiff out of Court, because, as I have pointed out, the first stage in the alteration of the original contract was the substitution of Mackenzie-Kennedy for Edwards. The next stage is stated to be the substitution of the Air Board for the Secretary of State for War, but the substitution of one party in place of one of the two parties to the contract does not alter the nature of the contract. It may alter one party in the same way as Mackenzie-Kennedy was substituted for Edwards. The substitution of the Air Board, even according to the plaintiff's own allegation, for the Secretary of State for War, leaves the Crown, as it seems to me, in exactly the same position as it was when the original contract was made between Edwards and the Secretary of State for War. It follows, therefore, in my opinion, that the Air Board, even on the plaintiff's own allegation, never undertook any liabilities in the sense that they made themselves the entity responsible to the plaintiff in the action. Therefore the next stage, as it appears to me, according to the plaintiff's own story, is that you get the original contract, but with two substituted parties, Mackenzie-Kennedy substituted for Edwards, the Air Board substituted for the Secretary of State for War; but the position as between the present appellant and the Air Board is exactly the same as it was between Edwards and the Secretary of State for War—namely, that the only remedy on the contract for breach was by way of petition of right. If that is so, the position of the Air Council is this: The Air Council came into existence on January 3, 1918, and it came into existence under and by virtue of the Air Force (Constitution) Act of 1917. Section 8 of that statute provided that on the establishment of the Air Council the Air Board should cease to exist, and all the powers, duties, rights and liabilities and property of that Board should be transferred to the Air Council. The plaintiff's first contention is that his relationship to the Air Board and the position of the Air Board as a substituted party to the original contract created a liability on the part of the Air Board within the meaning of this section. I do not agree with him, for the reasons I have pointed out. It seems to me that the Air Board never came under any liability in the sense in which that word is used in section 8 of the Act of 1917; and a reference to that section does not carry the plaintiff any further, because he has failed to establish any liability on the part of the Air Board which passed to the Air Council under the provisions of this section. He has failed to establish any Order in Council transferring from the Secretary of State for War any obligation to perform the contract which was created by the original contract with Edwards.

The only remaining argument is that founded on section 10 of the said Act, which provided that the Air Council may sue and be sued, and may for all purposes be described by that name, but I agree entirely with what Mr. Justice Russell and Mr. Justice P. O. Lawrence have both said with reference to that section, that although it assumes that there may be cases in which the Air Council may become liable and be liable in the sense that they are liable to be sued as for some breach of contract, yet this is not a case in which those words are fit to create a liability which did not exist apart from the provisions of this section. Mr. Justice Russell pointed out that to insert such a clause as that or such a power as that in an Act of Parliament is not sufficient to create a liability or an obligation which apart from the statute would have no existence at all. For these reasons I have come to the conclusion that this appeal on this particular point must fail, because in my view both Mr. Justice Russell and Mr. Justice P. O. Lawrence took the right view of these facts, and upon these facts the plaintiff failed to establish any contract which was enforceable against either the Secretary of State for War or the Air Board or the Air Council, and that his remedy, if any, is by way of petition of right against the Crown in respect of this particular complaint.

There remains for decision a question as to the plaintiff's claim in respect to an alleged infringement of his patent.

Lord Justice Scrutton.—This is an appeal from part of a judgment delivered by Mr. Justice P. O. Lawrence in the Chancery Division, and it is one incident in a very complicated course of litigation which has been going on for some years. This particular action alleges, so far as we are giving judgment at present, that Mr. Mackenzie-Kennedy made a contract, the other contracting party at the

time when the action was brought being the Air Council; that that contract contained impliedly a provision that the Air Council should keep secret the documents connected with the aeroplane which was being supplied, and that in breach of that obligation the Air Council did communicate to Messrs. Handley Page documents which they were under a contractual obligation to keep secret. Mr. Justice P. O. Lawrence heard the action for nine days, and he decided that there was no such contractual obligation, and that if there was it had not been broken, because the Air Council had not disclosed the documents; and he also decided that whether that was so or not, there was no right of action against the Air Council, the remedy, if any, being by petition of right. Obviously, if the Judge was right on that third point there was an end of the proceedings so far as they were an action, and consequently we have dealt first with that point, and are saying nothing, and the appellant has said nothing, about Mr. Justice P. O. Lawrence's decisions on the other two points—namely (1) that there was no contractual obligation, and (2) that if there had been a contractual obligation it had not been broken. The only advantage, so far as I can see, of Mr. Justice P. O. Lawrence having decided those two points is that it relieves the mind of the Court at present from any idea that they are doing injustice by insisting on anything like a technicality, because Mr. Justice P. O. Lawrence has found that, quite apart from the question how the right was to be enforced, there was never any right to enforce at all, and there was never anything which would have been a breach of such a right if there had been any such obligation.

The question we have to decide arises in this way. In July, 1915, a gentleman who was financing Mr. Mackenzie-Kennedy's invention submitted a tender to the Secretary of State for War to supply an aeroplane for a price on certain terms which are set out in the usual War Office tender, and the Secretary of State for War accepted that tender, and it is not disputed by the appellant or by the counsel who appeared for him in the earlier proceedings that so far as that contract was concerned no action lay against the Secretary of State for War, but, if it was broken, the remedy would be by petition of right to the Crown. The next stage was that in July, 1916, Mr. Edwards, the financier, dropped out, and Mr. Mackenzie-Kennedy was substituted as the party tendering, again tendering to the Secretary of State for War, and again there was no contract on which the Secretary of State could be sued; the only remedy, if there was a breach, was that Mr. Mackenzie-Kennedy should present a petition of right to the Crown if he could get the fiat. But apparently the first aeroplane which there was a tender to supply was one which would not work, and Mr. Mackenzie-Kennedy went on, with the consent of the Government authorities, endeavouring to improve the aeroplane which, it was hoped, he would ultimately supply, and the papers appear to relate to various forms of aeroplanes which it was hoped ultimately to make. The learned Judge has found that the contract to supply an aeroplane had become merged or metamorphosed or changed by mutual consent into a contract upon which Mr. Mackenzie-Kennedy was doing work for some Government department. He has sued the Air Council for remuneration for that work, and he has received £31,000 from the State. So again one's conscience is a little relieved that this is not the case of an inventor who has come away from the Government with nothing in his pocket. He came away with £31,000, and I am only sorry that he seems to be spending a good deal of it on the documents which are blocking up the Court.

Next comes a change, it is suggested, in the contracting party. In 1916 by the New Ministries Act and Secretaries Act, 1916, the Air Board was appointed, which, of course, presumably would deal with aeroplanes, and by section 8 of that Act it is provided: "The Air Board shall in relation to aircraft have such powers and duties of any Government department or authority, whether conferred by statute or otherwise, as his Majesty may by Order in Council transfer to the Board." Now, when the facts come to be looked into, no such Order in Council has been proved, and consequently it has not been proved that his Majesty has transferred any of the powers or duties of any Government department to the Air Board. I leave the rest of the section for a moment and go on to subsection 5 of section 11. Subsection 5 of section 11 of the same Act says: "Where in connexion with the undertaking of any duties or powers by a Minister appointed under this Act, it appears to the Minister and the department or authority concerned that in any notice, order, contract, or other document, the name of the Minister should be substituted for the name of any department or authority, or that the name of any officer of the Ministry should be substituted for the name of any officer of any such department or authority, the Minister may order that the substitution shall take effect." That, of course, would have authorized the Minister appointed under this Act dealing with the Air Board to substitute the name of the Air Board for the name of the Secretary of State for War in the tender. But again it is not proved that any such order was made, and consequently we have no proof that the contract was altered by the Air Board being substituted for the Secretary of State for War. Then there remains the last part of section 8: "or authorize the Board to exercise or perform concurrently with or in consultation with the Government department or authority concerned." There is no evidence as to any express authorization by his Majesty, but there is the fact that the Air Board did go on performing with reference to this aeroplane functions which presumably the Secretary of State for War would have performed before. But what appears clear to me, as far as I have got, is that no change has been made in the nature of the legal relation which Mr. Mackenzie-Kennedy has with some Government department. With the Secretary of State for War it was that he could present a petition of right, but had no contractual obligation with the Secretary. I can see nothing to change that in the case of the Air Board to a contract with the Air Board which he could enforce. It appears to me that the Air Board, whatever it does, is still a Government department acting on behalf of his Majesty, and that the remedy for any alleged breach of any obligation is to present a petition of right to his Majesty.

Then comes the last stage. The Air Board had a short existence. It came into existence on February 6, 1917, and it went out of existence in January, 1918. The Air Force (Constitution) Act of 1917 established the Air Council, and provided in section 10 that the Air Council may sue and be sued, and may for all purposes be described by that name, and provided in section 8, subsection (4): "His Majesty may, by Order in Council, transfer . . . to the Air Council . . . such property, rights, and liabilities of the Admiralty or Army Council or Secretary of State." If the Air Board had no liabilities, and if the Secretary of State for War had no liabilities, there was nothing to transfer to the Air Council. The argument appeared

to be based on the fact that there was a section saying that the Air Council could be sued, and that certain liabilities were to be transferred to it. In this particular action the reason why the action must fail is that there were no liabilities of the Air Board to be transferred to the Air Council. That is the view taken by Mr. Justice P. O. Lawrence, and though I do not think Mr. Justice Russell went into the facts so closely as Mr. Justice P. O. Lawrence did, he acted on the supposition that the allegation in the plaintiff's statement of claim that the Air Council was the successor of the Secretary of State for War was exactly accurate, but Mr. Justice P. O. Lawrence did go more carefully into the exact facts which I have set out, and he came to the conclusion that there was no contractual liability on the department, but that the only remedy would have been petition of right to the Crown if there was any occasion for such petition. I think that that decision was right, and that therefore so far as the Chancery action is based on contract it must be dismissed on the ground that no cause of action lies against the Air Council.

Lord Justice Atkin.—I agree. This is a case where the plaintiff has brought an ordinary action at law against the Air Council, and he brings his action for damages for breach of contract. The contract that he alleges is an implied term in a contract by which he bound himself to provide for the Government during the war an aeroplane built to his own plans. It has to be remembered that his whole cause of action, so far as is relevant to this point, is based upon an implied term in that contract, or a variation of it made in 1916. The original contract was a contract made with the Secretary of State for War in the year 1915, before ever there was an Air Board or an Air Council, and the altered or varied contract by which there was a contract for work and labour, in other words, by which Mr. Mackenzie-Kennedy was to give the benefit of his assistance in conjunction with Government employees for the purpose of constructing an aeroplane, was also a contract which was made with the Secretary of State for War before ever there was an Air Board or Air Council. It appears to me that the mere statement of those facts is sufficient to show that Mr. Mackenzie-Kennedy is not entitled in this action to sue the Air Council. There is a provision in the Act constituting the Air Council which provides that they can sue or be sued, and I do not propose to say what my view is as to the full and complete meaning of those words, but it seems to me quite plain that they cannot sue or be sued merely because they are, as a part of the Executive of this country, engaged in carrying out a contract which was made by one of the Ministers of State on behalf of his Majesty, which is the position in this case. Mr. Mackenzie-Kennedy fails to show that the Air Council ever themselves became parties to a contract; they never were substituted by novation or otherwise, if it was possible for them to be substituted for the Crown; they never took upon themselves the obligations of a contracting party towards Mr. Mackenzie-Kennedy, and in those circumstances it seems to me that the action must fail. I think it is unfortunate that the laws of this country do draw this distinction in this class of case. It seems very unfortunate that the layman should be told, when he has been dealing with a department like the Air Council, that after all his remedy is not against the Air Council but must be by petition of right; and I can only hope that this is one case which will lead the proper authorities in the direction of simplifying the procedure when people have claims which they seek to put in action against the Government. That is not to say that the Air Council are not entirely right in this particular case in taking the point, because as long as they remain without responsibility for such a contract it is obviously part of their duty to see that their freedom from liability is maintained; but the result is, it appears to me, that in this particular case Mr. Mackenzie-Kennedy fails.

The hearing then proceeded on the other part of the plaintiff's claim—namely, that which related to his alleged cause of action in regard to his patent. The Court then delivered the following further judgments.

Lord Justice Bankes.—This is the second branch of the appeal from the decision of Mr. Justice P. O. Lawrence. We have already decided that, in so far as the plaintiff's claim was for damages for breach of the alleged implied contract, an action would not lie against the Air Council, and we have given our reasons for that. We decided to deal separately with so much of the plaintiff's statement of claim as related to his alleged cause of action in regard to his patent, and it is necessary to see exactly how the pleadings stand in reference to that claim, and to see what the learned Judge in fact decided. After setting out the facts in reference to the patent which the appellant had taken out, the statement of claim goes on to claim "a declaration of the property in the said invention and of the validity of the said patent . . . and a declaration that the making, user and exercise of the said machines constructed by the said Handley Page, Limited, entitled the patentee to have compensation determined pursuant to the Patent Acts, 1907 and 1919, section 29." Further, it claims "that the terms of compensation for the matters aforesaid may be decided under the Patent Act, 1919, section 29," and an account of all the aeroplanes using the invention. It is manifest (I shall have to go into the matter at a little greater length in a moment) that that is a claim which is founded upon the provisions of what is called the new section 29 of the Patents and Designs Act, 1907, as amended by the Patents and Designs Act, 1919.

In answer to that, in the amended defence, the defendants, having set up that they were a public department of his Majesty's Government and servants and agents of his Majesty, and not liable to be sued in respect of any contract made on behalf of his Majesty—that is the first branch of the plaintiff's claim—went on to say "that in so far as the plaintiff's action is founded upon any alleged infringement of Letters Patent No. 166,184, in paragraph 16 of the amended statement of claim referred to, they will rely upon section 29 of the Patents and Designs Act, 1907, as a defence to such action, and will say that by reason of the said provisions they were at all material times fully and lawfully entitled to use and exercise the alleged invention, if any, the subject of the said letters patent, and that in default of agreement between the parties the sum, if any, to be paid by the defendants in respect of the user, if any, of the said alleged invention should be settled by the Treasury under the said section and not otherwise"—that has reference to the provisions of the earlier section. "Further or alternatively, the defendants say that the said contract was made and the said letters written and received by servants of his Majesty other than the defendants, and that no liability in respect thereof has ever attached to the defendants or been transferred so as to give any right against the defendants themselves, and the defendants deny

that they are successors of such servants of his Majesty in so far as any liability for alleged breaches of such agreements is sought to be founded on such succession or that the defendants have succeeded to any liability in respect thereof." That is a plea to the first branch of the plaintiff's claim. But then, in addition to paragraph 6, they say in paragraph 8 : "By reason of the foregoing the defendants will object that the present claim against the defendants is not maintainable and that the form of the present action and the frame thereof are wholly misconceived." Then they go on : "Without derogation from the foregoing pleas the defendants traverse each and all the allegations in paragraphs 4, 5, 6 and 8 of the amended statement of claim." Then they go on to allege that the letters patent are and always have been invalid, but it will be noticed that that allegation is introduced by the statement that it is without derogation from the foregoing pleas. In those circumstances, what happened was that Mr. Justice P. O. Lawrence first of all decided that the action would not lie, because in his view the plaintiff's only remedy was by petition of right. But then, apparently, those representing the defendants thought that it might be an advantage if the learned Judge was either allowed or invited to go into these other questions in reference to the validity of the patent, assuming, I suppose, that if the Judge gave a decision in their favour it would not add anything to the fact that he was prepared to dismiss the action on other grounds, but that it might put an end to litigation, possibly, in another form, in reference to the validity of the patent and the plaintiff's claim arising out of an alleged infringement of the patent or an alleged user of the patent. So the learned Judge did go into these other matters, and he decided them all against the plaintiff. He decided, first of all, that the plaintiff was not the first and true inventor. He decided that there had been a prior patent of Handley Page, and he decided that there had been no user by the defendants, but he made no declaration as asked for in respect of any of those matters. He merely decided them because he was asked to decide them, but apparently he was prepared to dismiss, and would have dismissed, the action, apart altogether from any decision upon these particular points. However, the decision of the learned Judge on these points did not have the desired effect, because the plaintiff has appealed, and in his appeal he asks this Court to reverse the decision of the learned Judge in reference to those three particular matters. He asks us, in substance, not only to reverse what the learned Judge did, but to make the order which the plaintiff in the first instance, or his predecessor in title in the first instance, asked the Court to make by the form of claim to which I have referred—namely, a declaration as to the plaintiff's property in the said invention.

Now it seems to me that the Court below was not competent, and we are not competent, to deal with this particular claim in this form. It is admittedly a claim founded upon the provisions of the Patents and Designs Act, 1919, because it starts with the implied admission that the Air Council as a department of the Government were lawfully making use of this invention of his, assuming it to be a good patent, and because of that lawful use it claims the remedy or the relief which the statute contemplates—namely, a payment of compensation to be ascertained in a particular way. If that is the form of relief which the plaintiff was seeking it seems to me that the relief is obtainable only by the steps indicated in the statute. It is quite true that although the statute refers to a dispute and to such a dispute as is indicated in the section being referred to the Court for decision, it does not lay down any procedure by which the Court is to be approached, and it was not until a much later date, in 1925, that the Rules of the Supreme Court laid down the procedure by which the approach might be made. But we have been told by the learned counsel, who is very familiar with this class of case, that although there was no procedure laid down in the Rules, there was an accepted procedure, at least accepted in the sense that it was adopted on several occasions, of approaching the Court, and approaching the Court by way of motion. It may be that until the Rules were passed that was an accepted way of approaching the Court, but it has never been attempted hitherto, so far as our information goes, to approach the Court by way of action asking for a declaratory judgment. The statute does not contemplate that, and it is not the way in which the particular relief which the plaintiff is asking for is to be obtained. In these circumstances, it seems to me that we should be doing wrong if we acceded to the course which was adopted in the Court below of really endeavouring to investigate the questions which might arise if the validity of the patent was in issue and properly in issue in this case, because, after all the investigation that we might make, we are not competent to do anything in the nature of giving an effective judgment.

For these reasons, in my opinion, this part of the plaintiff's case fails, and the appeal must be dismissed because the plaintiff has approached the Court by a way which was not open to him and which is not within the scope of the legislation under which alone he can claim this particular form of compensation. For these reasons I think that the plaintiff's remedy, if any, in respect of this matter is either by petition of right, when he can proceed against the Crown, or, if he chooses to proceed by the method now laid down in the Rules, it would be open to him to take that particular course.

For these reasons I think that this appeal, so far as it relates to either of the causes of action contained in this statement of claim, either the damages for breach of the implied contract, or the claim for a declaration followed by an ascertainment of compensation, fails ; and the action ought to have been dismissed, as it was dismissed, and the appeal fails.

Lord Justice Scrutton.—During the day and a half that we have been hearing the first two stages of this appeal I have been becoming more and more depressed as the case proceeded. As a Judge who has been concerned with business, it seems to me that these proceedings are thoroughly discreditable to any Constitution purporting to be up-to-date. I am not saying that Mr. Mackenzie-Kennedy has any rights. So far as the facts have been determined by Mr. Justice P. O. Lawrence he has not, but that there should have been all the proceedings which have been taken in this case, without its yet being ascertained whether he has any rights or not, appears to me to be thoroughly discreditable to the English Constitution. After many years a committee has at last delivered a report, I will not say on the question whether amendments should be made in Crown procedure, because that was not referred to it, I understand, but on amendments which might be made in Crown procedure if there are to be any amendments, and, if I may respectfully say so, the sooner the Government make up their minds whether they are or are not going to simplify the procedure by which subjects may make a claim against the Crown, the better for everybody concerned.

In this case Mr. Mackenzie-Kennedy was, I do not know whether I am using the right word, the in-

ventor, because I am not sure that he invented anything, but he alleged that he had invented something, and he had had relations with the Government in respect of a large aeroplane which was supposed to be going to be of great service in warfare. As a matter of fact it never succeeded in flying more than 25 yards. What it would have done if more money had been spent on it I do not know, but it never became efficient in the year or two during which it was being constructed. Mr. Mackenzie-Kennedy, however, who received £31,000 from the Government for work that he had done, alleges that he has far greater claims on the Government. Accordingly he issued a writ—he, or his trustee in bankruptcy, or both—against the Air Council, in the action now before us, and the nature of the statement of claim as he put it forward was twofold. He said first of all: "In the course of the work that I did for you on the aeroplane I handed you a large number of documents and plans and reports. It was your contractual duty to keep those secret. You did not keep them secret. You showed them to a competitor of mine, who used valuable information in them, and I want, first of all, damages for breach of your contract to keep them secret." That part of the case we have already dealt with in a judgment in which we have pointed out that the claim being based on contract could only be brought against the Crown by petition of right, and that the statutes constituting the Air Council at present do not make the Air Council a separate entity which can be sued as distinct from the Crown, and we have already dealt, therefore, with that part of the case.

Now we come to the second part of the case. The second part of the case is that, besides claiming damages for breach of secrecy, the plaintiff claims rather over £300,000 in respect of machines alleged to be manufactured by Handley Page, and alleged to contain an invention of Mr. Mackenzie-Kennedy. He said: "I have a patent and, first of all, you have said that that patent is invalid, and so I want a declaration that it is valid. You have used the invention in my patent, and I want compensation for the use which you have made of the invention in my patent; I want the compensation to which I am entitled under section 29 of the Patents and Designs Act, 1907, as amended by the Act of 1919." That, again, is not a claim in tort. The general law, roughly speaking, as to claims against the Crown is that, if you desire to claim in contract, you must do it by petition of right; you cannot do it by writ; and, if you desire to claim in tort, you cannot claim against the Crown for a wrong, because the Crown can do no wrong; you must claim against the individual subject who did something wrong, and it may be that, if you find the individual subject who did something wrong by the order of the Government, the Government will pay the amount of damages awarded against the individual subject.

This patent claim is not a claim in tort, because the Crown has a right to use the patent on the statutory terms set out in section 29 of the Patents and Designs Act, 1907. If, therefore, one wants to get a decision as to the patent, one is dealing with a statutory right, a right not to damages for tort, but a claim for an amount depending on a statutory contract. First of all, it seems to me, therefore, as Lord Justice Sargant seems to have thought, sitting as the President of the Commission which has dealt with claims by inventors, that, if you want to get a decision as to the validity of the patent and the Crown will not consent to its being dealt with under the proceedings under section 29, you must try to do it by petition of right. I am not saying that you can do it; but that is the way in which you may try to do it, if you want to do it. That was Lord Justice Sargant's view and at present it is mine. Then there is a further difficulty. Section 29 and the decisions given and the rules made under it provide that if you want your compensation in respect of use of an invention by a department, you do it by an originating motion, which proceeds in a particular form. There are no provisions for a writ issued against a department which enable you to sue the department directly for the compensation given under section 29; the claim is really against the Crown and is a claim for money due under a statutory contract and, unless you make it in the way provided by the rules, it cannot be made at all.

Possibly owing to the fact that this action was commenced in 1921, at a time when the procedure under section 29 had not been formulated, this action has been started in entirely the wrong way, and it appears to me to be quite contrary to the law as it at present exists to sue a department by writ and action for the compensation, and still more to test whether a patent is or is not valid with all the machinery of a patent action. As I say, I regret extremely that this should be the result of six years' litigation. Attempts were made by the Crown to get the matter determined as a preliminary point. The Court of Appeal (none of us were members of it; but it was a very strong Court of Appeal) took the view that it was desirable that the facts should be ascertained before the preliminary points were decided. I see that Lord Sterndale did express the view that he would probably agree with Mr. Justice Russell if the facts were found; but now, after six years' litigation, we have got the facts, with this result, that none of the proceedings for so far are of any use. I am not saying anything about the question whether anything that Mr. Justice P. O. Lawrence decided in fact will or will not be *res judicata* in any future proceedings; that will be another matter to be sorted out, if ever, in subsequent proceedings. The result of the present arrangements for dealing with a claim by a subject against the Crown is that six years have passed and nothing has happened and apparently Mr. Mackenzie-Kennedy desires to begin all over again, and, as I say, that seems to me a most depressing result, and the sooner it is put right the better.

Lord Justice Atkin.—I agree, and I also agree that this case illustrates the great misfortune which befalls subjects who have to make claims against the Government or against the Executive of the country who have to use their services, and I also agree that it is high time that some simplified form of procedure should be adopted; but I think it also is fair to add that, so long as the law remains what it is, it is plain that a department should not go beyond its legal liability or assume legal liabilities which do not in fact fall upon it. There can also be no doubt at all, I think, that, though these proceedings have taken a long time, the actors in them have had full notice as to what the issues raised are. I am only dealing with that part of the case which asks for a declaration that the patent taken out by Mr. Mackenzie-Kennedy in 1918 is a valid patent, and that there has been a use of the patent invention, and which claims that compensation should be decreed to him by the Court. That arises upon the provisions of the Act of 1919, amending the Act of 1907. Before the Act of 1907, a patent did not avail against the Crown. By the Act of 1907 there was a provision that a patent should have to all intents the like effect as against his Majesty the King as it

has against a subject, with a provision that any Government department may use the invention "on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the Treasury." That was at once made rather difficult by the fact that the Treasury refused to determine a dispute as to the validity of the patent. To my mind it always has been very difficult to ascertain, and it still, to my mind, remains very difficult to ascertain, how a Court can determine what is the use of a patented invention when there still remains the doubt whether it is the true subject-matter of a patent or not. I should have thought that that was of the essence of the question of the amount of the remuneration. However, an improvement in the procedure was no doubt intended to be made by the Act of 1919, which provides, again, that the patent is to have to all intents the like effect as against his Majesty the King as it has against a subject, and then there is a proviso that it is to have quite different effects—namely, that a Government department may use it without a licence "on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided." The "manner hereinafter provided" was that in the case of any dispute as to the making, use, or exercise of an invention the matter should be referred to the Court for decision, who should have power to refer the whole matter to a special or official referee or an arbitrator, and it was further provided that "The Court, referee, or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference." I am by no means certain now what is the precise meaning of that section, but I will assume that it means what it has been assumed to mean hitherto, that the Court may not, without the consent of the parties, take into consideration the validity of the patent. The Act of Parliament provides no procedure in itself by which that question shall be referred to the Court, and a difficult question arises as to how it is to be done. No procedure was in fact laid down until Rules of Court under the Patents Acts were made in the year 1925, when it was provided that the reference should be by means of originating notice of motion addressed to the department and, on such a notice of motion, apparently the Court may make such orders as are appropriate for determining the dispute. But this action was commenced in 1921, before there was any Rule of Court at all, and it was commenced in the ordinary way by a writ addressed to the Air Council, claiming a declaration of validity and claiming compensation.

It appears to me, therefore, that the question at once arises whether the Air Council, as a department, can be sued in the way in which they are sued in this action. To my mind they cannot. The result of this section is to give a statutory right of compensation to the patentee for the use of his invention by a Government department for the service of the Crown. That seems to me to be precisely similar to *Attorney-General v. De Keyser's Royal Hotel, Limited* (36 *The Times* L.R., 600; [1920] A.C., 508) and to give rise to a claim for compensation for use of the plaintiff's property and would be the proper subject of petition of right to the Crown. I think that the Act contemplated that the compensation was to be paid by the Crown. I do not think it contemplated that the compensation was to be paid by the department. It would be a very inconvenient mode of dealing with the matter, because the clause makes no provision by which the department is to meet the liabilities and there are numbers of departments which cannot even sue or be sued as a department. Oddly enough, in one part of the Act of Parliament the section describes the department as a person, which is an odd use of juristic language and which I should have thought was entirely inaccurate; but, however that may be, I think the true effect of the section is that it merely gives a right of compensation to a patentee against the Crown for the use by officers of the Crown of his invention for the purposes of the Crown. It gives no right in itself to sue the department. If that is so, I think that the position is not assisted by the fact that in the constitution of this Air Council there is power for the Air Council to sue or be sued. It can only sue or be sued in respect of matters in which as an Air Council it has acquired rights or assumed liabilities or become subject to liabilities, and, in this case, to my mind the Air Council never became subject to any liabilities as an Air Council.

It seems to me, therefore, to follow that the right mode of determining this matter would have been for the Court to have at once declined to make a declaration or, indeed, to investigate this matter of compensation at all, and that is the view which I think we must now adopt. The result is that, as we have now disposed of the matter upon the claim under contract and also disposed of the matter as to the patent, it follows that there was no right to sue the Air Council at all and, as a consequence, the judgment of the learned Judge, by which he dismissed the action, was right and, therefore, this appeal must be dismissed.

[Solicitor—The Treasury Solicitor.]

K.B. Div. (Salter, J.) 1927. July 12.

PATRICK AND CO. v. RUSSO-BRITISH GRAIN EXPORT COMPANY, LIMITED.*

Practice — Special case — Alternative awards—No view expressed by arbitrators—Right to begin—Party claiming damages.

In this case arbitrators had stated their award in the form of a special case for the opinion of the Court and a question arose which party to the dispute had the right to begin.

The defendants, the Russo-British Grain Export Company, Limited, had sold a quantity of Russian wheat to the plaintiffs, Messrs. Patrick and Co., to be delivered "as per bills of lading dated November, 1926." In the events which happened the defendants were unable to ship in the agreed time. The plaintiffs had resold to other parties, and the question for decision in the case was what was the measure of damages which the plaintiffs could recover.

Mr. Jowitt, K.C., and Mr. James Dickinson appeared for the plaintiffs; Mr. Somervell for the defendants.

Before the hearing of the case began, Mr. JOWITT asked his Lordship for a ruling which party should begin. In cases in which arbitrators had expressed a view of their own in favour of one of the parties, subject to the opinion of the Court, the other party had a right to begin, just as the unsuccessful party had in an ordinary appeal. But where, as often

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

happened and had happened here, the arbitrators made two or more alternative awards without expressing any view of their own in favour of either party, it was not clear which party had the right to begin, and it was desirable that the practice of the Court should be settled one way or the other. He submitted that in logic the party who was the plaintiff before the arbitrator should have the right to begin.

Mr. SOMERVELL said that he could not quarrel with that submission, and

MR. JUSTICE SALTER ruled that the party claiming damages should begin.

[Solicitors—Messrs. Richards and Butler ; Messrs. Coward, Chance, and Co.]

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore, and Lord Carson.)
1927. July 12.

JONES v. SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCIATION, LIMITED.*

Revenue — Income-tax—Association for mutual insurance — Surplus funds — Whether assessable.

A mutual insurance association was formed, its sole activity being the indemnity of its members, who were coalowners, against liability for compensation in respect of fatal accidents to workmen. The association formed a general fund by making calls upon members proportionate to the wages paid in their works for the time being, and the balance of the ordinary call fund was transferred to a reserve fund, into which any extraordinary calls were also paid. A member, on retirement, was entitled to get back in cash a proportion of his share in the above reserve fund, but, apart from this, members had no right at all to the cash in the reserve fund, though the interest accruing on the reserve fund could be used in diminution of members' calls.

Held, that the surplus funds of the association were not assessable to income-tax, as the association was mere machinery for the purpose of enabling subscribing members to insure themselves.

New York Life Insurance Company v. Styles (5 *The Times* L.R., 621 ; 14 App. Cas., 381) applied.

Decision of the Court of Appeal (42 *The Times* L.R., 703 ; [1927] 1 K.B., 33) affirmed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 703 ; [1927] 1 K.B., 33) affirming an order of Mr. Justice Rowlatt (42 *The Times* L.R., 401), which affirmed a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The question raised by the appeal related to an assessment to income-tax under Schedule D made upon the respondent association for the year ending April 5, 1921, in respect of the profits of its trade. Shortly stated, the question was whether the association was liable to be assessed in respect of the surplus of the "calls" made by it on its members, who were coalowners, over the amounts paid by it in settlement of their claims for indemnity. It was not disputed that income-tax was payable on the interest and dividends received by the association from its investments. The facts sufficiently appear from the opinion of the Lord Chancellor.

The respondent association, having been assessed to income-tax under Case I. of Schedule D for the above-mentioned tax year, appealed to the Special Commissioners on the ground that the association was a purely mutual concern and was not carrying on any trade from which profits liable to income-tax arose.

The Special Commissioners discharged the assessment, and that decision was affirmed, first by Mr. Justice Rowlatt and then by the Court of Appeal.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the appellant ; Mr. Latter, K.C., and Mr. H. P. Glover for the respondent association.

The LORD CHANCELLOR.—My Lords : This is an appeal by an inspector of taxes from a decision of the Court of Appeal affirming the judgment of Mr. Justice Rowlatt on a case stated by the Commissioners for the Special Purposes of Income Tax, and raises the question whether the respondent association is assessable to income-tax in respect of the surplus of its receipts in each year over the expenditure for the year as being profits of a trade or business.

The association, as the Special Commissioners have found, has for its sole effective purpose the indemnity of its members (who are all coalowners) against liability for compensation in respect of fatal accidents to workmen in their employment. The association is a purely mutual concern, every person indemnified by the association being a member of the association, and every member being indemnified by the Association. Under the scheme as set out in detail in the articles of association a fund was to be established by means of "ordinary calls" to be made yearly upon the members in proportion to their disbursements by way of wages or salaries. Out of this fund the members were to be indemnified against claims for compensation, and at the end of each year the surplus of the fund over the expenditure and liabilities of the association was to be carried to a reserve fund. The committee, upon which all the members serve or are represented, is also empowered to make "extraordinary calls" upon the members for the purpose of meeting any deficiency in the fund or for strengthening the reserve. There are provisions enabling the transferee of a mine belonging to a member, or the representative of a member who may die or become bankrupt, to be substituted for such member, and there are also provisions entitling a member on retirement to receive out of the reserve a payment to be ascertained in accordance with a method described in the articles ; but subject to these provisions the funds are to remain with the company, and in the event of a winding-up are to be divided among the members in proportions prescribed. A reserve fund has in fact been established, which at the date of the assessment in dispute exceeded £150,000.

The association has, of course, paid or borne income-tax upon the income from its investments representing the reserve fund, and as to this no question arises ; but for the year 1920-21 an additional assessment was made upon it by the Additional Commissioners for the Warrington Division in the sum of £20,000, which was considered to represent the "calls" received in respect of that year after deducting the expenditure and liabilities of the

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

association. On appeal to the Special Commissioners, the additional assessment was discharged; and the decision of the Special Commissioners has been affirmed by Mr. Justice Rowlatt and by the Court of Appeal. The question is whether that decision is right.

My Lords, when a question of law has been clearly decided by this House, it is undesirable that the decision should be weakened or frittered away by fine distinctions; and it appears to me that the decision of the House in the case of *New York Life Insurance Company v. Styles* (5 *The Times* L.R., 621; 14 App. Cas., 381) completely covers this case. In that case the company concerned was a life insurance company which had no shares or shareholders, the only members being the holders of participating policies. A calculation was made in each year of the probable liabilities and expenses of the company for the year, and the amount claimed for premiums from the members was founded on that calculation. At the end of the year an account was taken, and the greater part of the surplus of premiums over expenditure was returned to the policyholders, either in cash or by an addition to the sums secured or by a reduction of future premiums, the remainder of the surplus being carried forward as funds in hand to the credit of the general body of members. Income-tax having been claimed on the surplus of the premiums received for a year over the expenditure for that year as profits or gains under Schedule D, it was held in this House that there were no such taxable profits. Lord Watson expressed his opinion as follows at p. 394 :—

"When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies. He pays according to an estimate of the amount which will be required for the common benefit; if his contribution proves to be insufficient, he must make good the deficiency; if it exceeds what is ultimately found to be requisite, the excess is returned to him. For these reasons I have come to the conclusion that the transactions of the appellant company, in so far as these relate to participating policies, do not constitute the carrying on of a trade, within the meaning of the Income Tax Acts, and that the surplus funds returned or credited to its members are not profits."

Lord Herschell dealt with the point as follows at p. 409 :—

"Persons who agree to contribute to a common fund for mutual insurance certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or over-caution, been originally fixed at a higher rate than was necessary, or from the death-rate being lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers has earned a profit? The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a 'profit' arising or accruing to them from a trade or vocation which they carry on. It is true the alternative is allowed them of leaving the excess in the common fund, and so increasing their representatives' claim upon it in case of death, but I cannot think that this makes any difference."

Lord Macnaghten agreed, and the House by a majority held that no tax was payable.

Counsel for the appellant contended that the present case was distinguishable from the *New York Life Insurance Company's* case (*supra*) on the ground that, whereas the company there in question returned to its participating policy-holders the surplus of its receipts over its expenditure at the end of each year, the articles of the respondent association require that surplus to be carried to reserve and not at once returned to the members. I do not think this a sound distinction. In this case, as in the *New York Life Insurance Company's* case (*supra*), there are no shareholders interested, and the whole of the yearly surplus remains to the credit of the members and must either be applied to meeting their future claims or be returned to them on retirement. Sooner or later, in meal or in malt, the whole of the company's receipts must go back to the policy-holders as a class, though not precisely in the proportions in which they have contributed to them, and the association does not in any true sense make a profit out of their contributions. It may be added that in that case, as in this, some part of the receipts of each year was carried forward as funds in hand.

It was argued that this view gives no effect to the well-established distinction between a company and its members, and that, although the members may make no profit, a profit may still accrue to the company. The same point arose in the *New York Life* case (*supra*) and was disposed of in the speeches of Lord Herschell and Lord Macnaghten. Lord Herschell, after stating that the Attorney-General (who in that case appeared for the revenue authorities) had conceded that the fact that the persons associating themselves together for the purpose of mutual assurance had been incorporated was immaterial and that the case might be treated as though it were an association of individuals unincorporated, added at p. 408 :—

"I think the Attorney-General was correct in thinking it immaterial that the persons thus associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall, for the sake of simplicity, consider the questions that arise as though the association were unincorporated."

Lord Macnaghten dealt with the same point as follows at p. 411 :—

"It happens here that the persons who combined to obtain the benefit of mutual insurance became, by the very act of insuring their lives, members of an incorporated company. But the company (so far as regards the participating policy-holders) was not formed for the purpose of carrying on a business

having for its object the acquisition of gain. The fact, therefore, that the insured, who are also the insurers, carry on their business through the medium of a company was properly treated as immaterial."

It appears to me that the reasoning which commended itself to those distinguished jurists in the *New York Life* case (*supra*), applicable as it is to genuine mutual concerns and to no others, applies to the present case, and disposes of the contention now under discussion.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

VISCOUNT DUNEDIN.—My Lords: I concur. The whole case for the Crown rests on the idea that because in a single year the premiums received exceed the sums paid in respect of the losses in that year the balance represents a profit. It represents no such thing. It is simply a sum of money which is carried forward in order that it may be available to meet excessive losses in a future year, or, if it is found in the end to be redundant, be returned to the shareholders either in the form of reduced premiums or of cash. The basis of the Crown's case seems to me to fail, apart from the fact that I agree that the present case is absolutely ruled by the case of *New York Life Insurance Company v. Styles* (5 *The Times* L.R., 621; 14 App. Cas., 381).

The other noble and learned LORDS concurred.

[Solicitors—The Solicitor of Inland Revenue; Mr. William Pingree Ellen, for Messrs. Peace and Darlington, Liverpool.]

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Carson.) 1927. July 11.

CONSTANTINESCO v. THE KING.*

Revenue—Income-tax—Award by Royal Commission — Government user of patented invention — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40).

The House held that income-tax was payable on sums awarded by the Royal Commission on Awards to Inventors, it appearing that the sums in question were in fact the aggregate of royalties for Government user of a patented invention and not a capitalized sum in lieu of royalties.

Decision of the Court of Appeal (42 *The Times* L.R., 685) affirmed.

This was an appeal from a decision of the Court of Appeal (42 *The Times* L.R., 685) affirming a decision of Mr. Justice Rowlatt (42 *The Times* L.R., 383).

The substantial questions raised by the appeal were, (1) whether an award by the Royal Commission on Awards to Inventors in respect of the user by the Crown of the patented invention of the appellant was subject to income-tax; and (2) whether an award by the Commission, sitting conjointly with the Commission for the Adjustment of Foreign Claims appointed by the War Department of the United States of America, in respect of the communication to and user by the United States Government of the appellant's invention was subject to income-tax. It was admitted that there was no material distinction between the two questions.

There was also a subsidiary question, whether, assuming that income-tax was payable, it was rightly deducted at the source under Rule 21 (1) of the General Rules applicable to all schedules of the Income Tax Act, 1918.

The appellant, Mr. George Constantinesco, of Carmen Sylva, Beechwood-Avenue, Weybridge, was the inventor of synchronizing gears for the firing of machine-guns carried by aeroplanes, whereby the discharges from the machine-guns were made to synchronize with the intervals between the blades of the propellers. The invention was extensively used by the British and American forces in the war. On October 5, 1916, W. H. Dorman and Co., Limited, were given an exclusive licence to manufacture and sell machines made according to the appellant's invention, the licence reserving a royalty of £10 per gear to the appellant and his co-owner, Mr. Walter Haddon. A number of those gears were sold by the licensees to the Government on those terms.

In March, 1918, the Minister of Munitions informed the appellant and Messrs. Dorman that in future the Government intended to manufacture the appellant's invention by itself or its agents, and that it would employ Messrs. Dorman in future to manufacture directly for it. From March 8, 1918, to July 31, 1919, the number of gears manufactured for the Minister of Munitions by Messrs. Dorman and others was 27,857, and for those gears no royalty was paid to the appellant.

On March 19, 1919, the Royal Commission on Awards to Inventors was appointed by the Royal Warrant. The Royal Warrant provided, under clause 1, for awards by way of royalty or gross sum to claimants whose patents had been used by the Crown under the powers contained in section 29 of the Patents and Designs Act, 1907. It provided that the Commissioners should not actually award a sum exceeding £50,000, together with any allowance for outlay and expenses in connexion with the invention, but that the Commissioners might make a recommendation of a further sum to be paid if they thought fit. The Royal Warrant further provided in clause 3 for the award of remuneration to inventors whose claims were not based on strict legal rights.

On December 16, 1919, the appellant and his co-owner, Mr. Walter Haddon, made a claim to that Commission for an award in respect of the use of the invention, and a counter-statement was filed by the Air Ministry to the effect that the Commission would not be bound by the strict terms of section 29 of the Patents and Designs Act, 1907, but would consider the claim broadly, having regard to inventive merit and to all the circumstances of the case. Upon that understanding an award of £50,000 and a recommendation to pay a further sum of £20,000 were made on December 6, 1922. That award and recommendation were accepted by the Treasury.

On December 20, 1922, the Air Ministry sent to the appellant and Mr. Walter Haddon a cheque for £52,500, with a statement that £17,500 had been deducted as income-tax.

In the course of the war 6,827 gears, made according to the appellant's invention and under his British and American patents, were manufactured for the United States Government, and an agreement was entered into on January 11, 1923, between the appellant, Mr. Walter Haddon, the President of H.M. Air Council, on behalf of his Majesty, and the Assistant Secretary of the War Department, U.S.A., by which it was agreed that the Royal Commission on Awards

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

to Inventors, conjointly with the Commission for the Adjustment of Foreign Claims appointed by the United States War Department, should determine the amount to be paid by the United States Government in respect of the use of the invention.

According to that agreement, the appellant and Mr. Walter Haddon claimed for the use of the invention by the United States Government. That claim was heard by the Joint Commission in March, 1923, and an award of £15,000 was made.

At a later date the sum of £11,250 and no more was sent to the appellant and Mr. Walter Haddon by H.M. Government. The sum of £3,750, being the amount unpaid, was equal to the amount of income-tax on £15,000 at 5s. in the pound.

The income-tax deducted in respect of the appellant's share under those awards amounted to £10,875, and in July, 1924, the appellant presented a petition of right to recover that amount.

Mr. Justice Rowlatt dismissed the petition, and his decision was affirmed by the Court of Appeal.

Mr. Latter, K.C., and Mr. Carrol Romer appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

The Lord Chancellor.—My Lords, the appellant in this case is part owner of a patented invention of great utility, which consists of a control gear enabling a machine-gun to be fired through the propeller of an aeroplane without destroying the blades. During the War the Ministry of Munitions, under the powers which had been conferred upon the Government by the Patents and Designs Act, 1907, used this invention for war purposes. The terms upon which they were to use it were not settled at the time but were, under the provisions of section 29 of the Act, to be determined in default of agreement by the Treasury. At the end of the war the Treasury found that they had many claims of this kind to dispose of; and accordingly a Commission was set up which was called the Royal Commission on Awards to Inventors, and that Commission was authorized to inquire into claims, both by patentees and by certain other persons, and to make an award in favour of any claimant up to £50,000 and to recommend in special cases the payment of a sum in excess of that amount. The appellant and his partner put in their claim before the Commission stating the period during which this invention had been used by the Crown, and the number of gears or appliances falling under the patent which had been made for the Crown, and they claimed a sum equal to £10 per gear, being, as they said, the rate of royalty reserved by the licence previously granted to certain manufacturers. The Commission awarded to the appellant and his partner a sum of £50,000 and recommended the payment of a further sum of £20,000. The Crown paid to the appellant and his partner those sums, amounting to £70,000, less a deduction of income-tax on the amount, and the question is whether that tax was rightly deducted. There was a further award in respect of the use of the invention by the United States, but the question arising upon that award is the same, and I need not further refer to it.

My Lords, three points are raised on behalf of the appellant. First, it is said that the sum of £70,000 was not annual profits or gains within the meaning of the Income Tax Act, 1918, but was a payment of a capital sum. I cannot agree with that contention. The payment was made in respect of the use of the invention over a period of time. The claim put in was a claim as for royalty in respect of the successive uses of the invention. In the case of patented inventions it was the practice of the Commission, as appears from their report which has been cited on behalf of the appellant, to take as a basis of their award a fair royalty as between a willing licensor and a willing licensee, and I have little doubt that that basis was accepted in the present case subject, no doubt, to certain deductions. Lastly, the patent itself, that is, the *corpus* of the patent, was not taken away from the appellant and his partner but still remains in them. In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, and annual profits or gains, within the meaning of the Income Tax Act, 1918.

Secondly, it is said that, assuming that tax was payable on the amount, it was not right to deduct the tax under Rule 21 of the General Rules applicable to all the schedules of the Act, because it was not a royalty or other sum payable for the use of a patented invention. But again I do not agree. It is true that the validity of the patent was not originally admitted by the Crown; but no evidence was led for the purpose of attacking it, and we were told at the bar that the Royal Commission held it to be a good patent. I think, therefore, that the money was paid for the use of a patented invention.

Thirdly, it is said that Rule 21, which gives the power to deduct, only applies to a subject of the Crown and not to the Crown itself, and that the duty of the Crown was to pay the amount of the award in full and then to assess the appellant to income-tax in respect of the amount. My Lords, I am bound to say that in my view that point is not open to the appellant in this appeal. The point was not taken in the correspondence before the petition of right, and indeed there are expressions in the correspondence which go to show that the only point taken on behalf of the appellant was that no tax was payable on the amount of the award, and he nowhere claimed that the tax, if payable, was not deductible. Again, the point was not taken in the petition of right which received the fiat of the Attorney-General. The point taken in that petition of right was that the £70,000 was a capital sum and not an annual payment or annual profits and gains, and that income-tax was not payable in respect of it. That point was plainly taken, but nowhere was it suggested in the petition of right that the tax, if payable, was not deductible. When the Attorney-General in his answer to the petition referred to Rule 21 of the General Rules, the appellant allowed issue to be joined upon the facts without even then raising the point that Rule 21 did not apply to the Crown. A passage has been read from the shorthand notes with a view to showing that the point was raised before Mr. Justice Rowlatt. Having heard that passage read, I do not think that it raised with any clarity the contention which is now put forward, and accordingly Mr. Justice Rowlatt in no way dealt with the point. There is, indeed, in the judgment of the learned Master of the Rolls upon the appeal a passage referring to Rule 21; but, so far as I can follow that passage, it appears to show that the contention now put forward was not raised or, at all events, not plainly raised before the Court of Appeal. It was raised, and in my view raised for the first time, in the appellant's case on this appeal. In these circumstances, it appears to me that the point is taken too late and that the appellant, who might have raised it earlier and obtained the decisions of the two Courts below upon the point, ought not to be allowed to raise it now. If your Lordships were disposed to allow any latitude in this respect—as in some cases has been done—I doubt whether you would be willing to do so in the

present case, because the effect of the point now raised, if it were successful, would be that the amount in dispute must be paid to the appellant and that, as the time for assessment has gone by, the Crown would have no remedy open to it by which to recover income-tax, which in my view was plainly payable. Accordingly, I think it best to express no opinion upon the construction of Rule 21, but to say simply that this point is raised too late and, therefore, cannot be effective.

My Lords, for these reasons I think that this appeal fails and I move your Lordships that it be dismissed with costs.

Viscount Dunedin.—My Lords, I concur. I think, on the real merits of the case, the case was scarcely arguable. This was a patent which remains this man's property. He, in the old days, got royalties for it, and those were the profits of his property, and to say that the payments which the Crown makes for the same user as private persons had before lose their character as income and suddenly become capital is, I think, as all the Courts have understood the case, one of the most hopeless contentions that I have ever heard urged at your Lordships' bar.

As regards the other point, I hesitate to give opinions upon mere procedure points of English practice, but I do think it would be very unfortunate in a case like this if we were bound to consider now for the first time a point that was studiously—I do not mean intentionally—kept in the background by not being mentioned. There is not a trace of the point in the judgment of either Mr. Justice Rowlatt or the Court of Appeal.

Lord Atkinson.—My Lords, I concur. It appears to me clear that the sum which this man was to receive for the use of his patent is not a capital sum but is a yearly sum.

With regard to the second point, I think it is a point of importance, and that makes it all the more necessary that it should be distinctly raised so as to give the opponent clear notice of the things which he was intended to meet, and that we should have the advantage of having it dealt with by the different Judges in the Courts below. In this case I do not think it was raised, whether by omission or for some other cause, and for that reason I think, according to the wise and prudent practice, it should not be held to be open, and it is not open.

Lord Shaw of Dunfermline.—My Lords, I concur entirely in the opinion delivered from the Woolsack.

Lord Carson.—My Lords, upon the first and main point which has been argued I am of opinion that the sums of £50,000 and £15,000 awarded to the plaintiff are to be treated as income arising from the user of the plaintiff's patent by the Crown.

I desire, however, to say that, speaking for myself, I think the point as to whether Rule 21 entitled the Crown without assessment to deduct the income-tax payable was sufficiently raised by the pleadings. The appellant sued upon the award, and the respondents justify the deduction under Rule 21 as entitling them to make such deduction, and upon that issue was joined, which was, I think, the usual course of pleading. However, as your Lordships are of opinion that the point is not open to the appellant, having regard to the state of the pleadings and the absence of argument before Mr. Justice Rowlatt and the Court of Appeal, it becomes unnecessary to discuss the question whether the right of deduction imposed by Rule 21 applies to the Crown.

[Solicitors—Messrs. Bristows, Cooke, and Carpmael; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)

1927. July 14.

IN RE WHITE.*

Administration — Grant—Minority interest—No grant to less than two individuals—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 160 (1), 162 (1).

Under ss. 160 (1) and 162 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court cannot make a grant of administration to less than two individuals when it is aware that there is a minority interest.

This was an appeal by Mrs. Doris White, widow of the late Mr. James White, from a decision of Mr. Justice Hill refusing to appoint her sole administratrix of her late husband's estate.

Mr. Cotes-Preedy, K.C., and Mr. H. D. Grazebrook appeared for the appellant; Mr. Talbot-Ponsonby for the Westminster Bank, Limited, the largest creditor of the estate; and Mr. Sims for the receiver of the estate, who was appointed by Mr. Justice Eve on June 30.

Mr. Cotes-Preedy said that Mr. White had died intestate. The estate consisted of Foxhill with farms in the district, valued at £75,000, and certain furniture worth £3,000. The debts were very large, but the total amount was not yet ascertained. It would probably run into hundreds of thousands of pounds. It was believed that the estate was hopelessly insolvent, and that there would be nothing for the unsecured creditors. There would, of course, be nothing for the widow or the two young children.

A receiver of the estate had been appointed in the Chancery Division, but it was important that the appellant should be appointed administratrix in order to deal with certain urgent matters. There were eight racehorses belonging to the deceased man in training, and each horse was costing £5 a week. Moreover, the death of Mr. White made all the racing entries in respect of the horses void, so that it was important to sell the horses as quickly as possible to enable the purchasers to enter them afresh. For that purpose it was absolutely essential to get somebody who could make a valid title. No one was willing to join with Mrs. White in the administration, so she asked to be appointed alone, and therein lay the difficulty.

The horses were not in the possession of the receiver of the estate; they were at training stables, and the trainer would probably not allow them to leave his stables until his lien for sums owing for their keep had been satisfied. Counsel representing the largest creditor and the receiver were willing that the appellant should be appointed. Formerly, these appointments were made under section 73 of the Court of Probate Act, 1857, which gave the Court an almost unfettered discretion. That section had now been replaced by section 160 of the Supreme Court

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

of Judicature (Consolidation) Act, 1925, which provided :—

"(1) Probate or administration shall not be granted to more than four persons in respect of the same property, and administration shall, if there is a minority, or if a life interest arises under the will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals. . . ."

That section must, however, be read with section 162, which gave the Court a discretion as to the persons to whom administration was to be granted. Section 162 provided :—

"(1) In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person, or the proceeds of sale thereof . . . and any such administration may be limited in any way the Court thinks fit.

"Provided that where the deceased died wholly intestate as to his estate administration shall—(*a*) unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose. . . ."

Under that proviso the Court could, by reason of the insolvency of the estate, grant letters of administration to Mrs. White. She would be a suitable "other person." Counsel cited *In re Herbert, Deceased* (42 *The Times* L.R., 469 ; [1926] P., 109).

Mr. Sims, for the receiver, supported the arguments of Mr. Cotes-Preedy.

The Master of the Rolls said that the appeal must be dismissed. His Lordship, having read section 160 of the Act of 1925, said that it was clear that when the Court actually knew, as in the present case, that there was a minority interest it could not make a grant to less than two individuals.

Mr. Cotes-Preedy had relied upon the proviso to section 162 (1) as giving the Court a discretion, but the grant there referred to was to be to one or more of the persons interested, or, alternatively, if the Court thought expedient, to "some other person." The widow of Mr. White was clearly a person interested, so that the grant to some other person was not fulfilled by a grant to her. It was argued that section 162 (1) must be read with section 160 (1) and that the combined effect of the two sections was that "some other person" meant, generally, that the Court had a discretion to grant to one person.

It was said that section 162 was meant to replace the very wide discretion given to the Court by section 73 of the Court of Probate Act, 1857, but section 73 had not come after a preceding section which gave the very explicit directions contained in section 160. The latter was a new section and was important because of the interest taken by a widow in an intestate husband's estate under the Law of Property Act, 1925. It was a section inserted to protect the interests of minors or tenants for life. It did not seem right to say that section 162, because it replaced section 73 of the earlier Act, practically did away with the restrictions contained in section 160. The appeal must, therefore, be dismissed.

As regarded the matter of the racehorses, an order had been made by Mr. Justice Eve for their sale. The trainer must obey the order, but his right of lien for expenses incurred in keeping them, if he had one, would be protected.

Lord Justice Scrutton said that he agreed. Section 160 (1) provided in emphatic terms that where there was the interest of a minor to be considered administration should only be granted to not less than two persons. As to section 73 of the Court of Probate Act, 1857, in *In the Goods of Samuel Smith* (*deceased*) (27 L.J., P. and M., 105) the headnote stated : "The Court has no power under section 73 of 20 and 21 Vict., c. 77, to grant general administration to a person who before that Act would only have been entitled to a grant of administration during the minority of an infant, that section not conferring power to substitute one kind of administration for another, but merely to substitute another person as administrator in the place of the person who would by law be entitled to administration." It might be as well if on another application like the present counsel were to study that case. It was agreed that section 160 must be read with section 162, but to him (Lord Justice Scrutton) the meaning of section 162 (1) seemed to be that if "one or more of the persons interested in the residuary estate" applied, then the Court must turn back to section 160 (1) and say, "If there is a minority concerned we must make a grant to two or more." Then if the Court were to grant to "some other person," and if the applicant, by reason of the estate being insolvent, not being beneficially interested in the residue, were an "other person," did that exclude the terms of section 160 (1), or must two persons still be appointed ? If the decision of the President in *In re Herbert* (42 *The Times* L.R., 469 ; [1926] P., 109) were to the effect that one person was enough, then he (Lord Justice Scrutton) was not satisfied that that decision was correct. Mr. Justice Hill in the present case had taken the correct view, and the fact that all the counsel appearing agreed that the law should not be enforced did not help the Court to ignore the plain terms of the Act.

Lord Justice Sargant said that section 160 (1) contained a very definite prohibition of a grant to less than two persons in this case. To him it seemed that the widow was a "person interested" within the meaning of section 162 (1), and so it was impossible to treat her as "some other person." As to the decision of the President in *In re Herbert* (42 *The Times* L.R., 469 ; [1926] P., 109), he (Lord Justice Sargant) desired to reserve his opinion as to whether administration could in the circumstances be granted to a single creditor, the point not really arising in the present case.

[Solicitors—Mr. O. L. Richardson ; Messrs. Swann, Hardman and Co.]

House of Lords.
(Viscount Cave, L.C., Lord Dunedin, Lord Atkinson, Lord Phillimore, and Lord Carson.)

1927. July 14.

WELSH NAVIGATION STEAM COAL COMPANY, LIMITED v. EVANS AND ANOTHER.*

Master and Servant—Compensation for injury by accident—Dependency—"Ordinary necessaries of life"—Meaning of expression—Whether including savings for the future—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 22—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), s. 4 (2).

By s. 22 of the Workmen's Compensation Act, 1923, re-enacted by s. 4 (2) of the Workmen's

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

Compensation Act, 1925, "a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

Held, that the words "ordinary necessaries of life" in this enactment do not include the provision of savings for the future.

Decision of the Court of Appeal (20 B.W.C.C., 174) reversed.

This was an appeal from a decision of the Court of Appeal, the Master of the Rolls, Lord Justice Atkin, and Lord Justice Lawrence (20 B.W.C.C., 174), reversing an award of the county court Judge of Glamorgan made under the Workmen's Compensation Acts in favour of the employers.

The question raised by the appeal was whether the county court Judge was entitled to find upon the evidence before him that the respondents, the father and mother of a workman who was killed by an accident arising out of and in the course of his employment, were not partially dependent upon the earnings of the workman at the time of his death and were thus disentitled to compensation in respect thereof; and whether the county court Judge misdirected himself as to the effect of section 22 of the Workmen's Compensation Act, 1923 (now re-enacted by section 4 (2) of the Workmen's Compensation Act, 1925).

Section 4 (2) of the Act of 1925 provides:—

"A person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

The facts sufficiently appear from the opinion of Lord Dunedin.

Mr. E. W. Cave, K.C., and Mr. J. Victor Evans appeared for the appellants; and Mr. Montgomery, K.C., and Mr. A. T. James for the respondents.

Viscount Dunedin.—My Lords: This is a case under the Workmen's Compensation Acts in which a father and mother claim as dependants of a deceased son who met his death by accident arising in the course of and out of his employment. The facts as set out by the county court Judge are simple enough. The deceased was a young coal miner 20 years of age whose weekly average earnings were £1 13s. 1d. He lived in family with his father and mother and another brother. The father's weekly earnings were £4 4s. 9d. and those of the other brother £3 17s. 9d. The deceased handed all his wages to his mother, who kept him and gave him 5s. pocket money. They were a thrifty family and the father had saved £500.

In the circumstances the county court Judge held that there was no dependency proved and he appended to his judgment the following note:—

"In this case the note of the evidence is very meagre because it was impossible to get definite answers from the deceased's father and mother. The conclusion I came to was that the parents, who were very thrifty people, had always saved money, that they saved all the money obtained from each son except what was necessary to keep the son in food, clothes and pocket money, and that under the circumstances the parents could not be said to be in any way dependent upon the contributions from the deceased son for the provision of the ordinary necessaries of life suitable for persons in their class and position."

The learned Judges of the Court of Appeal set aside the award and remitted the case for a rehearing.

The reasons which they gave for this course were that they thought that the arbitrator had, or at least might have, misdirected himself, in so far as he had not, or might not, have considered whether a certain part of the total family income retained as savings was also one of the necessaries of life; and whether, if that sum was included, the applicants were dependent on the contribution of the deceased. They particularly referred to the opinions given by themselves in the cases of *Kennedy v. Horden Collieries Company* ([1925] 2 K.B., 438) and *Peart v. Bolckow, Vaughan and Co.* ([1925] 1 K.B., 399).

My Lords, very recently your Lordships gave judgment in the case of *Fife Coal Company v. McArthur* (19 B.W.C.C., 461), which had to do with this same question of dependency. That case was decided on December 3, 1926, and the present case was decided by the Court of Appeal on December 2, 1926; so that neither could the Court of Appeal know of your Lordships' judgment, nor were your Lordships aware of this case. I am bound to say that I do not think the opinion of the learned Judges in the Court of Appeal can be reconciled with the opinions pronounced by your Lordships. The actual decision of the case of *McArthur* (*supra*) turned on the effect of an admission, but your Lordships of set purpose examined section 22 of the Act of 1923 (with which section 4 (2) of the Act of 1925 is identical) as opinions thereupon had been pronounced in the Courts below which were considered erroneous.

My Lords, I refer to the opinion I delivered in that case, which, so far as the construction of the section is concerned, was concurred in by all the noble Lords present. But in order to avoid any misunderstanding I will deal with what I may call the critical stages of the development of the question.

I begin with the judgment of the Court of Appeal in *Simmons v. White Brothers* (15 *The Times* L.R., 263; [1899] 1 Q.B., 1005). The head-note of that case, which is accurate, states as follows:—

"*Held,* that in order to bring himself within the Act as a dependant, an applicant for compensation must show that he was to some extent dependent upon the earnings of the deceased workman for the ordinary necessaries of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings."

Now it will be observed that there are two separate propositions involved in this judgment. The first is that "dependent upon the earnings" means "dependent for the purposes of the ordinary necessaries of life." The Act there in question, the Workmen's Compensation Act, 1897, only used, in section 7 (2), the phrase "dependent upon the earnings," and therefore "for the purposes of the ordinary necessaries of life" was judicial interpretation. The second is that in order to find what are the necessaries of life you must take the average, and that average is to be sought among those who are in the same class and position of life as the applicant.

Now, when that case was displaced by the case of *Main Colliery Company v. Davies* (16 *The Times* L.R., 460; [1900] A.C., 358), the discussion turned, so far as I can see, much more on the second proposition than the first. Lord Shand, in his opinion, though agreeing as to the dislodgment of the second proposition, expressly saved the first. Lord Halsbury did not expressly disagree with the first proposition,

though doubtless there are expressions in his opinion which seem to point that way, and which most certainly were afterwards held by the Court of Appeal to have pointed that way. I think, however, that it is quite unnecessary to discuss whether Lord Halsbury's opinion was pressed beyond what it meant, because now it is no question of what Lord Halsbury did or did not say ; the question is what the section of the Act of Parliament means ; and the section introduces the express words "dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

Before I actually go to the section itself, I will deal with the cases on which the Court of Appeal relied, viz., *Peart v. Bolckow, Vaughan and Co.* (*supra*), and *Kennedy v. Horden Collieries Company* (*supra*). I say at once that, so far as the results of these cases are concerned, I think they were quite rightly decided.

In *Peart v. Bolckow, Vaughan and Co.* (*supra*) the facts were that the father earned £3 11s. 0d. a week, plus free house and coals. One boy earned £1 0s. 6d., and the deceased 15s. 3d. ; the mother and a younger son earned nothing. The county court Judge had found as a fact that the deceased made a contribution to the necessaries of life of the family, and the Court of Appeal upheld that finding. The real argument before them against the judgment of the county court Judge rested on the calculation that, if you took the whole money as representing the family purse, then the amount *per capita* available for maintenance was greater after the accident than before. That mere calculation they held could not be conclusive.

But in their comments upon the statutory clauses the learned Judges all agreed that the effect of the statute was to restore the law of *Simmons v. White Brothers* (*supra*). Lord Justice Warrington expressly reserved the question that might arise when he said (p. 414), "he [the county court Judge] arrived at the conclusion that the sum of 15s. 3d. which the boy contributed to the joint expenses of the household exceeded that which was necessary for his own personal maintenance, and there was, therefore, a contribution to what the learned Judge calls the 'family purse' ; that, however, may not be enough, because the amount of the family purse might, in certain cases, be so great that the small contribution which the boy makes to it could not be said to be a contribution for the provision of the ordinary necessaries of life, but that is not the case here."

There is, however, a sentence in the judgment of Lord Justice Scrutton which, with deference to that learned Judge, has, I think, had somewhat disastrous consequences. He said (p. 417) : "Now in my view the proper direction for a county court Judge is that he has to consider whether at the time of the death the alleged dependant was receiving a net balance of advantage from the deceased's contribution, that is to say, in the case of a father and son, whether after defraying the expense of maintaining the son the father had a balance of the contribution available for the provision of ordinary necessaries of life for himself and the rest of the family." This use of the words "available for" as a substitution for the words of the statute "dependent on" is the root, I think, of much erroneous argument that has followed.

Then in *Kennedy v. Horden Collieries Company* (*supra*) again the actual judgment is most easily supported. The learned county court Judge made some very sensible remarks in regard to what might be considered the standard expenditure in certain classes. And then on the facts of the case he said this, page 444 : "We get a sum of £4 15s. 0d. for four of them, which works out at £1 3s. 9d. per head. Was this more than was required to supply the family with the ordinary necessaries of life suitable to the father's class and position, bearing in mind that they had their house and fuel free ? The mother states, in effect, that they were unable to save anything out of it." That finding duly determined the case. But then, unfortunately as I think, the learned county court Judge proceeded to make an *obiter* remark : "If they had, in effect, put something aside, I do not know that it ought to tell against them ; for it does not necessarily follow that because a man makes some provision for his widow in the event of his dying before her, and for his own old age, his income is therefore more than sufficient for his needs. It may, I think, fairly be argued that it is a man's duty in the present day to make, if he can, such reasonable provision for the future as will ensure that neither he nor his widow will become a burden on others or on the public, and therefore that such reasonable provision ought to come under the head of 'necessaries.'"

This pronouncement is curiously out of line with the statement which he had previously made that "necessaries" should be construed as that word had been construed in connexion with the contracts of infants ; but this remark found favour with the Court of Appeal in this case, and their judgment, if analysed, comes to this, that they have set aside the award and remitted the case to the county court Judge in order that he might make an allowance for saving, and then see how the figures stand.

In *Kennedy's* case (*supra*) there was no such question involved. Lord Justice Atkin seems to have scented trouble ahead, but saw, as he was well entitled to do, no difficulty in the case in hand. For he says that the county court Judge had found in fact that the whole of the family income was spent on necessaries and that a balance of the deceased's income formed part of income expended.

Now going to the section itself, I confess I think the matter could not have been more clearly expressed. You are to find out what such a family budget, fitting the class and position, would naturally be. I agree that their actual expenditure is a *prima facie* guide. And I agree that there is no meticulous distinction between an absolute necessary and an article of comfort or a luxury. You are not to say that bread and butter is a necessary, but that if jam is added it is a luxury. But still, you are to take the necessaries of life. The expression is a common, well-understood expression. It indicates food, clothing, and shelter and the necessary concomitants thereto. But to extend it to such a thing as saving, or what is the same thing, insurance, is, in my opinion, to do utter violence to the expression. And though the learned Master of the Rolls says that he does not wish to say anything that would discourage thrift, I am afraid that I must reply that it is not allowable to encourage thrift by wresting a word used in a statute from its ordinary and natural meaning. If the true view was that any balance which came after a man's keep was "available" for necessaries, and that that was enough, why should there be any question of necessaries at all ? All money that anyone gets is available for necessaries just as it is available for anything else.

I am, therefore, of opinion that the judgment of the Court of Appeal was wrong. I think the learned county court Judge determined on the facts that here the family had enough for the necessaries of life without any contribution—if indeed there was a

balance—from the deceased, and that the remit if carried out would have directed him to consider items of expenditure which he had no business to consider.

I may, just in passing, take notice of one suggestion made by Mr. Montgomery for the respondents. He suggested that a judgment against him would mean that when there was a capital sum invested which represented savings, then so long as that capital sum was unexhausted there could be no contribution. I do not look on that as a commonsense suggestion. What is to be looked at is the family income, and income does not represent the touching of capital.

I move that the appeal be allowed and the decision of the county court Judge restored; the respondents to pay the costs in this House and in the Courts below.

The LORD CHANCELLOR and LORD PHILLIMORE have authorized me to say that they concur in this opinion.

LORD ATKINSON concurred.

LORD CARSON.—My Lords: In the case of *Fife Coal Company v. McArthur* (19 B.W.C.C., 461), which was recently heard by the House of Lords and in which I myself took part, the construction of section 4 (2) of the Workmen's Compensation Act, 1923, was very carefully considered, and the authorities were examined in an exhaustive judgment delivered by my noble and learned friend Lord Dunedin, in which the noble and learned Lords who heard the case concurred. The section enacts as follows:—"A person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." In the case referred to my noble friend quoted with approval a passage from the work of the late Judge Adshead Elliott on compensation, which explains the scope of the section in question, and which runs as follows:—"Since the passing of the 1923 Act it would seem that in order to establish partial dependency, the applicant must not only show that he has sustained pecuniary loss by reason of the death of the deceased workman, but must go farther and show that he relied partially on some or all of the amount which he has so lost in order to provide himself with the ordinary necessaries of life suitable to his class and position." In the present case the learned and experienced county court Judge held that no dependency was proved, and, as far as I can understand the facts proved, he had ample evidence for coming to that conclusion, and the question being one of fact this House ought not to interfere unless for sufficient reason. It is true that from the note of the learned county court Judge he seems to have drawn an inference that the parents of the deceased workman derived pecuniary assistance from the contributions of the deceased over and above what was necessary to keep the son in food, clothes, and pocket-money, but assuming that such inference was correct, that was not sufficient, having regard to the terms of the section and the decision of this House already referred to, to prove that some or all of the amount so lost was relied upon to secure the ordinary necessaries of life suitable to their class or position. I am unable to follow the reasoning of the Master of the Rolls and the Lords Justices in the Court of Appeal in finding reasons for remitting the case to the county court Judge on the hypothetical ground that the latter may have misdirected himself in holding that the respondents were not dependants because some of the money contributed may have been saved.

My Lords, I think the words of the section are clear and well understood, and I can find no sufficient grounds for construing the words "ordinary necessaries of life" as including pecuniary advantage which was applied not for the maintenance of the family but for such purposes as the parents might desire to apply it. My Lords, with great respect for the Master of the Rolls, I do not think we gain any assistance by considering questions either of the prevention or of the encouragement of thrift, which are more appropriate for the Legislature than for an appellate Court.

My Lords, I agree that this appeal should be allowed, and the decision of the county court Judge restored, and that the costs should be paid as proposed.

[Solicitors—Messrs. Bell, Brodrick, and Gray, for Messrs. Kensholes and Prosser, Aberdare; Messrs. Smith, Rundell, Dods, and Bockett, for Messrs. Morgan, Bruce, and Nicholas, Pontypridd.]

Court of Appeal. (Bankes, Scrutton, and Atkin, L.JJ.) 1927. July 4.

MACKENZIE-KENNEDY v. AIR COUNCIL.*

Crown—Department of State—Air Council—Action of tort against—Whether competent—Air Force (Constitution) Act, 1917 (7 and 8 Geo. V., c. 51), ss. 8, 9, 10.

No action of tort will lie against the Air Council for acts done in its capacity as such.

This was an appeal by the Air Council from a judgment of Mr. Justice Fraser, delivered in Chambers.

The plaintiff, Mr. Chessborough James Henry Mackenzie-Kennedy, by his statement of claim, said that he was a consulting engineer, a designer of aeroplanes and other aircraft, and the inventor of certain novelties in relation thereto; that he had constructed for and supplied to the defendants an aeroplane according to his invention; and that in February, 1920, he had received from the defendants £31,000 in respect of the work and labour done, materials supplied, and money expended by him in the construction of that aeroplane.

Paragraphs (6) and (7) were in the following terms:—

"(6) The defendants, wrongfully or fraudulently, secretly converted to their own use and benefit and deprived the plaintiff of his property in his said invention or inventions and in the said reports, specifications, designs, plans, drawings, prints, and other documents relating thereto and to the said aeroplane and to the said other aeroplanes, and the information derived from their said inspections of the said aeroplane . . . , whereby the plaintiff has suffered damage.

"The defendants also detained from the plaintiff the said reports, specifications, designs, plans, drawings, prints, and other documents and still so detain them, whereby the plaintiff has suffered damage.

"(7) The defendants, for the purposes complained of in paragraph (6) hereof, conspired with and/or through one Frederick Handley Page and/or Handley

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqrs., Barristers-at-Law.

Page, Limited, and/or others whereby the plaintiff has suffered damage."

An application was made by the defendants for an order that the statement of claim be struck out and the action dismissed or stayed. Master Bonner granted the application. The plaintiff appealed, and Mr. Justice Fraser allowed the appeal. He said that, in the exercise of his discretion, he did not think that the application was one which should be granted or that the action should be dismissed in a summary way.

The defendants appealed.

Mr. H. M. Giveen (the Attorney-General, Sir Douglas Hogg, K.C., with him) appeared for the appellants ; the respondent appeared in person.

Lord Justice Bankes, in the course of his judgment, said :—The plaintiff began an action in the King's Bench Division to which he made the Air Council defendants. The exact nature of his claim is set out in paragraphs (6) and (7) of the statement of claim. It is plain that the action is one founded on tort. In support of his claim the plaintiff delivered particulars of matters going back in date as far as July, 1909. An application was made in Chambers to strike out the statement of claim, or to dismiss or stay the action on the grounds, (1) that the action was frivolous and vexatious, and an abuse of the process of the Court, (2) that the statement of claim disclosed no cause of action, and (3) that the matter was *res judicata*. In support of the last ground the judgment of Mr. Justice P. O. Lawrence, as he then was, in *Rowland and Mackenzie-Kennedy v. Air Council* (41 *The Times* L.R., 545), was relied on. This judgment was recently affirmed in this Court (43 *The Times* L.R., 717), but those portions of the judgment which are relevant to the present contention were not gone into, as it became unnecessary to do so. For this reason I do not propose to deal with this question of *res judicata*, as it would involve a long investigation of a mass of detail. I am not suggesting any doubt as to the correctness of the learned Judge's conclusions, but as no decision was come to upon them, I prefer to rest my judgment on other grounds. With regard to the first ground, I will only say that, inasmuch as the Air Council only came into existence in the month of January, 1918, it is manifest that, to a very large extent, the plaintiff's claim must be frivolous and vexatious.

I rest my judgment, however, upon the second ground of objection, and for the following reasons. The action is plainly one of tort, and is founded upon acts and matters which are alleged to have been done by the Air Council in its capacity as Air Council. That Council is a statutory creation, and was established by the Air Force (Constitution) Act, 1917.

The Lord Justice then read sections 8, 9, and 10 of the Act and an Order in Council of December 21, 1917, made under section 8, and continued : —

It is clear from this outline of the constitution of the Air Council that it is a department of State, and that the acts and matters of which the plaintiff complains in this action, if done at all by members of the Air Council, or by their orders, were acts and matters done by virtue of their statutory position as members of the Council.

In these circumstances it is, I consider, clear that no action for tort can lie against the statutory body which has been set up under the name of the Air Council.

There are many cases in the books in which the law has been laid down and applied. I will only refer to a few of them. In *Raleigh v. Goschen* (14 *The Times* L.R., 36 ; [1898] 1 Ch., 73) an attempt was made to make the Lords Commissioners of the Admiralty and the Director-General of Naval Works responsible for a trespass to land by making the Commissioners and the Director-General defendants to the action. At page 77 Mr. Justice Romer lays down the rule of law in these terms :—

"I will state some general principles of law which I conceive govern this class of cases. . . . It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act, or one not justifiable), he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government or of any officer of State ; and it further appears to me, as at present advised, that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official was employed, or whatever his official position —could be sued ; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of State. I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the department, unless it can be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual, just as a stranger committing the same act would be."

In the action of *Gilbert and Another v. Corporation of Trinity House* (2 *The Times* L.R., 708 ; 17 Q.B.D., 795), in which the corporation unsuccessfully contended that they were acting as servants of the Crown, both Mr. Justice Day and Mr. Justice Wills made observations on the law which seem pertinent to the present case. At page 801 Mr. Justice Day says :—

"All the great officers of State are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals."

This is true of the members of the Air Council, though it was not the case with the Trinity House. At page 803 Mr. Justice Wills expresses a view which applies to the respondent's frequently repeated statement that he is suing the Air Council *qua* Air Council, and not as representing the Crown. The Judge says :—

"I am clear that at common law there is no instance of any person or body having two distinct capacities —in one of which there is no liability to be sued because the person or body is the direct representative of the Crown, and in the other there is a liability to be sued because the capacity is that of a private corporation or a person."

In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and on authority, that no such action is maintainable. The Air Council is not a corporation, and even if it were to be treated as one the respondent's position would not be improved. The most recent case on this point, apart from one which I decided myself, *Public Works Commissioners v. Pontypridd Masonic Hall Company, Limited* (36 *The Times* L.R., 459 ; [1920] 2 K.B., 233), is *Roper v. Commissioners of Works and Public Buildings* ([1915] 1 K.B., 45), where Mr. Justice Shearman refers to an Irish decision, *Wheeler v. Commissioners of Public Works in Ireland*

([1903] 2 I.R., 202), in which Chief Baron Palles (at p. 229) said :—

"Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is, *prima facie*, outside its powers to do anything except for the Crown, and as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it."

The respondent not unnaturally relies, in support of his contention that he had statutory authority for maintaining the action, upon the provision in section 10 of the Act of 1917 that the Air Council may sue and be sued and may for all purposes be described by that name.

Instances might be given in which this provision would confer a right of action against the Air Council, but it is unnecessary to consider them, as for present purposes it is sufficient to say that I entirely agree with the view of Mr. Justice Russell in *Rowland v. Air Council* (39 *The Times* L.R., 228), that, when applied to an action of tort, the authority falls far short of what is necessary to get rid of so well known and so well established a constitutional rule of law as that which I have been discussing. On this point the decision of the Court of Appeal in *Bainbridge v. Postmaster-General and Another* (22 *The Times* L.R., 70 ; [1906] 1 K.B., 178) is instructive. In that case it was decided that the Postmaster-General is not liable in his official capacity as head of the telegraph department of the Post Office for wrongful acts done by his subordinates in carrying on the business of his department even though the provision in section 42 of the Telegraph Act, 1863, that a telegraph company was to be answerable for injuries happening through the act or default of the company or of any person in their employment by reason of the company's works, was by later legislation to be read as applying to the Postmaster-General. In my opinion, the whole of the reasoning of the Master of the Rolls in that case, both on the question whether all the officials of the Air Council who could have been responsible for the acts of which the respondent complains (if committed at all) were officers or subordinate officers of the Crown, and also on the question of the impossibility of reaching the revenue of the country by the present action, is relevant here. I consider that the action is not maintainable against the Air Council. The appeal must be allowed, but, at the request of the Air Council, without costs.

Lord Justice Scrutton.—This is an appeal from an order of Mr. Justice Fraser allowing an appeal against an order of Master Bonner striking out a statement of claim in an action, *Mackenzie-Kennedy v. Air Council* (1925. M. No. 2,796), on the grounds : (1) That the action was frivolous and vexatious ; (2) that the statement of claim disclosed no cause of action against the defendants ; (3) that the matters involved were *res judicatæ*.

To understand the position it is necessary to state the previous litigation. Mr. Mackenzie-Kennedy had been concerned with various Government departments during the war in the experimental manufacture of a very large aeroplane to carry bombs and guns. The transaction began with tenders to the Secretary of State for War in 1915 and 1916, accepted by him. This business gradually changed into experimental manufacture of an aeroplane. In the end of 1916 the New Ministries and Secretaries Act, 1916, set up an Air Board which was apparently constituted by an Order in Council of February 6, 1917, of the holders for the time being of certain offices and additional members. It was not incorporated, and whilst as a Government department the Air Board in fact carried on negotiations with Mr. Mackenzie-Kennedy, no transfer of powers by Order in Council was ever made to it under section 8 of the Act of 1916, nor was its name inserted in any contracts under section 11 (5) of that Act. An Act of 1917 established an Air Council which, by Order in Council, came into existence on January 3, 1918, its constitution being fixed by an Order in Council of December 21, 1917, as consisting of eight holders, for the time being, of named offices and two additional members. It was not expressly incorporated, but section 10 (1) of the Act read : "The Air Council may sue and be sued . . . by that name." All "powers, duties, rights, liabilities, and property" of the Air Board were transferred to it. One of its first acts was to stop all further work on Mr. Mackenzie-Kennedy's aeroplane. He had spent a considerable sum of money on this work, and his first litigation was by a writ issued on June 25, 1919, *Mackenzie-Kennedy v. Air Council* (1919. K. No. 359), to claim remuneration for that work. His claim of over £40,000 was on February 7, 1920, settled by agreement for £31,000, and a receipt was given : "I hereby acknowledge that I have this day received from the Treasury Solicitor on behalf of the Air Council the sum of thirty-one thousand pounds in full discharge of all claims which I may have against the Crown or against the Air Council in respect of the matters set out in a statement of claim delivered in an action entitled *Mackenzie-Kennedy v. Air Council* (1919. K. No. 359) and of all other matters arising out of such action, including the costs incidental thereto." His next proceeding seems to have been a writ issued on August 12, 1921, by his trustee in bankruptcy, Mr. Rowland (1921. R. No. 2,076), to which, by an odd and unsatisfactory agreement, Mr. Mackenzie-Kennedy was added as a plaintiff at a much later stage. This claim went through several versions, but in its final form, after Mr. Mackenzie-Kennedy was joined in 1924, it alleged a contract with the Air Council that secrecy should be maintained in respect of all documents connected with Mr. Mackenzie-Kennedy's work, and a breach of such contract by communication of these documents in the latter part of 1917 and early in 1918 "to a rival contractor Handley Page, and especially communication of an invention of a gun cockpit in the tail of the aeroplane abaft the rudder." It will be noticed that anything before January 3, 1918, was done by the unincorporated Air Board, or its undisclosed members, and not by the Air Council, which only came into existence on that date. There was added a claim in relation to a patent for that tail gunpit based on a denial of the validity of the patent by the Air Council.

A preliminary attempt to stop the action was made by an application to Mr. Justice Russell to strike out the claim on the ground that it was really a claim in contract against the Crown, which could only be brought by petition of right. This succeeded before Mr. Justice Russell (39 *The Times* L.R., 228), but the Court of Appeal took the view that the whole facts should be ascertained (39 *The Times* L.R., 455), and after many vicissitudes the action came on before Mr. Justice P. O. Lawrence in May, 1925, when several days were spent in investigating the facts. The learned Judge decided against the plaintiff on all points (41 *The Times* L.R., 545). He held : (1) That an action of contract would not lie

against the Air Council contracting on behalf of the Crown ; (2) that the contract for remuneration for experimental research on which the plaintiff had recovered £31,000 in his first action contained no provision for secrecy, and that the information and reports which the Air Council had paid for became their unfettered property ; (3) that there had been in fact no communication of matter to Handley Page, who had arrived at his results by independent investigation. The patent claim was disposed of on grounds irrelevant to the present appeal.

It will be noticed that if the plaintiff had any claim against the Air Council as a statutory body in respect of tort, as distinguished from a claim against named individuals for individual tortious acts, he could have included it in this second action. The question whether Mr. Mackenzie-Kennedy had any property in his reports, plans, and documents, so as to prevent the Air Council from using them, and to require delivery of them to him—a claim for conversion or detinue—could have been decided on exactly the same evidence as was used by the Judge to decide the question of contract. The question whether there was any conspiracy between the Air Council and Handley Page to use wrongfully Mr. Mackenzie-Kennedy's information and documents could have been decided on the evidence given in the action on which the Judge found that there was no communication by the Air Council to Handley Page. If the findings of Mr. Justice P. O. Lawrence, which turned mainly on the credibility of the witnesses whom he saw, were correct, there was no claim in tort for detinue, conversion, or conspiracy.

Mr. Mackenzie-Kennedy appealed against the judgment of Mr. Justice P. O. Lawrence by an odd arrangement by which he paid £5 for the privilege of appealing at his own expense on the terms that he should get 20 per cent. of the proceeds of the appeal. The trustee evidently did not think much of the chances of success. But, having appealed, Mr. Mackenzie-Kennedy did not at first proceed with his appeal. Instead on September 9, 1925, he issued a third writ, *Mackenzie-Kennedy v. Air Council* (1925. M. No. 2,796). The writ claimed several matters which were dropped in the statement of claim. The claim delivered on December 16, 1925, alleges agreed confidence and secrecy in respect of the reports and drawings for his aeroplane before and after 1915, and detinue of these documents, and conversion of them to their own use, and also conspiracy with Handley Page for the purposes of such conversion.

When the summons to strike out this statement of claim first came before the Court of Appeal it was pointed out that, Mr. Justice P. O. Lawrence having decided the facts necessary to deal with these questions, the plaintiff had not brought on the appeal against his decision, and this appeal was ordered to come on with the hearing of the appeal on the summons. On the hearing of the final appeal this Court took the view (43 *The Times* L.R., 717) that the claims in contract could all be raised only by petition of right, and not by action against the Air Council, the same view as Mr. Justice Russell, and, this being sufficient to dismiss the appeal, did not hear it any further except in regard to the patent claim, which they also dismissed.

The question now is whether the Court, in the exercise of its inherent jurisdiction, should allow an action to proceed, when the plaintiff has failed in a previous action against the same party to establish any of the facts which he would need to establish in order to support his claims in tort, and has at present a final judgment of Mr. Justice P. O. Lawrence against him on those facts ; and when he did not raise, as he could have done in that action, any of the claims in tort which he now desires to raise, though he took nine days in failing to prove the facts necessary to support these claims. In my view the cases of *Reichel v. Magrath* (5 *The Times* L.R., 552 ; 14 App. Cas., 665), *MacDougall v. Knight* (6 *The Times* L.R., 276 ; 25 Q.B.D., 1), and *Stephenson v. Garnett* ([1898] 1 Q.B., 677) establish that the Court has inherent jurisdiction to strike out as frivolous or vexatious a claim or defence which has either been already decided, in previous proceedings, against the party raising it, or might have been raised in previous proceedings in which the facts necessary to raise it have been decided against the person who now desires to raise them. In the present case the facts or legal incidents necessary to raise a case of conversion of documents, or breach of secrecy with regard to them, or conspiracy with Handley Page, have all been decided against Mr. Mackenzie-Kennedy by Mr. Justice P. O. Lawrence in the previous action, in which he might have raised the allegations of tort which he now bases on the same alleged facts. I think the Court should prevent his doing so again by striking out the writ and claim. In any event, I should have been of opinion that all matters before January 3, 1918, must be excluded from the statement of claim, as I cannot think that any liabilities in tort of individual members of the Air Board were transferred by statute to the Air Council. Further, in view of the line of decision in *Raleigh v. Goschen* (14 *The Times* L.R., 36 ; [1898] 1 Ch., 73) that the head of a department is not liable for torts committed by his subordinates in the execution of his orders, but only for individual torts committed by himself, I have great difficulty in seeing how the Air Council can be sued for conspiracy or conversion, as distinguished from an action against any individual members of the body who themselves conspire or convert. I am disposed to think, though I do not finally decide it, that the appeal should also be dismissed on the grounds stated by Lord Justice Bankes, and in more detail by Lord Justice Atkin.

I allow this appeal, however, on the ground that as the facts necessary to support the action have been already decided by Mr. Justice P. O. Lawrence against the plaintiff in an action in which the plaintiff could have raised the legal claims which he now seeks to base on those alleged facts, the Court has an inherent jurisdiction to dismiss the action as frivolous and vexatious. The appeal should be allowed, and an order made to the above effect. As this is a personal action against an alleged individual, and not against the Crown, the appeal and action should be dismissed, with costs.

Lord Justice Atkin.—This is an action brought by Mr. Mackenzie-Kennedy against the Air Council. The indorsement on the writ appears to be consistent with the action being founded both on contract and on tort. The statement of claim, however, confines the claim to remedies for tort. The summons by the defendants seeks to strike out the statement of claim and further or alternatively have the action dismissed on the ground that it discloses no cause of action, or is frivolous and vexatious. The first ground is based on the contention that the Air Council cannot be sued for a tort ; the second on the contention that the issues sought to be raised by the plaintiff have already been determined against him by the judgment of Mr. Justice P. O. Lawrence (41 *The Times* L.R., 545) in an action brought in the Chancery

Division by the plaintiff against the Air Council; and that the matters are therefore either *res judicatæ* or such that it is vexatious and oppressive for the plaintiff to seek to litigate them over again. On the latter point I need only say that Mr. Mackenzie-Kennedy brought an appeal against the judgment of Mr. Justice P. O. Lawrence to this Court and we dismissed it (43 *The Times* L.R., 717) upon the point taken by the defendants below and approved by the Judge, that the action was founded upon an implied contract to which the defendants never became parties. It therefore became unnecessary to consider the other points decided against the plaintiff by Mr. Justice P. O. Lawrence, and we expressed no opinion upon them. In these circumstances it seems to me that we are not warranted in dismissing this action either as *res judicata* or as being frivolous and vexatious without a discussion of the very points which the plaintiff, by his notice of appeal, desired to review and which we decided not to consider. I therefore propose to deal in this appeal solely with the question whether the action as framed in tort will lie against the Air Council. I am of opinion that it will not. Unfortunately Mr. Mackenzie-Kennedy, who appeared in person, was naturally unable to offer us much assistance on the point of law, and I come to my conclusion with some anxiety lest some matter of importance may have been overlooked.

The Air Council was constituted by the Air Force (Constitution) Act, 1917, which by section 8 (3) provides that an Air Council should be established consisting of one of his Majesty's Principal Secretaries of State and of other members to be appointed in such manner as his Majesty by Order in Council should direct. It provided by section 10 that the Air Council might sue and be sued, and might for all purposes be described by that name, and that it should have an official seal which should be judicially noticed. It further provided by section 8 (3) that on its establishment the Air Board constituted under the New Ministries and Secretaries Act, 1916, should cease to exist, and all the powers, duties, rights, liabilities, and property of that Board should be transferred to the Air Council. Incidentally it may be observed that the provisions of section 10 (3) of the Act of 1916 may by this clause be held to be applicable to the Air Council. That subsection provided that the expenses of each of the Ministries established under the Act, to an amount sanctioned by the Treasury, should be paid out of moneys provided by Parliament. The Air Force (Constitution) Act, 1917, by section 8 (4) further provides for a transfer by Order in Council to the Air Council or the President of the Air Council of property, rights, and liabilities of the Admiralty, Army Council, or Secretary of State for War. Such transfers have been made by Order in Council, the most important for the present purpose being that of April 27, 1918 (Statutory Rules and Orders of 1918, No. 538).

Can then the Air Council so constituted be sued in tort? Unless the Air Council is by its constitution created a corporation I think the answer must clearly be in the negative. If it be a corporation, the liability to be sued is, in my opinion, a more difficult problem, to which I will revert. But unless incorporated the Air Council is but a name for several important officials who have administrative duties assigned to them on behalf of the Crown. It is clearly established that no proceedings to enforce a remedy for tort will lie against the Crown, or against any servant of the Crown as representing the Crown in the proceeding, unless the Crown consents to such proceeding. The Crown itself can do no wrong, and the public revenues cannot be made liable without the Crown's consent to remedy wrongs committed by servants of the Crown. I think that this is the effect of the decision in *Raleigh v. Goschen* (14 *The Times* L.R., 36; [1898] 1 Ch., 73), where it was held that the Lords Commissioners of the Admiralty could not be sued in tort, though they were named individually. There they were described collectively by their official title, and Mr. Justice Romer came to the conclusion that they were sued in their official capacity. I think that perhaps it might be more accurate to distinguish between a suit against a person in his individual capacity and a suit against him in a representative capacity, for I cannot see that if one is partly suing an individual on his personal liability it makes any difference whether one describes him as an official or not. If, however, you sue him as representing some interest or assets other than his own which you seek to bind by the action, it becomes very relevant how you describe him, for it may be found that as a representative he is not liable at all. Now this is clearly true of a representative of the Crown who, as such, cannot be sued in tort. It is, of course, equally clear that individual servants of the Crown who themselves commit torts cannot escape liability by pleading the commands, express or implied, of the Crown. But sued as individuals they expose their own assets alone to liability in the event of judgment against them. Applying these considerations to this action, it appears clear that unless the Air Council is incorporated the name is but a name for the individuals that compose it. I do not think that it can be used at all as the equivalent of the names of its members in a suit which is directed against the members in their private capacity. In any event in this case I think it is plain, plainer even than in the case of *Raleigh v. Goschen* (*supra*), where at least the Lords Commissioners were individually named, that this present action is directed against the members of the Air Council in their official or, as I prefer to say, representative capacity as servants of the Crown, and therefore will not lie. If, however, the Air Council were incorporated, different considerations might apply. The Crown may and does employ as its servant or servants an individual, a joint committee or board of individuals, or a corporation. None can be made liable in a representative capacity for tort; the individuals may be made liable in their private capacity, and I see no reason why this liability should not extend to the juristic person, the corporation, as to the individual. It may be true that the corporation in such a case will have no private assets available for execution, but that may also be true of the individual. One must also face the difficulty that such a corporation will have no servants, for as in the case of individual officials those who serve under it are not its servants but servants of the Crown. It is, therefore, only for torts which are actually committed by it, or to which it is directly privy, as by giving orders for their performance, that it can be made liable. But for such a tort proved, for example, by a minute of an incorporated board expressly commanding the commission of a tort, in principle, as it appears to me, an action would lie, however unprofitable such an action would be. If the action were to be attacked at all it would have to be proved that such a futile proceeding was vexatious and oppressive. I think, therefore, that the decision in *Roper v. Commissioners of Works and Public Buildings* ([1915] 1 K.B., 45) could only be supported on the view that the action was against the Commissioners (who are incorporated) in a representative capacity.

The further objection that any tort would be *ultra vires* the corporation is of quite a different character, and must depend on the duties of the corporation and the circumstances of the particular act complained of. I do not think that the doctrine of *ultra vires* would be of universal application to every tort, or that it would be to the Crown's advantage that it should. The case of *Bainbridge v. Postmaster-General* (22 *The Times* L.R., 70 ; [1906] 1 K.B., 178) seems to depend entirely upon the fact that the Post Office servants, for whose negligence the Postmaster-General (a corporation) was sought to be held liable are servants not of the Postmaster-General but of the Crown.

I have therefore felt it necessary to consider whether it could be contended in this case that the Air Council was a corporation. "To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident," *per* Mr. Justice Littledale in *Conservators of the River Tone v. Ash* (10 B. and C., 349, at p. 384). The learned Judge goes on to consider whether in the case of the Conservators they have a name, a perpetual succession, and a right to sue and be sued in their corporate name. It must be admitted that most, if not all, of these characteristics of a corporation attach to the Air Council. They have a name in which they can sue and be sued, and it would appear that they are to have perpetual succession, for by the Act of 1917, section 8 (3), the property of the Air Board is to be transferred to them, and by section 8 (4) it is contemplated that the property of the Admiralty or Secretary of State for War may be transferred to them by Order in Council. I find, however, that in fact under the Order in Council the property of the Secretary of State for War and such property as the Air Council may acquire under the powers transferred to them are vested not in the Air Council but in the President. I also bear in mind that there were in existence before 1917 various Acts expressly constituting departments of State as corporations. I need only refer to the Acts incorporating for certain purposes the Secretary of State for India in Council (Government of India Act, 1858, section 65) ; the Postmaster-General (Post Office (Duties) Act, 1840, section 67), and the Commissioners of Public Works (Commissioners of Works Act, 1852, section 1). If it had been intended to incorporate the Air Council one would have expected the well-known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.

In these circumstances I am unable as at present advised to find in the words of the Legislature the manifest intention to incorporate, which Mr. Justice Littledale, in the case cited, rightly thought essential. I should, however, deem myself free to reconsider this opinion if hereafter in a case between different parties further assistance were afforded to the Court than could be given by the respondent in the present case. In any event I am also at present inclined to the view that the Air Council, if a corporation, are being sued in a representative capacity, which, as I have said, is impossible, but as that defect could be cured by amendment, upon which we have not heard Mr. Mackenzie-Kennedy, I do not decide on that ground.

For the reasons given I am of opinion that the decision of the learned Master in this case was correct, and that the appeal from the decision of Mr. Justice Fraser should be allowed, and that the action should be dismissed.

[Solicitor—The Treasury Solicitor.]

K.B. Div. } 1927.
(Atkin and Lawrence, L.JJ.) } July 18.

VOSPER v. GREAT WESTERN RAILWAY COMPANY.*

Railways—Passenger's luggage—Hand luggage—Responsibility of railway company—Exception—Loss through negligence of passenger—Onus of proving such negligence.

The plaintiff, who had a third-class ticket by the defendant railway company's line, got a porter to put his suit-case in a first-class compartment and travelled in another part of the train, third class, with some friends whom he found on the train. At the end of the journey the plaintiff's suit-case could not be found. In an action against the railway company for its value,

Held, that as the railway had failed to discharge the onus of proving that the loss of the hand luggage arose by reason of the negligence of the passenger, the plaintiff was entitled to recover.

This was an appeal by the defendant railway company from a decision, given on February 24, 1927, by his Honour Judge Scully, sitting at Marylebone County Court, in favour of the plaintiff, Mr. Stanley Vosper, an insurance assessor, for £51, the assessed value of a suit-case belonging to the plaintiff which was lost on a journey between Exeter and Paddington.

The defendants appealed.

Mr. Barrington-Ward, K.C., and Mr. Kenelm Preedy appeared for the appellants ; Mr. Phineas Quass for the respondent.

Mr. Barrington-Ward, in opening the appeal, said that the plaintiff often spent week-ends at Exeter, using for that purpose a third-class week-end ticket. On Friday, February 26, 1926, he travelled from London to Exeter with a suit-case as his luggage. After spending the week-end there he proceeded by taxicab to St. David's Station at 9.40 on Monday morning, March 1. He gave the suit-case to a porter to be put into the cloak room, intending to return after a morning's fishing and catch the 1.45 p.m. train to Paddington. After the morning's fishing he went to the station at 1.30 p.m., where he saw the same porter, who had collected the suit-case from the cloak room.

The plaintiff's evidence was that when he was crossing the bridge he saw the porter put the suit-case into the luggage van of one of the coaches which were standing in the bay awaiting the arrival of the Plymouth express, to which they were to be attached. The Judge rejected that evidence, and found that the plaintiff had agreed with the porter that the suit-case should be put into a first-class compartment, and that that was done.

When the Plymouth express arrived, the plaintiff found some friends of his in a third-class compartment. After putting his cap and stick into a third-class compartment, he joined his friends and went with them to the restaurant car, returning with them later to their compartment. When the train arrived at Paddington Station the plaintiff's suit-case was not to be found, and he brought this action against the railway company.

He (counsel) submitted that the railway company

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

were not common carriers in respect of luggage kept in a compartment in which a passenger was not travelling. The County Court Judge was wrong in holding that the onus was on the company to show that the plaintiff had not taken reasonable care in looking after his luggage. In the present case the plaintiff never went near his luggage at any stage of the journey and took no steps to prevent the loss. He referred to *Great Western Railway Company v. Bunch* (4 *The Times* L.R., 356 ; 13 App. Cas., 31), and *Great Western Railway Company v. Talley* (L.R., 6 C.P., 44).

Mr. QUASS submitted that the onus of proof was on the railway company to show that the loss occurred owing to the plaintiff's negligence. There was no evidence when the loss of the case occurred.

LORD JUSTICE ATKIN, in giving judgment, said that this was an interesting case for railway passengers. His Lordship stated the facts, and said that they were bound to accept the County Court Judge's finding that the suit-case had been placed in a first-class compartment at the request of the passenger, who held a third-class ticket. On the arrival of the train at Paddington the suit-case could not be found, and an action was accordingly brought against the company in respect of the loss. With regard to the liability of a railway company as common carriers in respect of luggage lost from a railway compartment, a modification had been introduced to the effect that the company was not liable if it could show that the loss in the case of hand luggage arose by reason of negligence of the passenger. The law as to a railway company's liability had been authoritatively laid down in *Great Western Railway Company v. Bunch* (4 *The Times* L.R., 356 ; 13 App. Cas., 31), where Lord Watson said, at p. 46 :—

"It does not admit of question that passengers' luggage, duly delivered to the company's servants for carriage in the railway van, remains during its transit at the risk of the company as common carriers ; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers, in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent Judges have differed as to the nature of the contract under which hand luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care, others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same, but, according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passenger ceases for a time, and his hand-luggage is committed to the exclusive charge of their servants."

And at p. 48 Lord Watson said this :—

"However that may be, I prefer the principle which appears to me to have been adopted in *Richards v. London, Brighton, and South Coast Railway Company* (7 C.B., 839) and *Butcher v. London and South-Western Railway Company* (16 C.B., 13). I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory."

Mr. Barrington-Ward, in accepting the view there expressed, laid stress on the words "where the passenger has assumed control," and said that those were essential words. He (the Lord Justice) thought that it was impossible thus to limit the doctrine. Everyone knew that in these days hand luggage, in many instances, was carried in circumstances where the luggage was placed in the corridor in as close proximity to the compartment as possible. He did not think that it could be the duty of a passenger to remain in the compartment all the time, having regard to the fact that he might be invited by the company to be absent for a time in order to resort to another part of the train to take meals. It was an ordinary incident that a passenger who had chosen a compartment might change his mind *en route* and wish to travel in another compartment for the purpose of joining friends, or because, being originally in a non-smoking compartment, he desired to smoke, and, therefore, had to choose another compartment. In that event the company remained still under the liability to carry his luggage as common carriers, subject to the limitation already stated.

In the present case the County Court Judge had held that he was unable to say that the loss had been contributed to by the passenger. He had thrown the onus on the railway company—namely, by holding that there was a duty on them to show that the loss occurred by want of care on the part of the passenger. The only question of difficulty which arose was that the luggage, which belonged to a passenger holding a third-class ticket, had been placed in a first-class compartment. If it had been established that the passenger had the intention of travelling first-class, different considerations might have arisen. Sometimes the change of class was due to violation of rights ; sometimes it was done with the full intention of paying the excess fare. And it certainly could not be said that a third-class passenger was an outlaw when he travelled first-class. On the evidence given he was of opinion that the decision of the Judge was correct, and the appeal therefore failed.

LORD JUSTICE LAWRENCE said that he agreed. *Bunch's* case (4 *The Times* L.R., 356 ; 13 App. Cas., 31) had established that the railway company were under a liability as common carriers, subject to this, that it was the duty of the passenger to take reasonable care. If the company proved that the loss was caused by the neglect of the passenger to take reasonable care, then they were entitled to succeed. In his opinion the learned Judge had put the onus in the right place.

[Solicitors—Mr. A. G. Hubbard ; Mr. H. F. K. Ireland.]

K.B. Div. (Sankey, J.) } 1927. July 19.

WISBECH RURAL DISTRICT COUNCIL v. WARD.*

Negligence — Architect — Building contract — Interim certificates — Loss to employers — Payment of same amount twice over.

The plaintiffs, a local authority, for the purpose of a housing scheme, made a contract with the builders under which the defendant was the architect. Clause 29 of the contract provided :

* Reported by J. W. HALL, Esq., Barrister-at-Law.

"No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

The Ministry of Health had the right to require the use of materials which the Disposals Board had for sale. While the houses were in course of erection the defendant gave interim certificates in pursuance of clause 29, and he also gave documents under which the plaintiffs paid the Disposals Board for articles supplied by the Board. Owing to the negligence of the defendant the plaintiffs had to pay both the builders and the Board for the same material, and the amount so overpaid to the builders could not be recovered from them. In an action by the plaintiffs to recover from the defendant the amount overpaid the defendant contended that he was a *quasi*-arbitrator and therefore not liable.

Held, that in view of the terms of the particular contract, and in view of the course of business under it, the defendant was not, in giving the interim certificates, acting as an arbitrator or *quasi*-arbitrator, but was merely acting as agent for the plaintiffs, and was liable to pay the amount claimed.

His Lordship delivered a considered judgment in favour of the plaintiffs in this action, which was tried before him at Cambridge Assizes. The plaintiffs, the Wisbech Rural District Council, sought to recover from Mr. Frank Ward, the architect employed for a housing scheme of the plaintiffs, £221 3s., which they alleged they had been compelled to pay twice through the negligence of the defendant in granting interim certificates.

The facts and the defences raised are stated in his Lordship's judgment.

The Hon. Sir Malcolm Macnaghten, K.C., and Mr. Gerald Dodson appeared for the plaintiffs; Mr. Schiller, K.C., and Mr. Linton Thorp for the defendant.

Mr. Justice Sankey, in delivering judgment, said:—In this action, the Wisbech Rural District Council sue Mr. Frank Ward for damages for negligence.

The facts are as follows:—Shortly after the war the plaintiffs were minded to erect a number of houses under a Housing Scheme and for that purpose they made a contract with Messrs. Wright and Wilson on September 30, 1920. The defendant was the architect under that contract. The Ministry of Health had rights in connexion with the scheme and they could compel war material which the Disposals Board had for sale to be used. The Ministry further had the right of revising the prices and making allowances in the event of the prices of labour or material rising or falling during the continuance of the contract.

In the years 1920-21 the houses were in course of erection, and the defendant gave 12 interim certificates, the first on November 29, 1920, and the last on November 24, 1921, in pursuance of clause 29, which regulated the method of payment and which is as follows:—

"No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

It is unnecessary for the purposes of my judgment to go into minute details, but it is sufficient to say that in addition to giving those certificates to the builder the defendant also gave documents under which the plaintiffs paid, and in my opinion rightly paid, the Disposals Board for some of the prime cost articles, if they may so be called, supplied by the Board. Unfortunately, he gave some interim certificates and documents under which the plaintiffs had to pay both the builders and the Board for the same material, chiefly consisting of baths. I find as a fact, indeed it was not really disputed by the defendant, whose memory was not of such a character as enabled the Court to place absolute reliance on it, that, owing to the defendant's negligence, he certified that a sum of £221 3s. was due both to the Disposals Board and to the builders. The plaintiffs' witnesses said, and I accept it, that they had paid this sum twice over. The defendant said: "I allowed for the baths in my certificate to the builders and the plaintiffs have paid the builders for them; I have also certified that the Disposals Board was entitled to be paid for the baths, and the plaintiffs have paid them also for the baths."

After considerable delay, which was due to the fault of the defendant, the parties endeavoured to get a final settlement of the accounts and, as late as October, 1923, the defendant went through the accounts with some of the plaintiffs' officials and, in effect, admitted that he had made a mistake. He did not deny the correctness of the sum paid twice over and promised to obtain a refund from the builders. The plaintiffs gave the defendant an opportunity, at his request, to recover the amount of the money, if he could. Unfortunately, the builders dissolved partnership, and one went bankrupt. The present writ was then issued to obtain from the defendant the overpaid money. I find that owing to the negligence of the defendant the plaintiffs have had to pay the sum of £221 3s. twice over.

On behalf of the defendant four points were taken:—(1) That the defendant was a *quasi*-arbitrator, and, therefore, not liable. (2) That the action is premature because there is power to rectify under a final certificate and no final certificate has at present been issued. Should that final certificate be issued it would be found that the builders have not been overpaid, because a sum of £221 11s. 8d. is due to them in respect of sums which they ought to be allowed for paying increased wages, and so, in effect, the plaintiffs have suffered no damage. (3) If the matter cannot be rectified there has been a final certificate contained in a document known as Summary No. 4, which was the document gone into between the parties to find what the exact position was, and the defendant has issued his final certificate and cannot be sued for negligence. (4) If the defen-

dant was negligent, so, too, were the plaintiffs for not keeping and checking their accounts.

I will deal with the last three points at once. As to (2), in my view there is no power to rectify by giving a final certificate, and for several reasons :—(*a*) By reason of the delay in this matter which has been caused by the defendant. As far back as 1923 he admitted the mistake, and he was allowed time to see whether he could not get the money out of the builders. They, as above pointed out, were in a partnership, which came to an end a considerable time ago. Subsequently Mr. Wright, who carried on the business by himself, became insolvent, and was adjudicated a bankrupt. (*b*) In my view the builders were not entitled to any sum at all in respect of an increase in wages, and, in fact, the Ministry disallowed it. As to (3), in my view Summary No. 4 was not a final certificate. Moreover, it was not intended by the defendant to be one, nor was it issued or accepted as such. The real question here is whether the defendant was negligent in giving an interim certificate. As to (4), this is a question of fact. I find that the plaintiffs were in no way negligent, and that there was no breach by them of any duty which they owed to the defendant.

I therefore turn to the important part of the case. As to (1), Was the defendant a *quasi*-arbitrator, and is he, therefore, not liable ? In my opinion an architect under a building contract may occupy two positions :—(*a*) He may be merely an agent of the building owner ; or (*b*) he may be placed in the position of an arbitrator, or *quasi*-arbitrator. If he is merely acting as an agent for the building owner, he may be liable for negligence. If he is acting as an arbitrator or *quasi*-arbitrator, he is clothed with the duty of exercising an impartial judgment (*Chambers v. Goldthorpe*, 17 *The Times* L.R., 304 ; [1901] 1 K.B., 624, at p. 645), and he will not be liable for mere negligence. He will only be liable when he has been shown to be fraudulent. In this case there is no suggestion that the defendant has in any way been fraudulent.

It was urged before me that in the case of *Stevenson v. Watson* (4 C.P.D., 148) both Lord Coleridge and Mr. Justice Denman said that in circumstances like the present the defendant would have been in a *quasi*-judicial position. As it appears to me, they said no such thing. The facts of that case have to be carefully looked at. The plaintiff was a builder. The architect had issued his final certificate and refused to reconsider it, and it was held on demurrer in that particular case "that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie." But Mr. Justice Denman points out at page 161 that the question is, What duty did the architect undertake ? That depends upon the nature of the employment of an architect who acts under a contract of that kind. The remark at the bottom of that page must be taken to refer to the facts of that case.

A more accurate statement of the law, if I may be allowed to say so, is that of the Master of the Rolls, Lord Justice A. L. Smith, in *Chambers v. Goldthorpe* (*supra*), at page 634 :—

"I have no doubt that, under many clauses of the building contract in this case, the plaintiff acted merely as the agent for the defendant, the building owner, for the purpose of seeing that the builder did his work properly, and used proper materials. As regards matters in which the plaintiff was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and the plaintiff would be liable to an action by his employer if he acted negligently in such matters."

Although it is probably right to say that in giving a final certificate the architect acts in a *quasi*-judicial character unless there is some express clause in the contract to contradict it, it cannot, I think, be asserted that in giving an interim certificate he is so acting. Personally, I should have thought that the inference was just the other way—namely, that in giving an interim certificate he is merely acting as agent for the building owner unless there is something in the contract to contradict that relationship. But, after all, the contract must be looked at to see whether or not in giving an interim certificate the architect was acting as an arbitrator or *quasi*-arbitrator.

Having regard to the course of business under this contract, and having regard to the clause dealing with the method of payment, especially clause 29 (1), (3), and (5), I have come to the conclusion that, in giving these interim certificates, the architect was not acting as an arbitrator or as a *quasi*-arbitrator. The interim certificates were not made with a view to regulating the advances and showing how much should be paid on account—*Tharsis Sulphur and Copper Company v. M'Elroy and Son and Others* (3 App. Cas., 1,040 ; see *per* Lord Blackburn, page 1,049). The defendant was deciding no dispute, he was settling no final balance ; he was, as I think, merely acting as agent for the plaintiffs. He was beyond all question negligent, and, in my opinion, he is liable to pay the amount claimed.

There must be judgment for the plaintiffs.

[Solicitors—Messrs. Lee, Ockerby, and Co., for Messrs. Sharp, Wade, and Whittome, Wisbech ; Messrs. Withers, Bensons, Currie, Williams, and Co., for Messrs. Metcalfe, Copeman, and Pettefar, Wisbech.]

Court of Appeal. (Bankes, Atkin, and Lawrence, L.JJ.) 1927. June 30.

THE JUPITER.*

Ship—Title—Russian ship—Soviet decree for nationalization—Sale by Soviet Government to Italian company—Right to possession.

The plaintiff company was a Russian ship-owning company, and by a Russian decree made in 1918 the company's property was nationalized and it passed to the Soviet Republic, provided that the Soviet Republic took possession of it. The plaintiff company's business having been moved to France in 1919, the French Courts appointed an administrator, and to this office the plaintiff B. ultimately succeeded. In 1922 one of the plaintiff company's ships was laid up at an English port, and the master handed her over to the London representatives of the Soviet Government, and in 1924 she was sold on behalf of that Government to the defendants, an Italian company. In an action claiming that the plaintiffs were the lawful owners of the vessel

* Reported by T. W. Morgan and E. J. M. Chaplin, Esqrs., Barristers-at-Law.

and that possession should be given to them, the evidence was that the decree did not transfer property which was not within the jurisdiction of the Soviet Republic, and the Trial Judge came to the conclusion that it was not proved that the ship was within the territory of the Soviet Republic at the time of the decree.

Held, that the defendant company had failed to establish a title superior to that of the plaintiff B., and that the latter had a sufficient possessory title to maintain the action against the defendant company and was entitled to possession.

Decision of Hill, J. (43 *The Times* L.R., 210 ; [1927] P., 122), affirmed.

This was the defendants' appeal from the judgment of Mr. Justice Hill (43 *The Times* L.R., 210 ; [1927] P., 122) in an action brought in the Admiralty Division in respect of the steamship Jupiter.

The plaintiffs were the Compagnie Russe de Navigation à Vapeur et de Commerce, and MM. Claude M. A. A. E. Bourgeois and Leonidas Tcheloff and Gregoire Margoline, on behalf of themselves and others, trading as the Compagnie Russe de Navigation à Vapeur et de Commerce.

The nominal defendants were an Italian company of shipbreakers, the Cantiere Olivo Società Anonima, although the action was really defended by the Union of Socialist Soviet Republics.

The facts were shortly as follows :—The Compagnie Russe, under its Russian name of "Ropit," carried on business in Russia before the revolution, having a head office in Petrograd, its ships being registered at Odessa. In 1917 the head office was transferred to Odessa. At the beginning of 1919 the business was, apparently, moved to France and the ships traded from Marseilles. After a time issues arose between the company and its shipmasters, with the result that the French Courts appointed an administrator, to which office the plaintiff Bourgeois eventually succeeded.

In September, 1922, owing to the general depression of the shipping industry, the Jupiter was laid up at Dartmouth in the charge of the master, a Captain Lépine. In March, 1924, while the vessel was so laid up, the master handed her over to the representatives of the Soviet Government in London. That step, he told the Court, was taken from patriotic motives. The plaintiffs alleged that he was influenced by bribes or threats.

In those circumstances an action was instituted in the Admiralty Division by the Compagnie Russe, claiming possession of the Jupiter. The Soviet Government, which defended the action, successfully pleaded "sovereign rights and privileges," and Mr. Justice Hill, on May 29, 1924, set aside the writ and stayed all proceedings in the action on the ground that the Jupiter was a Russian ship and that the Russian Government, having asserted property in the vessel and declared its unwillingness to submit to the jurisdiction, could not be impleaded in the British Courts (40 *The Times* L.R., 673). On July 17, 1924, the Court of Appeal upheld that judgment of Mr. Justice Hill (40 *The Times* L.R., 815 ; [1924] P., 236).

The Russian Government claimed to be the owners of the vessel under a decree for the nationalization of Russian merchant ships and also asserted that the plaintiff company had no legal existence by reason of the operation of a Soviet decree for the liquidation of Russian private companies.

In September, 1924, the Arcos Steamship Company, Limited, on behalf of the Soviet Government, sold the Jupiter to an Italian company, the Cantiere Olivo Società Anonima. On October 8, 1924, the plaintiffs issued the writ in the present action, claiming against the Italian purchasers a declaration that the plaintiffs were the lawful owners of the vessel and that possession should be given them, or, alternatively, judgment for the value of the ship, and damages.

The Soviet Government at once moved to stay proceedings in this action also, but the President, Lord Merrivale, who was upheld on appeal by the Court of Appeal (41 *The Times* L.R., 321 ; [1925] P., 69), dismissed the motion, holding that the Russian State was not impleaded by the action, which was against an Italian company, and that the Admiralty Court had jurisdiction to entertain a claim by one foreigner against another foreigner for possession of a foreign ship that was within the territorial jurisdiction.

The action then came before Mr. Justice Hill (43 *The Times* L.R., 210 ; [1927] P., 122), who held that the shipmaster had betrayed his trust to his employers in France, in whom was vested the right of possession. The result of his judgment was to hold that the plaintiff, M. Bourgeois, was in March, 1924, wrongfully deprived of possession ; that no one had established any title superior to that of M. Bourgeois ; and that, therefore, M. Bourgeois must have judgment for possession. He directed that the name of the Compagnie Russe de Navigation à Vapeur et de Commerce, as plaintiffs, should be struck out of the writ, and he formally pronounced against the claims of two of the plaintiffs—Tcheloff and Margoline. He granted a declaration that the plaintiff Bourgeois was entitled to possession of the Jupiter at the date of the writ, and gave judgment for him for £7,800, with costs. He refused the application of M. Bourgeois for interest, as damages, because it was a matter of mere speculation whether he would have been in any better position if he had had possession of the ship in October, 1924, rather than of £7,800 at the date of the judgment.

The defendants appealed.

Mr. Dunlop, K.C., and Mr. H. L. Murphy appeared for the appellants ; Mr. Langton, K.C., and Mr. Carpmael for the respondents.

The Court did not call on counsel for the respondents.

Lord Justice Bankes, in giving judgment, said that two main questions were raised in effect—(1) Whether the Italian company had a title to the ship which was superior to any title which M. Bourgeois could claim as administrator appointed by the French Court ; and (2) whether the French administrator had established a sufficient possessory title to maintain the action. Of those two questions the second was the more important, and if that title were established it became unnecessary to consider the first question. The second question depended partly on the effect of Russian law, which had to be treated as a question of fact, and partly also on what might be called a pure question of fact. On both those questions of fact the learned Judge below had arrived at a clear conclusion. He (the Lord Justice) thought there was ample evidence upon which that conclusion could be arrived at and there was no reason for differing therefrom.

Upon the first point the case for the Italian company was that the Jupiter originally belonged to

a Russian company whose headquarters were in Petrograd and which was governed by Russian law. By a decree made in January, 1918, the whole of the property of this Russian company was nationalized and, therefore, the property passed to the Soviet Republic, provided that that Republic was in a position to, and did in fact, take possession of the property of the company, including the Jupiter. It was said that the effect of the decree, coupled with the taking of possession in March, 1924, constituted a complete transfer of property in the Jupiter to the Soviet Government, from which the Italian company had bought the vessel.

The answer to that, as found by Mr. Justice Hill, was that, assuming the Russian decree to be the decree contended for and that the circumstances which occurred in March, 1924, amounted to a taking of possession, yet the Italian company had not made out their case. One reason for that conclusion was that on the evidence with regard to Russian law the decree did not operate to transfer property which was not within the jurisdiction of the Soviet Republic. After going into the whole question, Mr. Justice Hill came to the conclusion that it was not proved that this ship was within the territory of the Soviet Republic at the time of the decree. If that were right—and he saw no reason to doubt the Judge's conclusion—it followed that the Italian company had failed to establish the superior title which they set out to prove.

The other question which arose was whether the Judge was right in holding that M. Bourgeois, who had been appointed by the French Court as administrator of the property of a number of persons who had sought to transfer the business of the Russian company to Paris and were managing at least some of the vessels (including the Jupiter), had a sufficient possessory title to enable him to maintain the action. Upon that it was plain from the order of the French Court that M. Bourgeois had a sufficient title to maintain the action against anyone who could not establish a superior title.

The result was that the appeal failed and must be dismissed.

LORD JUSTICE ATKIN and LORD JUSTICE LAWRENCE concurred.

[Solicitors—Messrs. Wynne-Baxter and Keeble; Messrs. William A. Crump and Son.]

Chan. Div. (Russell, J.) } 1927. July 14.

IN RE CASSEL—PUBLIC TRUSTEE v. MOUNTBATTEN.*

Revenue — Estate duty — Property passing on death—Principal value—Method of assessing duty—Right of beneficiary to apportionment of duty—Finance Act, 1894 (57 and 58 Vict., c. 30), ss. 1, 2 (1) (*b*).

By his will the testator left Brook House, of which he had a lease expiring in 1995, to Mrs. C. for life, and on her death to Lady L. for life. Mrs. C. died in 1925. The testator directed that the rent, rates and taxes, outgoings, and cost of repairs of Brook House should always be paid by his trustees out of the income of his residuary estate. The summons asked by whom the estate duty payable at Mrs. C.'s death on account of the annual benefit, agreed at £5,000 a year, conferred on the person for the time being entitled to Brook House was to be paid, and secondly how it was to be assessed.

Held, that on the death of Mrs. C. the property which passed was the right to the benefit of the annual sum of £5,000; that the estate duty on the property must be borne by the person to whom the property passed, but on equitable terms; that in the first instance the estate duty should be paid out of residue, and the residue be recouped by a policy being taken out on the life of Lady L. for such an amount as would at her death produce a sum equal to the duty and be vested in the trustees; and that the interest on the estate duty and the policy premiums should be retained and paid by the trustees in each year out of the £5,000.

Sir Ernest Cassel held a lease of Brook House, and the stables at No. 5, Woods-mews, for a term of 90 years from September 29, 1905. He bequeathed the stables and house, with the furniture, pictures, and other articles of household use and ornament to his trustees upon trust to permit his sister, Mrs. Wilhelmina Cassel, to have the use and enjoyment thereof for life. She died on September 16, 1925. After her death the trustees were to hold the house and contents upon similar trusts in favour of his granddaughter, Edwina Ashley, now Lady Louis Mountbatten, and after her death on trust for such of her children as she should by deed or will appoint and, in default of appointment, upon trust for the first son, or, failing a son, the first daughter attaining the age of 21 or marrying. Subject to those trusts there were similar successive trusts in favour first, of his granddaughter, Ruth Ashley (now Mrs. Cunningham Reid) and her family; secondly, in favour of his nephew, Sir Felix Cassel, and his family; thirdly, in favour of his (Sir Ernest's) niece, Mrs. Jenkins, for life, and after her death in favour of her daughter, Marjorie, now Countess of Brecknock, and, on her death, in favour of such children as she should by deed or will appoint and, on failure of appointment, in favour of the first son, or failing a son, the first daughter attaining the age of 21 or marrying. The testator then directed that in the event of the failure or determination of the trusts declared of Brook House it should be offered as a gift to the then reigning English Sovereign or, if not accepted, be held on trust for King Edward's Hospital Fund for London. The testator also directed that "the rent outgoings, rates and taxes for the time being payable in respect of the said messuage and premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall be always paid by trustees out of the income of my residuary personal estate."

The testator then devised and bequeathed his residuary real and personal estate upon trust for sale and conversion and disposed of it as follows:—25/64ths of the whole for the benefit of his granddaughter Edwina and her children and issue, 15/64ths of the whole for the benefit of his granddaughter Ruth and her children and issue, 8/64ths of the whole for the benefit of Mrs. Jenkins and her children and issue, and 16/64ths of the whole for the benefit of Sir Felix Cassel and his children and issue.

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

In this summons the Public Trustee, one of the trustees of Sir Ernest Cassel's will, asked (1) whether the estate duty, which became payable on the death of Mrs. Wilhelmina Cassel on account of the above annual expenditure directed by the testator, ought to be borne by Lady Louis Mountbatten, the present tenant for life, or by the residuary personal estate of the testator, or in any other or what manner; and (2) how such estate duty should be assessed.

Mr. H. C. Bischoff appeared for the plaintiff; Mr. Wilfrid Greene, K.C., and Mr. J. V. Nesbitt for Lady Louis Mountbatten; Mr. R. Turnbull for her infant daughter; Mr. Ashton Roskill for Sir Felix Cassel and Mrs. Jenkins; Mr. Maugham, K.C., and Mr. W. M. Hunt for the other infant defendants, and the Countess of Brecknock and Mrs. Cunningham Reid; and Mr. Stamp for the Inland Revenue Commissioners.

Mr. Justice Russell delivered the following considered judgment:—

The questions now raised for decision are, (1) how the estate duty which became payable on Mrs. Cassel's death on account of the annual expenditure provided for in respect of Brook House by the special clause should be borne as between Lady Louis and the testator's residuary estate; and (2) how such duty should be assessed. The Commissioners of Inland Revenue have consented to be joined as defendants for the purpose of being bound by the judgment on the second question.

The following matters were agreed between the parties in the course of the argument—namely, (1) the average annual income earned by the whole estate of the testator is 6.39 per cent.; (2) the rate of estate duty payable in respect of Mrs. Cassel's estate is 29 per cent.; and (3) the average annual amount of the benefit conferred by the special clause on the beneficiary for the time being entitled under the will to Brook House is £5,000.

Dealing first with the second question, the point resolves itself into the question how the principal value (upon which the estate duty must be levied and paid) is to be ascertained; in other words, whether, as regards the benefit conferred by the special clause, property passed on the death of Mrs. Cassel so that the case falls within section 1 of the Finance Act, 1894, by force of the provisions of that section), or whether the case falls within section 1 only by virtue of the provisions of section 2.

If I were unassisted or unimpeded by previous authority I should have said that the case was only brought into charge under section 1 by virtue of the provisions of section 2. I should have thought that where a life interest in A ceased by A's death, with the result that an interest in B which during A's life was reversionary became an interest in possession, no property passed on A's death. A's interest merely ceases, no part of it is transferred to B, or passes to B. I should have thought that such a case fell directly within the provisions of section 2 (1) (*b*) and only came within the charging section, section 1, by virtue of section 2. If this were the correct view, the principal value would be ascertained under the provisions of section 7 (7) (*b*) upon what is sometimes called the slice theory. That is to say, the principal value would be the capital sum which at 6.39 per cent. would produce £5,000, say £78,250. The estate duty would be payable out of the residuary estate, but a portion of the interest thereon would be borne by the person for the time being entitled to the benefit of the special clause. Such person would bear the same proportion of the whole interest as the £78,250 bears to the value of the whole residuary estate including the £78,250. That is to say, the £5,000 per annum applicable under the special clause would be reduced by that amount of interest accordingly. This method of apportioning the burden of the estate duty would be in accordance with the decision of the Court of Appeal in *In re Palmer* ([1916] 2 Ch., 391).

This indeed was the contention before me of counsel for the Commissioners of Inland Revenue, who definitely contended that in the ordinary case of property settled on A for life with remainder to B estate duty was leviable on A's death not under section 1 *simpliciter*, but under section 1 by virtue of section 2. In other words, such a case was a section 2 case and not a section 1 case; it was a section 2 case to which section 7 (7) (*a*) was applicable. On this footing it was argued that the case before me was a section 2 case to which section 7 (7) (*b*) applied.

As before indicated, this view appeals strongly to me if I am at liberty to adopt it. It is said, however, on the other side that I am not free to adopt this view; that upon the death of Mrs. Cassel property passed within the language of section 1, and that section 2 never comes into play at all; and this on the authority of the House of Lords in *Cowley v. Commissioners of Inland Revenue* (15 *The Times* L.R., 270; [1899] A.C., 198). I have carefully considered *Cowley's* case (*supra*), and in my opinion it prevents me from holding that the present case is not a section 1 case but a section 2 case. In *Cowley's* case (*supra*) a tenant for life had died, with the result that the tenant for life in remainder had become tenant for life in possession. The main question for decision was whether estate duty was payable upon the gross value of the settled estate without deducting the amount of sums previously raised by mortgages of the fee. It was held that the amount of the mortgages must be deducted on the ground that the property which passed to a new tenant for life was the equity of redemption in the entire estate. Some of the Lords concerned in that decision dealt with the case on the alternative footings of section 1 and section 2, arriving on either view at the same result; but they all, I think, took the view that the case fell under section 1 and not section 2. Lords Halsbury, Macnaghten, Morris, Shand, and Davey clearly said so. If this be so, then section 2 would not come into consideration. To borrow Lord Macnaghten's language (at p. 213), the provisions of section 2 "do not . . . refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass." I feel constrained to hold that the present case falls within section 1.

What then is the property which passes on Mrs. Cassel's death? In my opinion the true answer is the benefit of the annual sum payable under the special clause. The duration of this provision is for a term which must expire in 1995. It may expire earlier if Brook House is sold; but in view of the benefits conferred by the special clause this event though possible is improbable. In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the persons for the time being entitled under the will to the enjoyment of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mrs. Cassel.

Next, how is the principal value of that property to be ascertained? The machinery provided by the Act is section 7 (5) supplemented to some extent by

section 7 (8). That machinery does not exactly fit the present case, because from the personal nature of the provision, the benefit of it could not be sold at all; an outside purchaser would not obtain delivery of the goods. Nevertheless, the machinery must be made to fit, and I think it can be made to fit. It was made to fit in the Irish case of *Attorney-General v. Jameson* ([1905] 2 I.R., 218). The value cannot be ascertained by reference to market price, because there can be no market. But a hypothetical market price at Mrs. Cassel's death could be fixed by ascertaining the value of the £5,000 per annum over the unexpired period of the special clause. This value should not be the full value, for the owner of Brook House does not receive the annual sum, he only enjoys the benefit of payments made in respect of his property, all of which do not necessarily represent payments which he would otherwise have made out of his own pocket. To some extent, therefore, the full value would be in excess of the true value. Further, there is always a possibility of the special clause ceasing to operate before 1995 in the event of Brook House being sold. There should, I think, be no difficulty in the Commissioners' taking all these matters into consideration and forming a fair opinion of the principal value, subject, of course, to the right of appeal given by the statute.

Having ascertained the principal value on the above footing, the first question raised by the summons then arises. I must here proceed on general principles. Various suggestions were made before me. It would, I think, be wrong to say that the present tenant for life must herself pay the duty out of her own pocket. The duty at 29 per cent. must obviously be a large sum; and her period of enjoyment of the benefits of the special clause might not be sufficiently prolonged to recoup to her the disbursement. On the other hand, residue has not benefited by the death of Mrs. Cassel. The charge on residue continues throughout the duration of the term. The death of Mrs. Cassel has not reduced or diminished the burden. Accordingly, in my opinion, residue should not permanently bear any part of the burden. The burden must be borne by the person to whom the property has passed—but upon equitable terms. The extent of her burden should be made as far as possible payable out of and commensurate with her benefit. This can, in my opinion, be properly achieved in the following manner: Let the amount of the estate duty be raised and paid out of the residuary estate. Let a policy of assurance be effected on the life of Lady Louis to cover the amount of such duty, and let that policy of assurance be assigned to the trustees. Let the interest on the amount of the duty and the premiums on the policy be retained and paid by the trustees out of the annual sum which would otherwise be payable under the special clause. The result will be that on the death of Lady Louis the residue will be fully recouped and she will have borne the burden of the duty to the extent of the annual diminution of her benefit under the special clause.

Before parting with the case I must say a word about *In re Palmer* (*supra*). It was urged that this case was in both its aspects governed by that decision. In many respects the two cases resemble each other, and if I had been able to hold here that this was a section 2 case I should have applied *In re Palmer* (*supra*). But in *In re Palmer* (*supra*) the question as between sections 1 and 2 was not before the Court. The Inland Revenue was not represented. The question was simply this—how as between the persons interested in residue was the burden of the estate duty already paid as on a section 2 case to be borne? The hands of the Court were tied to that extent. The case had to be treated on the footing of section 2 being the section to be considered, and not section 1.

In the result, I make the following declarations:—

1. Declare that the estate duty ought in the first instance to be borne by the residue, and that the residue should be recouped by means of a policy of insurance on the life of Lady Louis to be vested in the trustees, securing payment at her death of a sum equal to the amount of the duty, the interest on the amount of the duty and the policy premiums being retained and paid by the trustees in each year out of the sum which would otherwise have been applied by them under the special clause.

2. Declare that such duty ought to be charged upon the principal value (to be ascertained under section 7 (5) and (8) of the Finance Act, 1894) of the right to enjoy for a period expiring at the latest on September 29, 1995, the benefits conferred by the special clause.

[Solicitors—Messrs. Norton, Rose and Co.; Messrs. Nicholl, Manisty and Co.; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. July 7.

FULLWOOD v. HURLEY.*

Principal and Agent—Double commission—Hotel broker.

A hotel broker, who is acting as the vendor's agent for reward, is not entitled to enter into a second agency of the like kind on behalf of the purchaser, unless this arrangement is assented to with full knowledge by the original principal.

This was an appeal by the plaintiff from the judgment of a Divisional Court, consisting of Lord Justice Bankes and Mr. Justice Roche. The question raised was whether a hotel broker, who had received commission from the vendor on the sale of a hotel, could also claim commission from the purchaser. The case came before the Divisional Court on an appeal by the defendant from the Judge of the Leighton Buzzard County Court.

The plaintiff, Mr. Reginald Joseph Fullwood, of 156, Strand, W.C. (trading as Fullwoods), hotel broker, sued the defendant, Mr. Reginald William Hurley, the Hunt Hotel, Leighton Buzzard, to recover £66 5s. for services rendered by the plaintiff, as a hotel broker, to the defendant in connexion with the purchase by the defendant of the Hunt Hotel, Leighton Buzzard.

The defendant denied that he was indebted to the plaintiff and that the plaintiff had rendered him any service as a hotel broker in connexion with the purchase of the Hunt Hotel.

In July, 1926, the defendant called at the plaintiff's office and asked for particulars of hotel businesses for sale. On July 6, 1926, the plaintiff sent the defendant particulars of a number of houses and orders to view, and wrote, *inter alia*, "... we shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage...." The orders to view contained a special notice as follows:—"In the event of terms being arranged,

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

you are requested to pay the usual 10 per cent. deposit to Messrs. Fullwoods, otherwise you will become equally liable with the vendor for the commission. This order is issued on this express condition only. . . ."

The defendant eventually negotiated directly with the owner for the purchase of the Hunt Hotel, Leighton Buzzard, and at the end of July the purchase was completed. The plaintiff thereupon claimed £66 5s. commission from the purchaser, although he received full commission, £134, from the vendor.

Mr. G. F. Emery appeared for the appellant ; Mr. du Parcq, K.C., and Mr. C. W. Measor for the respondent.

The MASTER OF THE ROLLS, in the course of his judgment, having stated the facts, read the letter containing the passage, "We shall be glad to know your decision in due course, and if business is done we shall act for you at the usual brokerage." Fullwoods gave the order to view because they were the authorized agents for the vendor. The defendant viewed the hotel and ultimately entered into a contract with Mrs. Lloyd, the owner, for the purchase of the hotel from her.

The plaintiff had received a commission, the not insignificant one of £134, from the vendor, and he now claimed £66 5s. from the purchaser. It was said that it was the practice in the trade for one agent to act for both vendor and purchaser. That might be the case with regard to completion of the purchase, when measurement of stocks had to take place. In his opinion there was no evidence to show that a contract was made between the plaintiff and the defendant for the payment of that commission. The plaintiff was clearly acting as agent for the vendor. That being his position, he was, *ipso facto*, disentitled from entering into a second agency on behalf of the purchaser, unless that arrangement was assented to with full knowledge by his original principal. The evidence showed that the defendant made no objection to the terms of the letter, but those terms were not sufficient to make him liable to pay commission. The evidence fell far short of establishing the plaintiff's right to recover, even assuming that it could be established.

It could not be stated too plainly that an agent could not normally accept commission on a sale from both parties. If commission were claimed for work done for both parties, it must be claimed to the knowledge and with the assent of the other principal concerned. The result here was that no contract for payment of commission by the defendant was shown, and the appeal must be dismissed, with costs.

LORD JUSTICE SCRUTTON said that he agreed with the decision, though he was not sure that he agreed with all the observations reported to have been made by the members of the Divisional Court. But he desired to emphasize the view which the law took of these double commissions. No agent who had accepted an employment from one principal could in law accept from a second an engagement inconsistent with his duty to his first principal. If, as agent for the vendor, he was negotiating as to price and knew that his principal would take a certain named figure, by no possibility could he use that knowledge to get the property for the purchaser for less than the purchaser was inclined to pay. The main ground on which he (his Lordship) decided the case was that the plaintiff could not show any real contract with the defendant to pay the commission. The order to view contained nothing putting any liability on the purchaser to pay purchaser's commission to the agent. It was the duty of the agent to make the fullest disclosure of the exact contract that he had, and the benefit that he was getting out of it. Messrs. Fullwoods seemed to have quite misunderstood the position, for they seemed to have suggested that giving an order to view was a consideration for getting commission from the purchaser ; if so, that was quite inconsistent with their duty to the vendor. In his (his Lordship's) view the letter accompanying the order to view the hotel was quite ambiguous ; there was nothing to make it a proposal of a contract which was necessarily accepted by accepting the order to view. If the agents wanted a double commission, they must make to each party a full disclosure of the exact nature of their interest and obtain the consent of each party. Such a contract must be made in the clearest possible terms and with the fullest disclosure to each principal of what the agent was doing ; otherwise the agent could not sue under any alleged agreement.

LORD JUSTICE SARGANT said that he was of the same opinion. No custom of the trade for the purchaser to pay commission to the vendor's agent could be shown. That being so, the plaintiff's case rested entirely on the final paragraph of the letter, and the sentence relied on was ambiguous. It might be a statement that the order to view was only given to the purchaser on the terms of his paying the plaintiff a second commission. The plaintiff could not insist on that interpretation, for it was seeking to impose an onerous condition on the purchaser in flagrant violation of the plaintiff's duty to the vendor. It would be wrong and improper for the agent to seek to impose on the purchaser a condition which might have the effect of stalling off the purchaser and prevent the agent from securing a purchaser acceptable to the vendor. The plaintiff had failed to show that there was any contract between him and the defendant.

[Solicitors—Mr. W. H. Lane ; Messrs. Mockridge and Co.]

Court of Appeal.
(Bankes, Atkin, and Lawrence, L.JJ.)

1927.
July 15.

THE FAGERNES.*

Ship — Practice — Service out of jurisdiction—Collision—Inlets of the sea—Bristol Channel—R.S.C., Order XI., r. 1 (*ee*).

A collision occurred in the Bristol Channel, about midway between the English and Welsh coasts, a little to the eastward of a line drawn from Bull Point in Devon to Port Eynon Head in Gower, Glamorgan, between the plaintiffs' steamship Cornish Coast and the defendants' steamship Fagernes. At the place in question the channel is 20 miles wide. The Fagernes, an Italian ship, was sunk, and in those circumstances the plaintiffs, being unable to proceed for their damage *in rem*, brought an action of tort against the Italian owners *in personam*, and obtained an order giving leave to serve notice of the writ out of the jurisdiction on the ground that the action was founded on a tort committed within the jurisdiction. The defendants thereupon moved to have this order set aside, on the

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

ground (*inter alia*) that the collision occurred outside British territorial waters and therefore the Court had no jurisdiction. The Judge hearing the motion held that the collision occurred in a part of the Bristol Channel over which the English Courts had jurisdiction, because the waters of that part of the channel were *inter fauces terræ* and were deemed by the common law to be part of the territory of the State which owned the land on both sides, and that therefore the order giving leave to serve notice of the writ out of the jurisdiction must stand.

On the hearing of an appeal the Attorney-General informed the Court of Appeal that the Crown did not claim the part of the Bristol Channel where the collision occurred as being within the territorial jurisdiction of the King.

Held, that in view of the information given to the Court by the Attorney-General and of the absence of evidence of any effective occupation the order giving leave to serve notice of the writ out of the jurisdiction must be set aside.

Appeal from decision of Hill, J. (42 *The Times* L.R., 621 ; [1926] P., 185), allowed.

This was an appeal by the defendants, the Società Nazionale di Navigazione, of Genoa, the owners of the steamship Fagernes, from a judgment of Mr. Justice Hill (42 *The Times* L.R., 621 ; [1926] P., 185), delivered on a motion by the defendants to set aside an order for service of notice of the writ in the action out of the jurisdiction.

On March 17, 1926, a collision occurred in the Bristol Channel between the steamship Cornish Coast, owned by the plaintiffs, and the Fagernes. The Cornish Coast was damaged and the Fagernes was sunk. In those circumstances the plaintiffs brought their action for damage by collision *in personam* against the owners of the Italian steamship, and obtained an order in Chambers giving them leave to serve notice of the writ out of the jurisdiction.

The defendants thereupon moved to set aside that order on the grounds that the collision occurred outside British territorial waters ; that the Court had no jurisdiction to try the case ; and, alternatively, that, if there were jurisdiction, leave to serve notice of the writ out of the jurisdiction was a matter for the discretion of the Court, which ought not, in the circumstances, to exercise its discretion in favour of the plaintiffs.

Mr. Justice Hill held that the waters of the Bristol Channel, at any rate above a line drawn from Bull Point, in Devon, to Port Eynon Head, in Glamorgan, were *inter fauces terræ,* and were thus part of the territory of the State which owned the land on both sides, and, therefore, within the jurisdiction of the High Court. He accordingly held that the order for service of the notice of the writ out of the jurisdiction was rightly made.

The defendants appealed.

Mr. E. A. Digby, K.C., appeared for the appellants ; and Mr. Balloch for the respondents. The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Giveen appeared for the Crown.

Lord Justice Bankes delivered the following considered judgment :—On March 17, 1926, two vessels came into collision in the Bristol Channel. One vessel was British owned, the other Italian owned. As a result of the collision the Italian vessel sank. The British owners sought to make the Italian owners responsible for the collision. As no action *in rem* was possible owing to the loss of the Italian vessel, the British owners commenced an action *in personam,* and applied for leave to issue notice of the writ out of the jurisdiction upon the ground that the action was founded on a tort committed within the jurisdiction, and, therefore, within Order XI., Rule 1 (*ee*).

An order having been obtained in Chambers, the defendants moved to set it aside upon the ground that the place where the collision occurred was not within the jurisdiction. The point thus taken necessarily raised an extremely important and very interesting question, which was fully dealt with by Mr. Justice Hill in a careful and exhaustive judgment. He finds that the collision occurred more than 20 miles to the east of Lundy Island and some miles to the eastward of a line drawn from Bull Point in Devon to Port Eynon in Gower, which is part of Glamorgan. The nearest point on the English coast is a little west of Ilfracombe ; the nearest point on the Welsh coast is Oxwich Head. The distance across is about 20 miles, the English coast being distant 10½ or 12½ miles and the Welsh coast 9½ or 7½ miles. In speaking of miles the Judge is referring to sea miles.

The learned Judge commences by defining the question which he has to decide as being whether the place where the collision occurred was "within the territorial jurisdiction of the King." He then refers to what is the undoubted fact, that within limits inlets of the sea into the land are part of the territory of the State which owns the land on both sides, and after referring also to the fact that the expression *inter fauces terræ* has high authority as an indication of what the limits are, he asks himself this pertinent question : "What are the inland waters contained within the land ? What are bays, gulfs, or estuaries *inter fauces terræ* ? What is the metaphor : the open mouth of a man or of a crocodile ? "

This question has never been authoritatively answered, except in cases where some effective occupation has been proved, or some statutory recognition established, or where the opening is so narrow as to admit of no doubt. The answer to the question can be sought either in the domain of international law or, in the case of our own country, in our common law. The learned Judge considers both. I do not propose to discuss the various and varying opinions of jurists and text writers, to which the learned Judge, to even a fuller extent this Court, has been referred, because it is common ground from the point of view of international law that no agreement on the question has been reached. The learned Judge so treats the matter.

His decision upholding the plaintiffs' contention is founded on his view of the common law, based on the language of the judgment in *Cunningham's* case (Bell's Crown Cases, 72). In that case the question was whether a collision which occurred between two vessels, and which resulted in the death of a member of the crew, had occurred in the county of Glamorgan, where the indictment for manslaughter was laid. In the present case the only evidence before the Court is that the collision occurred at the spot ascertained and described by Mr. Justice Hill as above set out.

In *Cunningham's* case (*supra*) a number of facts were proved. In the first place the collision occurred considerably higher up the Bristol Channel, where its width is not much over ten miles. The place of the collision was within the port of Cardiff and between

an island which is part of the parish of Cardiff and the Welsh shore, and only three miles from that shore. It was with reference to these facts that Chief Justice Cockburn used the language upon which Mr. Justice Hill founds his judgment. The passage in the judgment is as follows (Bell's Crown Cases, at p. 86) : "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan ; and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded ; and the fact of the Holms, between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded."

If the case in this Court had been presented in the same form and on the same materials as it was presented to Mr. Justice Hill I should have hesitated in accepting his conclusion, because it appears to me that the Court in *Cunningham's* case (*supra*) had not to consider the circumstances of the present case, where the width of the channel is so much greater and there is an entire absence of anything indicating effective occupation, but were merely using language applicable to the facts of the case before them, without intending to lay down any rule applicable to other parts of the Bristol Channel. This view of the judgment in *Cunningham's* case (*supra*) is not, in my opinion, inconsistent with Lord Blackburn's comments on that judgment in the Conception Bay case, *Direct United States Cable Company, Limited v. Anglo-American Telegraph Company, Limited* (2 App. Cas., 394, at p. 419). It is not, however, necessary to express a decided opinion upon this question because, for a reason which I will proceed to indicate, the case as finally presented to this Court has assumed a different aspect.

When the appeal first came on some time ago the Court felt that the question was one so materially affecting not only the rights and interests of the Crown but public interests also, that the Attorney-General should be given the opportunity of appearing, if he desired to do so. He did appear, and in the first instance he gave the Court an exhaustive statement of the opinions of jurists and text writers from very early times upon this much discussed question of the territorial jurisdiction over creeks, bays, &c., and he referred the Court to all the relevant authorities, with the view of inducing the Court not to lay down any rule on the question, but to content themselves merely by saying that there was no authority for holding that the place of this collision was within the jurisdiction.

The question what is within the realm of England being one of the matters of which the Court takes judicial notice, we thought it right to ask the Attorney-General whether the Crown did or did not claim that particular part of the Bristol Channel where this collision occurred as being within the territorial jurisdiction of the King, and he replied that the Crown did not. This information was given at the instance of the Court and for the information of the Court. Given under such circumstances and on such a subject, it does not, in my opinion, necessarily bind the Court in the sense that it is under an obligation to accept it.

Having regard, however, to the position created by the information given to the Court by the Attorney-General, to the absence of authority and to the general trend of the more recent opinion on the question of limiting the width of the *fauces terræ* to which the rule of territorial jurisdiction should apply, I think the Court ought to be guided by the information given to the Court by the Attorney-General to the extent of saying that they do not consider that there is sufficient authority for supporting the judgment of Mr. Justice Hill, and that the order appealed from must be set aside and Mr. Justice Hill's decision reversed, with costs here and below. I confine my judgment to the particular part of the channel where this collision occurred and to a case where no evidence of any effective occupation is given.

I desire also to say that the Court is indebted to the learned counsel who have argued this case for the assistance which they rendered to the Court. The only reason why I do not deal with their arguments at length is because, having regard to the course which the case took, it does not appear to me to be necessary to do so.

Lord Justice Atkin.—The question to be decided in this case is no less momentous than whether the Bristol Channel is part of the realm of England. What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available ; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. In these circumstances the Court requested the assistance of the Attorney-General ; who, after elaborate and valuable argument on the municipal and international law, so far as it affects the question, eventually informed the Court that he had consulted the Home Secretary, and was by him instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of his Majesty extends. I consider that that statement binds the Court, and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed.

I think, however, that it is desirable to make it clear that this is not a decision on a point of law, and that no responsibility rests upon this Court save that of treating the statement of the Crown by its proper officer as conclusive. Speaking for myself alone, if I had to decide this case upon the materials before Mr. Justice Hill and the further authorities brought before us, I should have been inclined to come to the same conclusion as he did. It is quite certain that there is at present no such agreement in the practice of civilized States as to afford a definite rule to regulate territorial claims to the waters of gulfs and bays for the future ; still less to determine what has been in fact the territorial jurisdiction in the past. And it is also clear that whenever a rule may in the future be recognized as a principle of inter-

national law, it will have to admit exceptions where territorial jurisdiction has been effectively exercised beyond the limits of the general rule, whatever it may be. And in determining the existence of those exceptions, I do not know a better statement of the considerations that must be taken into account than is to be found in the Award of the Permanent Court of Arbitration at the Hague, in *The North Atlantic Coast Fisheries* case, in 1910 : "The interpretation must take into account all the individual circumstances which for any of the different bays are to be appreciated : the relation of its width and the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented : the special value which it has for the industry of the inhabitants of its shores, and the distance which it is secluded from the highways of nations on the open sea, and to other circumstances not possible to enumerate in general." That is from the award, Command Paper 5396, 1910, page 22.

One bears in mind that at this particular point the Channel is only about 20 miles wide, that it has on its north bank the teeming population of Glamorgan with its coal ports, that it penetrates into the vitals of England, having towards the end of its course one of the oldest ports of the kingdom, Bristol. One has also to bear in mind that the whole of the Bristol Channel was part of one of the King's Chambers, which were delimited by an Order of James I. in 1604, which will be found set out in Selden's Mare Clausum, Book II., Chapter xxii.

The statement of the Crown in this case makes it unnecessary to trace the history of the claim to the King's Chambers, but I think it relevant that, though some modern writers on international law have doubted whether the claim to them would be maintained in these days, yet they were treated as material to the decision of cases in prize by Sir Ludlow Jenkins in the cases of St. Anne, Biscay, Delmothe, and Hope, from 1665 to 1675. The existence of the territorial jurisdiction over them was maintained in the leading English work on international law of last century, Phillimore, throughout its editions; was admitted by Wheaton, the leading American authority of that century ; and also by Major-Gen. Hallack, of the United States of America ; and was supported by the English Attorney-General in the North Atlantic Coast Fisheries Arbitration in 1910. The alleged limit of ten miles in width which the Attorney-General contended was the boundary of that part of the channel which was wholly territorial (apart from the three miles coast limit) is not yet accepted, and undoubtedly has admitted exceptions in the case of British, American, French and other national waters. Finally, though neither the case of *Rex v. Cunningham* (Bell's Crown Cases, 72) nor the case of *Direct United States Cable Company, Limited v. Anglo-American Telegraph Company, Limited* (2 App. Cas., 394), the Conception Bay case, determined this question as a matter of law, it seems to me plain that Chief Justice Cockburn in the former case, and Lord Blackburn in the latter, treated the Bristol Channel as territorial waters in that part of it which is between Glamorgan and Somerset, *i.e.*, at a width exceeding ten miles. And, in my view, considerable importance should be attached to the fact that Lundy Island, 20 miles to the westward of the *locus in quo*, is part of Devon. I mention these considerations, without further discussion of the various questions and authorities concerned, to support the statement which I have already made that in arriving at its conclusion the Court is not purporting to do more than give effect to the authoritative pronouncement of the Government. The appeal must be allowed, and the order for service of notice of the writ and the service must be set aside with costs here and below.

Lord Justice Lawrence.—I agree. The question whether the alleged tort was committed within the jurisdiction of the High Court has given rise to an interesting discussion on the subject of the territorial character of inlets of the sea (such as bays, gulfs, estuaries and creeks, all of which for the sake of brevity I will call "bays").

As the territorial jurisdiction of the High Court extends over the whole of England (including the principality of Wales and the town of Berwick-on-Tweed) it follows that, if the spot where the collision occurred is in the realm of England, the alleged tort was committed within the jurisdiction. The real question, therefore, is whether that part of the Bristol Channel where the collision occurred is in the realm of England.

It is common ground that there is no international treaty or convention expressly sanctioning or recognizing any territorial rights of the Crown over the Bristol Channel. Further, no evidence has been adduced that the Crown has possessed itself of, or has effectively asserted any territorial rights over, that part of the Bristol Channel where the collision occurred. In the absence of any express treaty or controlling executive act of the Government, the question arises whether there is any established general rule of international law for determining the territorial character of bays. The consideration of this question has occupied the greater part of the hearing both in the Court below and in this Court.

The Attorney-General, in the course of his able argument, has cited and commented upon the opinion of jurists, the practice of nations, and the relevant judicial decisions. I do not propose to deal with these sources of information in detail, but content myself by saying that in my judgment the Attorney-General has established the proposition that, although the principal of claiming territorial rights over bays is well established as a rule of international law, and although there is no question as to the applicability of that principle in the case of bays the entire land boundaries of which form part of the territory of the same State and the entrances of which do not exceed six sea miles in width, yet there is no recognized general rule of international law by which it can be determined whether any given bay with an entrance wider than six sea miles does or does not form part of the territory of the State whose shores form its land boundary. Each such case must depend upon its own special circumstances.

There is another matter which deserves mention here, namely, the suggestion that because the Bristol Channel is within the limits of the so-called King's Chambers, therefore it is necessarily within the King's territory. An interesting historical account of the King's Chambers is to be found in Fulton, on the sovereignty of the sea (see Chapter iv., commencing at page 118), which records the fact that in 1604 James I. issued a proclamation prohibiting all hostile actions of belligerents within certain limits along the English coast which were fixed by a jury of 13 skilled men appointed by Trinity House. This proclamation had reference to the continuance of the war between the United Provinces and Spain (from which James had himself withdrawn), and according to Fulton (see page 9) is not to be regarded as in any sense an assertion of maritime sovereignty or jurisdiction beyond what was then customary.

Oppenheim, in his work on international law (2nd edition, Vol. I., page 263, 1912) (3rd edition, page 344, 1920), states that: "It must be specially observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers, which include portions of the sea between lines drawn from headland to headland." In a note on the same page the author (after pointing out that whereas Hall, section 41, p. 194, 8th edition, 1924, says that England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers, yet Phillimore (Vol. 1, section 200) still keeps up this claim, states that the attitude of the British Government in the Moray Firth case would seem to demonstrate that this claim is no longer upheld. The author is there referring to the fact that after the decision in *Mortensen v. Peters* (8 Fraser (J.), 93) Parliament passed the Trawling in Prohibited Areas Prevention Act, 1909 (9 Edward VII., chapter 8).

In the present case the Attorney-General has put forward no claim on behalf of the Crown to the territorial character of the Bristol Channel by reason of its being within the King's Chambers, and his statement to the Court, to which I will refer later, expressly negatives such a claim. In these circumstances, the fact that the Bristol Channel is within the limits of the King's Chambers cannot, in my opinion, be relied upon as proving that it is within the territorial jurisdiction of the High Court.

The next matter for consideration is whether *Cunningham's* case (Bell's Crown Cases, 72), upon which the learned Judge in the Court below based his decision, covers the present case. For the reasons stated by Lord Justice Bankes, with which I agree, I do not think that it does. That case was concerned with a different locality, and evidence was adduced there which satisfied the Court that the place where the offence was committed was within the parish and port of Cardiff, and therefore within the body of the county of Glamorgan. It was not necessary to decide and, in my opinion, the Court did not purport to decide that the Bristol Channel at the spot where the collision occurred in the present case was part of the territory of England. Therefore, even if the present case had been left where it was in the Court below, I should have felt great hesitation in agreeing with the conclusion reached by the learned Judge. But the matter does not rest there. It is the duty of the Court to take judicial cognizance of the extent of the King's territory; and, if the Court itself is unacquainted with the fact whether a particular place is or is not within the King's territory, the Court is entitled to inform itself of that fact by making such inquiry as it considers proper.

As it is highly expedient, if not essential, that in a matter of this kind the Courts of the King should act in unison with the Government of the King (see *Foster v. Globe Venture Syndicate, Limited* ([1900] 1 Ch., 811)), this Court invited the Attorney-General to attend at the hearing of the appeal, and at the conclusion of the arguments asked him whether the Crown claimed that the spot where the collision occurred was within the territory of the King. The Attorney-General, in answer to this inquiry, stated that he had communicated with the Secretary of State for Home Affairs, who had instructed him to inform the Court that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of his Majesty extends."

In view of this answer, given with the authority of the Home Secretary upon a matter which is peculiarly within the cognizance of the Home Office, this Court could not, in my opinion, properly do otherwise than hold that the alleged tort was not committed within the jurisdiction of the High Court.

In the result, therefore, I am of opinion that the appeal succeeds, and that the order for service of notice of the writ on the defendants in Italy must be discharged, with costs here and below.

[Solicitors—Messrs. Godfrey Warr, Clarkson, and Co., for Messrs. Batesons and Co., Liverpool; Messrs. Stokes and Stokes; the Treasury Solicitor.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Lord Atkinson, Lord Blanesburgh, Lord Darling, and Lord Warrington of Clyffe.)

1927. July 18.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY COMPANY.*

Canada — British Columbia—Statute—Validity — Taxation — Whether "direct" — British North America Act, 1867 (30 and 31 Vict., c. 3), s. 92—Fuel-Oil Tax Act, 1923, c. 71 (British Columbia statute), ss. 3, 6.

The Fuel-Oil Tax Act, 1923 (British Columbia statute), which provided that every person purchasing within the province fuel-oil sold for the first time after its manufacture in or importation into the province should pay a tax, to be collected and paid to the Government by the vendor, is invalid, since the tax is not a "direct" tax within s. 92 of the British North America Act, 1867.

Decision of the Supreme Court of Canada ([1927] S.C.R., 185) affirmed.

This was an appeal by the Government of British Columbia from a judgment of the Supreme Court of Canada ([1927] S.C.R., 185) relating to the validity of the British Columbia Fuel-Oil Tax Act, 1923. That judgment affirmed decisions of the Court of Appeal of British Columbia and Mr. Justice Morrison.

Mr. Farris, K.C. (of the Canadian Bar), and the Hon. Geoffrey Lawrence, K.C., appeared for the appellant; Mr. W. N. Tilley, K.C., Mr. E. P. Davis, K.C., and Mr. J. E. McMullen (all of the Canadian Bar) for the respondents.

VISCOUNT HALDANE, in delivering their Lordships' judgment, said that the question was concerned with the validity of the British Columbia Fuel-Oil Tax Act, 1923, and especially with sections 3 and 6 of that Act. It was contended for the respondents that under section 92 of the British North America Act, 1867, there was no power in the Provincial Legislature to pass the statute, the ground being that the taxation attempted was not "direct." The purpose was to enact that every person who purchased within the Province fuel-oil sold for the first time after its manufacture in or importation into the Province should pay for provincial purposes a tax equal to ½c. per gallon on the oil so purchased.

By the definition clause "purchaser" was to mean "any person who within the Province purchased fuel-oil when sold for the first time after its manu-

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

facture in or importation into the Province." "Vendor" was to mean "any person who within the Province sells fuel-oil for the first time after its manufacture in or importation into the Province." By section 3 the purchaser was to pay the tax so defined. By section 4 the vendor, on the sale to the purchaser, was to levy and collect and pay it over to the Government. By section 6 every person who had in his possession for use or consumption fuel-oil on which the tax had not been paid was to pay it. The rest of the Act forbade the use of fuel-oil unless the tax had been paid, made an exception from liability to the tax for fuel-oil used in the operation of vessels plying between ports in the Province and ports outside the Dominion, and imposed penalties.

The first and cardinal question was whether the tax was direct or indirect within the meaning of the expressions used in sections 91 and 92 of the British North America Act, 1867. If the tax was indirect, the respondents escaped wholly. Their Lordships entertained no doubt that, within the meaning placed on the language employed by a series of decisions in the Canadian Courts and in the Privy Council, the tax was indirect. If so, the statute in question was *ultra vires*.

In *Attorney-General for Manitoba v. Attorney-General for Canada* (41 *The Times* L.R., 409; [1925] A.C., 561) the Board held invalid an Act of Manitoba imposing a tax on persons selling grain for future delivery, notwithstanding that the Act declared in terms that the tax was a direct one. There was in that case an agreed statement that the ultimate price of the grain, which was called a "world price," was fixed, but it was little controlled by the producers and had to be looked to as covering all the items in the cost of production and transportation.

It was laid down by the Board that while a direct tax was one that was demanded from the very person who was intended or desired to pay it, an indirect tax was that which was demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as might be the case with Excise and Customs. A tax levied, as in that case the tax was, on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation. The meaning of the distinction had been settled by the exposition given of it by the political economists, whose broadly phrased definition had been adopted in earlier decisions, such as *Attorney-General for Quebec v. Reed* (10 App. Cas., 141, *per* Lord Selborne); *Bank of Toronto v. Lambe* (3 *The Times* L.R., 742; 12 App. Cas., 575, *per* Lord Hobhouse); and *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario* (13 *The Times* L.R., 197; [1897] A.C., 231, *per* Lord Herschell).

It was true that the question of the meaning of the words used in sections 91 and 92 was one not of political economy but of law. Still, as Lord Hobhouse pointed out, the legislation must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies. The definition given by John Stuart Mill was, accordingly, taken as a fair basis for testing the character of the tax in question, not as a legal definition but as embodying with sufficient accuracy an understanding of the most obvious *indicia* of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867. Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test. The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applied. An exhaustive partition would be an impracticable task.

Taking the principle so laid down as the guide to the solution of the present question, the result did not seem doubtful. There were two fuel-oil companies which were associated in business in a close fashion. The Union Oil Company of California sold its oil to the Union Company of Canada, which had large storage tanks at Vancouver which the former company kept replenished according to directions from the Canadian company. The respondents purchased oil in British Columbia from the latter company. It was sought to tax them as first purchasers under section 3, and as holders of the oil for consumption under section 6, which had to be read with reference to section 3. It might be true that, having regard to the practice of the respondents, the oil which they purchased was used by themselves alone and was not at present resold. But the respondents might develop their business so as to include resale of the oil which they had bought. The principle of construction as established was satisfied if that was practicable and did not for its application depend on the special circumstances of individual cases. Fuel-oil was a marketable commodity, and those who purchased it, even for their own use, acquired the right to take it into the market. It therefore came within the general principle which determined that the tax was an indirect one.

Other points were argued against the validity of the Act in question, as, for instance, that it contravened the special provisions of the British North America Act, 1867, in reference to Excise. On those points their Lordships abstained from expressing an opinion. The conclusion at which they had arrived rendered it unnecessary to discuss them and, in accordance with their practice, they accordingly avoided doing so. They agreed with the conclusion arrived at by all the Courts below, and they would humbly advise his Majesty that the appeal should be dismissed, with costs.

[Solicitors—Messrs. Gard, Lyell, and Co.; Messrs. Blake and Redden.]

K.B. Div. (Salter, J.) } 1927. July 15.

WILLIAM BARKER (JUNIOR) AND CO., LIMITED v. ED. T. AGIUS, LIMITED.*

Contract—Sale of goods—Condition—Breach—Right of rejection—Whether validly exercised—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), ss. 11 (1) (*c*), 30 (3), 35.

The appellants sold to the respondents, for shipment from Hamburg to Liverpool, a cargo of coal to consist of briquettes, size 2in., the contract providing as follows:—

"Bills of lading to be accepted by buyers as absolute and conclusive proof of weight, quality, and description, the buyers having right of inspecting the cargo.

"No warranty is expressed or implied, and sellers accept no responsibility in regard to the

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

description, size, quality, condition, or fitness for steaming purposes or otherwise of the coal or fuel contracted for or supplied, and no reduction in price will be made in respect of any such matters."

The respondents required the coal to supply power stations, and at the time of the contract the appellants were aware of this. The cargo was shipped, some of it being in the holds and the remainder on deck and covering the hatch covers. On arrival at Liverpool the vessel had to wait for a discharging berth, and the captain, finding that the cargo in the holds was heating, bought the deck cargo from the respondents and removed it and opened the hatches. The respondents then found that though the briquettes on the deck were of the contractual size the briquettes in the holds were larger and were not suitable for use in power stations, and they gave notice of rejection of the whole cargo.

Held, on a case stated by an arbitrator, (1) that it was a condition of the contract that the briquettes should be of the size of 2in., and the condition was effective as the warranty clause dealt only with warranties as such and did not affect a condition ; (2) that the respondents had a right to reject the underdeck part of the cargo, but that as they had claimed the right to reject the whole cargo they had never validly exercised their right to reject the underdeck part ; and (3) that they were remitted to their right to recover damages for breach of a condition, namely, failure to ship a cargo in conformity with the contract.

In this case a dispute had arisen between buyers and sellers of German coal which was shipped to England during the coal strike of 1926. An arbitrator had made an award in the form of a special case, which now came on for argument. It raised a question as to the right under the Sale of Goods Act, 1893, of a buyer to give notice of rejection of the whole, or of part, of the goods purchased when he had already taken possession of and resold another part of the goods.

Mr. Bevan, K.C., and Mr. Willink appeared for the appellants, the sellers ; and Mr. Miller, K.C., and Mr. Chapple for the respondents, the buyers.

During the coal strike of 1926 the buyers, William Barker (Junior) and Co., Limited, arranged to buy from the sellers, Ed. T. Agius, Limited, a quantity of German coal. The coal was shipped at Hamburg, some of it being in the holds and the remainder on deck and covering the hatch covers. The vessel arrived at Liverpool, but had to wait for a discharging berth. The captain found that the cargo in the holds was heating. To be able to reach it he bought the deck cargo from the buyers and removed it and opened the hatches. The buyers then for the first time inspected the cargo in the holds, and found that it was not of the contract description. They then gave notice of rejection of the whole cargo, but the sellers contended that as the buyers had dealt with part of the cargo by selling it to the captain the right to reject had been lost. The arbitrator decided in favour of the buyers, subject to the opinion of the Court on a special case.

By a contract in writing dated October 26, 1926, Messrs. Agius sold to Messrs. Barker two cargoes of 1,500 tons (10 per cent. more or less) of brown coal briquettes, size 2in. The first cargo was to be shipped "about" November 9 and the second "within" November 20. Delivery was to be on the Elbe, f.o.b., and payment was to be net cash against documents at a named bank in London. The price was 34s. per ton of 1,000 kilos, exclusive of trimming, and the buyers undertook to take delivery of the coal whether the coal strike in England continued or not.

Particular clauses of the contract which were here material were as follows :—

"Bills of lading to be accepted by buyers as absolute and conclusive proof of weight, quality, and description, the buyers having right of inspecting the cargo.

"No warranty is expressed or implied, and sellers accept no responsibility in regard to the description, size, quality, condition, or fitness for steaming purposes or otherwise of the coal or fuel contracted for or supplied, and no reduction in price will be made in respect of any such matters."

The arbitrator found facts as follows :—

1. At the time of making the contract the sellers were aware that the buyers required the briquettes to supply power stations.

2. The cargo now in question was shipped in purported fulfilment as to one cargo under the contract on a vessel chartered by the buyers (the s.s. Slemish) at Hamburg about November 16, 1926, and was loaded in the four holds and on the deck. The deck cargo was loaded not only on deck but also on the hatch covers. When the vessel left Hamburg the deck cargo consisted of about 40 tons, but about 15 tons were lost on the voyage, so that only 25 tons arrived at Liverpool. The deck cargo consisted of briquettes of the contractual size of 2in., but the underdeck cargo in all four holds consisted in the main of briquettes substantially larger than the contractual size.

3. The cargo was shipped by suppliers who had sold it to a firm who sold it to the sellers, and the sellers were not aware until the buyers so informed them that any part of the underdeck cargo was not of the contractual size.

4. The vessel arrived at Liverpool on November 26, 1926, and the buyers paid on receipt of the bill of lading. An invoice from the sellers described the coal as "brown coal briquettes size 2in."

5. On the vessel's arrival there was no berth available and the cargo was heated. Mr. Barker on November 28 went on board and inspected the deck cargo, neither thinking, nor having reason to think, that it differed in any way from the underdeck cargo.

6. On December 6 the captain became alarmed at the heated condition of the cargo, and, wanting to open the hatches and get at the underdeck cargo, he offered to buy the deck cargo. The buyers sold the deck cargo to the master solely to help him and to secure the safety of the ship on the terms that no freight should be payable on it. The captain then had the deck cargo moved into the bunkers, this being the most reasonable and practicable means of getting it removed from the deck. The sellers did not know until the hearing before the arbitrator that the buyers had disposed of the deck cargo in this way.

7. On December 10 the covers were taken off the hatches and the buyers for the first time inspected the underdeck cargo, and discovered that the greater

part of it was not of the contract size and was not suitable for use in power stations. Thereupon they wrote to the sellers declining to accept the cargo. On December 16 the cargo in the holds was discharged without prejudice to the rights of the parties.

The arbitrator held that it was a condition of the contract that the cargo should consist of briquettes of the size of 2in., and that, by reason of the composition of the underdeck cargo, the sellers committed a breach of that condition. The buyers could have inspected the cargo during the loading at Hamburg, and, if they had done so, they would have found that in the main it was not of the contractual size. In the circumstances, however, it was not unreasonable on their part to delay inspection until December 10.

The questions left by the arbitrator for the decision of the Court were as follows :—

"(*a*) Whether, on a true construction of the contract and on the facts as found, it was a condition of the contract that the briquettes should be of the size of 2in. ? (*b*) Whether, on a true construction of the documents and on the facts found, the buyers had a right to reject the underdeck cargo and validly exercised it ? (*c*) Whether, on a true construction of the documents and on the facts found, if the buyers had no right to reject, or, having one, did not validly exercise it, the buyers were entitled to recover such damages as they could prove from the failure to ship a cargo in conformity with the contract ? "

Mr. BEVAN, for the sellers, contended that the buyers had no right to reject. On a true construction of the contract it was not a condition that the briquettes should be of 2in. size. It was expressly provided that the sellers accepted no responsibility in regard, amongst other things, to size or description. Size was therefore not a condition of the contract, or, if it was held to be a condition, it was not actionable. Further, by the terms of the contract the bill of lading had to be accepted as conclusive evidence that goods of the contract description had been shipped. By taking the bill of lading the buyers agreed to accept the coal actually shipped as being in accordance with the contract.

On the facts, the buyers never made an effectual rejection. A buyer who thought himself entitled to reject must elect to do so within a reasonable time and must notify the seller of his election, and here the buyers did not give notice of rejection until they had already re-sold part of the cargo.

He referred to sections 11, 30, and 35 of the Sale of Goods Act, 1893.

Mr. MILLER, for the buyers, submitted that the right of inspection continued until the goods arrived at Liverpool. The provision in the contract that no warranty was given with regard to size must be ignored, for the size of two inches was specified in the body of the contract and was of vital importance to it and the buyers could not be forced to accept something which was not of the contract description.

He referred to *Hardy and Co. v. Hillerns and Fowler* (39 *The Times* L.R., 547 ; [1923] 2 K.B., 490) ; *Cunningham v. Munro* (28 Com Cas., 42) ; *Moore and Co. v. Landauer and Co.* (37 *The Times* L.R., 52, 452 ; [1921] 1 K.B., 73 ; [1921] 2 K.B., 519).

Section 30 (3) of the Sale of Goods Act, 1893, gave a clear right to reject that part of the goods delivered which did not comply with the contract. By the correspondence it was evident that this was what the buyers here did. Rejection of the whole must operate as a rejection of that part of the whole which was still capable of rejection, so that even if the letter of rejection here was held to be a rejection of the whole it would still be valid in regard to that part which could still be rejected.

With regard to the point that the contract excluded any warranty as to size he referred to *Wimble, Sons, and Co. v. Lillico and Son* (38 *The Times* L.R., 296) ; *Wallis, Son, and Wells v. Pratt and Haynes* (26 *The Times* L.R., 572 ; [1910] 2 K.B., 1003 ; 27 *The Times* L.R., 431 ; [1911] A.C., 394). An exclusion clause, such as there was in this case, could not do away with the fundamental obligation of the contract.

Mr. WILLINK replied. The intention of the contract was that the buyers should inspect the coal at Hamburg on shipment and that from that moment the matter was to be closed. If the buyers took the risk of not inspecting at Hamburg they could not afterwards complain.

Section 30 (3) of the Sale of Goods Act, 1893, had never been the subject of judicial decision. It only contemplated the case of the whole of the contract goods being properly delivered and having with them, by mistake or for some other reason, other goods which had nothing to do with the contract. The contract in this case was one for the sale of a whole cargo and was not severable. The buyers must be deemed to have accepted the whole of the cargo, as provided by section 35 of the Act.

The clause in the contract "no warranty is expressed or implied . . ." was so express and clear that it could not be overridden by anything in the other parts of the contract.

MR. JUSTICE SALTER said that originally the contract was for the sale of two cargoes, but by agreement that was varied and there was now only a contract for the sale of one cargo of 1,500 tons more or less "size two inches." The first question was whether the words "size two inches" constituted a condition of the contract. The briquettes were in fact required for use in the furnaces of power stations, and it was essential to their fitness for this purpose that they should be of the specified size. The sellers knew that the briquettes were intended for use in power stations, but the case did not find that they knew also that the size was essential. In the circumstances he had no doubt that the words "size two inches" were part of the description under which the goods were sold and were a condition of the contract.

Then the question arose whether it was an effective condition. The sellers contended that it was not, for two reasons. They said that the bill of lading clause meant that the buyers had the right to inspect the goods on shipment at Hamburg, and that after the issue of the bill of lading they could not dispute any statement in it as to weight, quality, or description, unless some inaccuracy was in fact discovered on inspection at Liverpool. In his opinion the words meant that inasmuch as the buyers had the right to inspect before the bill of lading was issued they were bound by any statement which the bill of lading contained as to weight, quality, or description ; but the matter now in issue was size, and as to size the bill of lading said nothing. There was therefore nothing in the bill of lading point to prevent the condition from being effective. The other reason relied on by the sellers was the clause, "No warranty is expressed or implied . . . in regard to size." If those words had stood alone, they might have affected the position, but in his view the warranty clause must be read as a whole, with reference to description, quality, condition, or fitness, as well as size, and he thought that it only dealt with warranties as such

and did not affect a condition. He therefore held that the words "size two inches" were a condition, and an effective condition, of the contract.

The next question raised by the arbitrator was whether the buyers had a right to reject the underdeck cargo, and whether, if they had such a right, they had validly exercised it. The arbitrator did not rely on the fact that the buyers acted in an emergency, and the fact that there was an emergency need not be considered. The case was one in which the full contract quantity, and no more, had been delivered, and, before the cargo in the holds had been seen, the buyers thought fit to sell the cargo on deck. Was the right to reject the whole, or the underdeck part, of the cargo lost by the taking over and disposal of the part of the cargo on deck? That involved the consideration of sections 11 (1) (*c*), 30 (3), and 35 of the Sale of Goods Act, 1893.

Section 11 (1) (*c*) provided that, where a contract of sale was not severable and the buyer had accepted part of the goods, the breach of any condition to be fulfilled by the seller could only be treated as a breach of warranty and not as a ground for rejecting the goods and for treating the contract as repudiated. If the matter had been free from authority, he personally should have thought that that subsection governed this case. The word "rejection" there was equivalent to rescission, and meant that the buyer would say that the tender of non-contract goods was a breach of the contract and entitled him to treat the contract as repudiated by the seller. For himself, in the absence of authority, he would have held that the effect of this subsection was that if a buyer so dealt with part of the goods tendered that he could not return the whole to the seller then he could not claim to return the part which he had not dealt with; if there was an unseverable contract and the buyer chose to accept and re-sell part of the goods tendered under it he could not return to the seller the other part of the goods.

Then section 30 (3) provided that where a seller delivered to a buyer the goods which he contracted to sell, mixed with goods of a different description not included in the contract, the buyer might accept the goods which were in accordance with the contract and reject the rest or might reject the whole. Dealing with that clause, in the absence of authority, he should have thought that it only referred to a case in which the seller had delivered the whole of the contract goods together with other goods which had nothing to do with the contract; but that construction had not been adopted.

Then section 35 provided that a buyer was deemed to have accepted goods when the goods had been delivered to him and he did any act in relation to them which was inconsistent with the ownership of the seller.

The position, however, was not free from authority. His Lordship then discussed the effect of *Moore and Co. v. Landauer and Co.* (37 *The Times* L.R., 452; [1921] 2 K.B., 519); *Cunningham v. Munro* (28 Com. Cas., 42), and *Hardy and Co. v. Hillerns and Fowler* (39 *The Times* L.R., 547; [1923] 2 K.B., 490), where Lord Justice Bankes approved of a *dictum* of Mr. Justice Greer, and said that any opinion expressed by Mr. Justice Greer, even if *obiter*, could not be neglected, particularly when it had been approved *obiter* in the Court of Appeal. The authorities were perhaps not strictly binding on him, but in view of the opinions expressed in them he felt that it would not be right to follow his own view of the effect of the sections. He therefore held that the buyers had the right to accept and deal with the 25 tons of cargo which was on deck and to reject that which was in the hold.

Assuming then that the buyers had the right to reject that part, did they validly exercise the right? [His Lordship dealt with the correspondence and with the conduct of the buyers, and came to the conclusion on the facts that the buyers had claimed to reject the whole, and that the right to reject only the underdeck part of the cargo had never been exercised.]

That being so, the buyers were remitted to their right to recover damages for breach of contract, and the sellers contended that the clause "No warranty is expressed or implied . . ." prevented the buyers from recovering any damages. But he thought that that point was disposed of by the decision in *Wallis, Son, and Wells v. Pratt and Haynes* (27 *The Times* L.R., 431; [1911] A.C., 394, at p. 395). The condition in the contract remained a condition and was not degraded into a mere warranty, and the provision excluding claims for a breach of warranty did not apply to exclude claims for breach of a condition.

The questions asked by the arbitrator must, therefore, be answered as follows:—(*a*) Yes. (*b*) The buyers had the right to reject the underdeck part of the cargo, but did not exercise it. (*c*) Yes.

[Solicitors—Messrs. Gregory, Rowcliffe, and Co., for Messrs. Hill, Dickinson and Co., Liverpool, for the buyers; Messrs. Thomas Cooper and Co., for the sellers.]

K.B. Div. (Rowlatt, J.) 1927. July 25.

MIDLAND BANK, LIMITED v. COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duties—Receipt forms issued by bank to customers—Availability for payment either to customer or to holder—Limitation to sums under £2—Whether subject to the same stamp duty as cheques—Stamp Act, 1891 (54 and 55 Vict., c. 39), s. 32.

The appellant bank introduced a scheme by which their customers could obtain free of charge a book of receipts containing forms which, when filled up, could be presented by a customer for payment at a branch of the bank or could be handed to a tradesman or other creditor in settlement of a debt and then presented by him for payment. The receipt forms were available only for the payment of sums under £2 and the bank contended that the forms did not require to be stamped with a 2d. cheque stamp.

Held, that as such a document "entitled" the recipient, within the meaning of s. 32 of the Stamp Act, 1891, to payment of the sum mentioned, it was subject to the same stamp duty as a cheque.

This was a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891. The case raised the question whether receipt forms issued to their customers by the Midland Bank for sums under £2 were subject to stamp duty.

On June 28, 1927, and July 4, 1927, respectively,

* Reported by J. W. HALL, Esq., Barrister-at-Law.

two instruments were presented on behalf of the Midland Bank, Limited (the appellants) by their solicitors to the Commissioners of Inland Revenue (the respondents) under the provisions of section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty, if any, with which the instruments were respectively chargeable.

The following was a copy of instrument No. 1 :—

"This receipt must only be used for amounts under £2.

0975 A

Paid 24th Jun. 1927.

Received of 24th June, 1927.

MIDLAND BANK LIMITED,
Threadneedle Street, E.C.2,

the sum of ten shillings

at the debit of {my / our} account.

10. 0.

T G. E. BALDRY."

The following was a copy of instrument No. 2 :—

"This receipt must only be used for amounts under £2.

0976 A

Paid 2nd July 1927

Received of 30th June, 1927.

MIDLAND BANK LIMITED,
Threadneedle Street, E.C.2,

the sum of ten shillings at the debit of {my / our} account.

10. 0.
D/A

Coutts & Co. Strand 11.

T G. E. BALDRY."

Both instruments were unstamped.

The facts were as follows :—

During May, 1927, the appellants caused it to be publicly announced that they had been considering the objection which many people raised to the opening or more frequent use of a banking account—namely, the requirement of a stamp on every cheque drawn, and that to overcome that objection they had devised a new means of payment which should provide an added encouragement to the opening of a bank account. The bank announced that in future customers of the bank might obtain free of charge from any branch a "book of receipts" containing a number of forms which, being available only for the payment of sums under £2, would not require to be stamped.

The receipt form, somewhat similar in appearance to a cheque, would bear upon its face the wording "Received of the Midland Bank Limited..... Branch, the sum of ....." and provided space for the date, the amount in words and in figures, and the customer's signature. When the receipt had been filled in, it might be presented for payment in cash at the branch on which it was drawn, or handed to a tradesman or other creditor in settlement of a debt. In this and several other respects it possessed the advantages of a cheque.

The bank announced that the new system was to be put into operation forthwith and that books of receipts were available for old or new customers at any of the 1,940 branches of the bank in England and Wales. The effect of this statement was widely reproduced in the public Press. Mr. G. E. Baldry, who signed both of the instruments to which this case related, was a customer of the appellants and had had, at all material times, a current account in credit at the Threadneedle-street branch of the appellants. He signed and delivered to the appellants a request in the following terms, on a form of request supplied by the appellants for the purpose :—

"Midland Bank Limited.
"Threadneedle-street Branch.

"I/We request you to allow me/us to withdraw from time to time from my/our account with you sums under £2 each against delivery to you of receipts addressed to you and duly signed by me/us and I/we authorize you to pay the amount of such receipts to the bearer thereof and to debit the same to my/our account.

"Dated this 24th day of June, 1927.

"(Signature) G. E. BALDRY.

"Address—9, St. Mildred's-court, Poultry, E.C.2."

Thereupon the appellants delivered to Mr. Baldry a book of detachable forms to be used by him if he so desired. The instruments presented for adjudication were in that form. Each one of the forms was so marked, printed, lettered and numbered as to be separately identifiable by the appellants.

On June 24, 1927, the sum of 10s. was paid by a Mr. James to, and received by, Mr. Baldry. A liability was thereby created on the part of Mr. Baldry for payment of a like sum to Mr. James. Mr. Baldry thereupon signed one of the forms detached from his book of receipts, being instrument No. 1, and handed it to Mr. James, and it was the expectation of both parties that the instrument should be used by Mr. James for obtaining from the appellants payment of a sum of 10s. to be debited to Mr. Baldry's account in discharge of such liability by production and delivery of the instrument to the appellants by Mr. James, either personally or through his own bankers. The instrument was, in fact, so used by Mr. James.

Mr. James was a customer of the Threadneedle-street branch of the appellants and delivered the instrument to the cashier at that branch over the counter. The document was accepted and Mr. Baldry's account with the appellants was debited with the sum of 10s. and Mr. James's account with the appellants was credited with the like sum. The endorsement "Paid 24th June, 1927," appearing by means of a rubber stamp on instrument No. 1, was made by the appellants.

On June 30, 1927, the sum of 10s. was paid by a Mr. W. H. Beaumont to, and received by, Mr. Baldry. In this case Mr. Baldry detached instrument No. 2, which he handed to Mr. Beaumont. Mr. Beaumont was a customer of Messrs. Coutts and Co., bankers, of 440, Strand, and he delivered the instrument to Messrs. Coutts and Co.'s cashier with instructions to obtain payment of the sum of 10s. from the appellants. Messrs. Coutts and Co.'s representative attended at the Threadneedle-street branch of the appellants on July 2 and requested payment of the sum of 10s. in exchange for instrument No. 2. The sum of 10s. was paid to Messrs. Coutts and Co.'s representative, who handed over to the appellants instrument No. 2, and the account of Mr. G. E. Baldry at the Thread-

needle-street branch of the appellants was debited with the amount. The endorsement, "Paid 2nd July, 1927," appearing by means of a rubber stamp on instrument No. 2, was made by the appellants. The endorsement, "Coutts and Co. Strand 11," appearing on instrument No. 2 by means of a rubber stamp, was made by Messrs. Coutts and Co.

The Commissioners expressed their opinion that each of the instruments presented for adjudication was a bill of exchange within the true intent and meaning of the Stamp Act, 1891, and, being payable on demand, or at sight or on presentation, was chargeable with the duty of 2d. under that Act and section 36 of the Finance Act, 1918. The appellants declared themselves dissatisfied with the determination of the Commissioners on the ground that neither instrument was a bill of exchange within the meaning and effect of the Stamp Act, 1891. They, therefore, in pursuance of section 13 of the Stamp Act, 1891, required the Commissioners to state a case.

The question for the opinion of the Court as respects each of the instruments presented for adjudication was whether it was chargeable with the duty of 2d. applicable to a bill of exchange payable on demand, or, if not, whether it was liable to any duty, or whether it was exempt from duty.

Mr. Rayner Goddard, K.C., and Mr. Andrewes-Uthwatt appeared for the appellants; the Attorney-General (Sir Douglas Hogg, K.C.), and Mr. J. H. Stamp for the Commissioners.

Mr. GODDARD contended that there were three, and only three, ways in which the receipts could be used:—(1) For collection of a sum under £2 from the bank by the customer personally; (2) for collection from the bank of a sum under £2 by an agent for the customer; (3) for payment of a sum under £2 to a person not an agent of the customer. In his submission, both the documents in this case stood on the same footing and the fact that in one case the money was collected through a bank would make no difference.

A document was stampable according to its tenor; the same document could not be stampable in one set of circumstances and not stampable in another set of circumstances. Section 32 of the Stamp Act, 1891, defined "bill of exchange" as follows:—

"For the purposes of this Act, the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money, and the expression 'bill of exchange payable on demand' includes—(*a*) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. . . ."

"Bill of exchange" for stamp purposes was an arbitrary thing having no relation to "bill of exchange" as defined in the Bills of Exchange Act, 1882. The Stamp Act, 1891, was aimed at documents, not transactions. If a transaction could be carried out in two ways, of which one required the use of a document and the other did not, it was quite legitimate to carry it out without the document and so avoid the stamp. It was only one step farther to say that if a transaction could be carried out either by a document requiring a stamp, or by a document not requiring a stamp, the one which did not require a stamp could be used and the Inland Revenue could not say:—"Because you might have used a document which requires a stamp you must stamp the document which you have in fact used." (*Inland Revenue Commissioners v. G. Angus and Co.* (5 *The Times* L.R., 697; 23 Q.B.D., 579); *Brown, Shipley and Co. v. Inland Revenue Commissioners* (11 *The Times* L.R., 585; [1895] 2 Q.B., 598).

The document in this case purported to be nothing but a receipt; it bore no payee's name. If it required no stamp when filled in by a customer and presented by him, it required no stamp in any circumstances; otherwise the Inland Revenue would be stamping, not the document, but the transaction, and an inquiry would be necessary into each case. A clerk might go with two of those receipts; one to get £1 for his employer and one to get £1 which his employer owed him—one would be stampable and the other not.

MR. JUSTICE ROWLATT.—I suppose you do not receive a salary from the Exchequer? I do, quarterly. The document is always in the form of a receipt, and till a year or two ago I had to stamp the receipt. [Receipts for salary were exempted from duty by section 36 of the Finance Act, 1924.]

MR. GODDARD, continuing, said that the Crown must show that section 32 of the Stamp Act, 1891, was as comprehensive as section 17 of the Revenue Act, 1883. These receipts would have come within the definition in that section:—

"Sections 76 to 82, both inclusive, of the Bills of Exchange Act, 1882 . . . shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque.

"Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument. . . ."

These documents did not entitle the holder to payment from anyone. He could not sue the bank. If he wished to sue the customer he would have to do so on the original consideration, not on the document. Counsel distinguished *Rothschild and Sons v. Inland Revenue Commissioners* (10 *The Times* L.R., 328; [1894] 2 Q.B., 142) and *Committee of London Clearing Bankers v. Inland Revenue Commissioners* (12 *The Times* L.R., 283; [1896] 1 Q.B., 542).

The ATTORNEY-GENERAL said that he did not differ from the statement that a person was at liberty to select, if he could, a way of carrying out a transaction which avoided stamp duty, nor from the statement that one stamped documents, not transactions. But he did not agree that it was always irrelevant to consider the user of the document. By section 12 (2) of the Stamp Act, 1891 (the adjudication section),

"The Commissioners may require to be furnished with an abstract of the instrument, and also with such evidence as they may deem necessary in order to show to their satisfaction whether all the facts and circumstances affecting the liability of the instrument to duty, or the amount of the duty chargeable thereon, are fully and truly set forth therein."

These documents were clearly to enable a person to obtain money. Counsel drew attention to the caution inside the book—the ordinary caution which most banks put in their cheque-books—in particular, "the bank reserves the right not to honour receipts drawn against uncleared cheques." This document

was a new invention of the Midland Bank and its purpose and effect had to be considered.

MR. JUSTICE ROWLATT.—When the very first bill of exchange was drawn—which was probably longer ago than people think—the right of recourse must have been a matter of arrangement.

The ATTORNEY-GENERAL.—Clearly : then it became custom, then law merchant and, ultimately, statute law. The question whether one could sue on the document under discussion was immaterial. It was a document entitling the recipient to get the money from the Midland Bank and, as they themselves said, it possessed some of the advantages of a cheque. The form signed by the customer bore out the Crown's view. The bargain between the parties was that the document should entitle the bearer to payment and oblige the bank to pay.

MR. JUSTICE ROWLATT.—But is it a "document entitling" the bearer to payment ?

The ATTORNEY-GENERAL.—It is the document and nothing else which entitles him to payment. It is only by presenting the document that the bearer could get the money. What had to be looked at was the substance of the transaction effected by the document, not its language only.

MR. JUSTICE ROWLATT.—You say that this document meant to every one concerned exactly what a cheque meant ?

The ATTORNEY-GENERAL.—Yes. The effect of the arrangement between the banker and the customer was that it should operate as an order for payment. He referred to the cases cited by Mr. Goddard. In *Rothschild and Sons v. Inland Revenue Commissioners* (*supra*) the document was not an order to anyone to pay, but the Court said that they must look at the real transaction effected.

The ATTORNEY-GENERAL also referred to *Great Western Railway Company v. Inland Revenue Commissioners* (10 *The Times* L.R., 128 ; [1894] 1 Q.B., 507, at p. 513) ; *Mortgage Insurance Corporation, Limited v. Inland Revenue Commissioners* (4 *The Times* L.R., 172, 173 ; 20 Q.B.D., 645 ; 4 *The Times* L.R., 710 ; 21 Q.B.D., 352). The Revenue Act of 1883 was narrower, not wider, than the Stamp Act, 1891. It was intended to bring certain documents within the crossed-cheque provisions of the Bills of Exchange Act, 1882, and it employed language taken from the Stamp Act, 1870.

Mr. GODDARD, in reply, said that to inquire into surrounding circumstances to see whether a document, *prima facie* liable to duty, fell within any exemption was a totally different thing from inquiring into surrounding circumstances to see whether a document, which on its face contained nothing to make it liable to stamp duty, could be brought within the purview of the duty by its use in a transaction not apparent on the face of the document.

MR. JUSTICE ROWLATT read the following considered judgment :—In this case the facts and documents make it abundantly clear that these so-called receipts were designed to serve the purpose of cheques, in that they were intended (to use the most neutral term that occurs to me) to put the money at the disposal of the persons to whom they were handed. They are not, however, cheques, and if it had been attempted to tax them as such because the transaction might have been effected by cheques, that attempt would have been defeated by the well-known principle exactly exemplified in *Commissioners of Inland Revenue v. G. Angus and Co.* (5 *The Times* L.R., 697 ; 23 Q.B.D., 579). That is the point of that case. Here the tax is claimed not as if the documents had been cheques, or anything else which they are not, but because (so it is said) they are in themselves "documents entitling" a person to a payment by another person—which is a substantive subject of tax. I say "in themselves" because that raises a question which must be faced. If there is another advantage which accrues to the holder of a document by virtue of another arrangement *dehors* the document, the effect of that arrangement cannot be imputed to this document (if I may use that expression) so as to attract to it any duty to which a document embodying such an arrangement would be liable. That is made clear by *Brown, Shipley and Co. v. Commissioners of Inland Revenue* (11 *The Times* L.R., 585 ; [1895] 2 Q.B., 598). Mr. Goddard says that this is such a case, and, if it is, he is right.

He contends that what the recipient of this document gets is the benefit of a promise to him by the person who signs it that the bank will pay the money. But the Crown are not asking for duty as upon such a promise and Mr. Goddard does not say that they are. What he is really saying is a totally different thing—namely, that in considering what the document itself does, one has to look at the mere words in the document in the abstract, apart from the function of the document as intended and understood by the parties who employ it. That proposition, as it seems to me, receives no support from *Brown, Shipley and Co. v. Commissioners of Inland Revenue* (*supra*) and is negatived by the decision in *Rothschild and Sons v. Commissioners of Inland Revenue* (10 *The Times* L.R., 328 ; [1894] 2 Q.B., 142), where Mr. Justice Mathew, at pages 146 and 147, treats himself as entitled to have regard (I quote his own words) to "what the document is and how it is used."

What, therefore, is this document and how is it used ? It is referred to as a receipt. But it is not a receipt unless and until it is used as such by being given as an acknowledgment of payment. When the person signing it gives it to his creditor he is not giving a receipt, and if it were for an amount of £2 or upwards he would not incur a penalty under section 103 of the Stamp Act, 1891, for giving a receipt not duly stamped. What, then, is it when it is used as it is here ?

The words of it, upon which Mr. Goddard says we are to concentrate, describe nothing occurring between the signatory and the recipient, and unless we are permitted to inquire what is the meaning of its existence in the hands of the bearer we must say that, as a document, it has at this stage effected nothing at all ; it has not indeed come into operation. If, as I think, this inquiry cannot be excluded, we find that it has effected something ; that it has come into operation as a delivered document and that (subject to one question as to the meaning of the word "entitled") its function has been to entitle the recipient to payment of the sum mentioned in it. Mr. Goddard correctly pointed out that the holder of this document cannot sue the bank, nor, upon the document itself, the signatory. I think, however, that the case of *Committee of London Clearing Bankers v. Commissioners of Inland Revenue* (12 *The Times* L.R., 283 ; [1896] 1 Q.B., 542) shows clearly that no such right of action is necessary to bring a document within the phrase under discussion.

For these reasons I think that my decision must be in favour of the Commissioners, with costs.

[Solicitors—Messrs. Clarke, Rawlins and Co. ; the Solicitor of Inland Revenue.]

House of Lords.
(Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Carson, and Lord Blanesburgh.)
1927. July 26.

BAKER v. ARCHER-SHEE.*

Revenue — Income-tax — Foreign securities, stocks and shares, and other foreign property —Whether foreign possessions — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Case V., rule 2.

A testator, who was a citizen of the United States, left his property to trustees in that country to be applied to the use of his daughter for life. The fund constituted under the will consisted of "foreign Government securities, foreign stocks and shares, and other foreign property." The appellant, who resided in England, married the testator's daughter, and was assessed to income-tax on the income under Schedule D.

The trustees of the fund were a New York company, which was entitled to payment for its services, and the estate had been fully administered. The income was subject to American income-tax. It was admitted at the Bar that the income was not remitted to this country but was paid into a New York bank to the order of the testator's daughter, less the trustees' commission and the American income-tax.

By Schedule D of the Income Tax Act, 1918, residents in the United Kingdom are taxable under that Schedule on all property, wherever situate, except that by rule 2 of Case V. of that Schedule tax on income from foreign possessions other than stocks, shares, or rents, is to be computed only on so much as is actually received in this country.

The Special Commissioners of Income Tax decided that the assessment was good, but stated a case.

Held (Viscount Sumner and Lord Blanesburgh dissenting), that as the estate had been fully administered the right of the respondent's wife, if American law was the same as English law, was not merely a right to the balance sum left after deducting the commission and American income-tax, but she was entitled in equity to the dividends, and the right was not a foreign possession, other than stocks, shares, or rents, within rule 2 of Case V., and the case must be referred back to the Special Commissioners to state, (*a*) The particulars of the "foreign government securities, foreign stocks and shares, and other foreign property" sufficiently to show first, which of them were, in their opinion, "securities" within Case IV., rule 1, and, secondly, which of them were, in their opinion, "stocks, shares or rents" under Case V., rule 1, and thirdly, which were, in their opinion, "possessions out of the United Kingdom other than stocks, shares, or rents" under Case V., rule 2, and (*b*) which of those they had assessed on the income of the year of assessment and which on the average of the three preceding years; and (*c*) that the sums paid into the New York bank had not been in whole or in part remitted to the United Kingdom.

Decision of the Court of Appeal (42 *The Times* L.R., 594; [1927] 1 K.B., 109) reversed.

This was an appeal by the Crown from an order of the Court of Appeal (42 *The Times* L.R., 594; [1927] 1 K.B., 109) reversing an order of Mr. Justice Rowlatt (42 *The Times* L.R., 367) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

By the will, made in New York, of Alfred Pell, a citizen of the United States and the father of the respondent's wife, Lady Archer-Shee, therein described as "my daughter Frances," it was directed, after various specific bequests, that the executors and trustees of the will should hold in trust all the testator's real and personal estate upon trust (*inter alia*)

"That in the event that my said wife shall die leaving no issue by me her surviving the whole of the said income and profits shall thereafter be applied to the use of my said daughter, Frances, during her life."

The will also gave power in events which in due course happened for a trust company incorporated under the laws of the State of New York to be appointed an executor and trustee with like powers as the original executors and trustees, which included power to retain and hold, or change, investments and to reinvest as they might deem expedient in their discretion. In 1904, on the death of the testator's widow leaving no issue, Lady Archer-Shee became entitled to the income of the trust fund for her life under the provision of the will above set out. That fund consisted of foreign Government securities, foreign stocks and shares, and other foreign property.

In 1914 the Trust Company of New York was appointed to be executor and trustee of the will, and at all material times was sole executor and trustee.

Paragraph 4 of the case stated by the Special Commissioners was as follows:—

"During the three years ending 5th April, 1925, the appellant (the present respondent) was married to the said daughter (Frances) of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Company of New York have paid over such part of the sums which they received from the said fund as they considered to be income as the same accrued to her to her order at Messrs. J. P. Morgan and Company's bank in New York while retaining in their own possession such sums as they thought might be required to comply with the income-tax or other provisions of American Law."

In these circumstances, the question to be determined was whether the amount which the American Trust Company paid in the course of a year to Lady Archer-Shee's account in New York was income arising from specific securities and stocks and shares within Case IV. of Schedule D of the Income Tax Act, 1918, or within rule 1 of the Rules applicable to Case V., or was income arising from a foreign possession within rule 2 of the Rules applicable to

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

Case V. It was not disputed that the respondent was chargeable under the Act for his wife's income. If the income was income arising from stocks and shares or from securities the respondent was liable to income-tax, whether the income was received in the United Kingdom or not, but if it was derived from foreign possessions he was liable only if it was remitted to the United Kingdom.

The respondent was assessed to income-tax by the Additional Commissioners for the Division of St. James's, Westminster, under the Fourth Case of Schedule D of the Income Tax Act, 1918, in respect of income which included the interest arising from the securities forming part of the aforesaid trust fund for the income-tax years 1923-24 and 1924-25 as being income belonging to his wife. He appealed to the Special Commissioners against the assessments, and contended that only so much of the interest in question as was remitted to his wife in the United Kingdom was chargeable to income-tax.

It was contended that such income was assessable only under the Second Rule of Case V. of Schedule D as being income from a foreign possession (not being stocks, shares, or rents)—namely, the right which the respondent's wife had under the will of her father to have the trusts duly administered; and that the specific interest from the specific securities was not the income of the wife, and that the right of the wife under the trusts of the will was not a foreign security.

It was contended on behalf of the appellant, the inspector of taxes, that the income receivable under the will by the respondent's wife arose from the specific securities, stocks, and shares which formed part of the trust fund, and that it was chargeable to income-tax in respect of the full amount under the Rules of Case IV. of Schedule D, in so far as it was interest arising from securities whether it was actually remitted to the United Kingdom or not; and, similarly, under the First Rule of Case V., in so far as it arose from stocks or shares.

The Special Commissioners decided in favour of the inspector of taxes.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners, but his decision was reversed by the Court of Appeal (the Master of the Rolls, Lord Justice Warrington, and Lord Justice Sargant).

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the appellant; Mr. Maugham, K.C., and Mr. Edwardes Jones, K.C., for the respondent.

Viscount Sumner.—My Lords: In this case the respondent was assessed by Additional Commissioners in respect of the income-tax years 1923-24 and 1924-25. His appeal to the Special Commissioners failed. Their decision was in turn affirmed by Mr. Justice Rowlatt, but was set aside by the Court of Appeal. Hence the present appeal.

The respondent's wife was born in the United States. Under the will of her father, Mr. Alfred Pell, of New York, she is entitled, as tenant for life, to the income of a considerable estate now held in trust by the Trust Company of New York. So far as concerns the present appeal it is in respect of his wife's interest under this trust that the respondent is charged with tax.

Paragraph 2 of the case of the appellant, the inspector of taxes, runs thus:—"The question arising in this appeal is whether for income-tax purposes the income of foreign securities, held by the trustee of a foreign will resident abroad upon trusts which entitled the respondent's wife to the income during her life, belonged to the respondent's wife so as to be chargeable to income-tax under Case 4 of Schedule D of the Income Tax Act, 1918, whether such income was remitted to the United Kingdom or not." In different words the respondent's case states the question to the like effect, and counsel so argued it on both sides.

The case stated sets out the relevant sections of the will. In the events which happened the whole income and profits of the trust estate were to be applied to the use of Lady Archer-Shee during her life. The trust fund consisted, in the years now in question, of foreign government securities, foreign stocks and shares, and other foreign property. The case stated says:—

"During the three years ending April 5, 1925, the appellant was married to the said daughter of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use."

So far it merely follows the will. It proceeds:—

"The Trust Company of New York have paid over such part of the sums which they received from the said fund as they considered to be income, as the same accrued, to her order at Messrs. J. P. Morgan and Company's Bank in New York, while retaining in their own possession such sums as they thought might be required to comply with the income-tax or other provisions of American law."

This is, in effect, a finding that no profits or gains *in specie*, arising from any particular trust investment, have been paid to Lady Archer-Shee at all. The trustees have throughout retained the receipt and control of the income from all sources. Your Lordships were told by the respondent's counsel, without contradiction, that the sums actually paid to Messrs. J. P. Morgan and Co. for Lady Archer-Shee's account were not remitted to her in this country, but were spent by her in the United States, and it has been the appellant's contention throughout, as the case stated recites, that the income arising from the trust property was taxable here, whether actually remitted to the United Kingdom or not. In truth the issue, as raised, is independent of the proportions in which the trust fund is made up of securities, shares, and other foreign possessions, and this is no doubt the reason why the Special Commissioners, with the concurrence of both parties, have thought it unnecessary to define those proportions.

There is no finding as to the law of the State of New York and, in accordance with the settled rule, we must presume that the general law of New York which is here relevant—namely, the law of trusts and wills, is the same as our own. How far any such presumption arises with regard to statutory law and particularly to revenue statutes is another matter. I am sure no well-wisher of the State of New York would willingly suppose that the income-tax law there prevailing is expressed in the same terms as our own.

Though the Attorney-General conceded at your Lordships' Bar that tax should not be claimed on any sums rightly deducted by the trustee before making payment to Lady Archer-Shee's New York bank, I still think that the Inland Revenue is logically committed to its original contention that, because she is the beneficiary for life under a trust vested in a New York trustee, she is now chargeable to English tax in a greater measure than if she had made these investments herself and had owned them absolutely at law, instead of being merely beneficially entitled to their income for life in equity. This broad contention is variously expressed, viz.:—(*a*) that the respondent was rightly assessed in respect of income arising from "securities out of the United Kingdom

belonging to his wife" (Reason 1); (*b*) that the income of the securities, forming part of the trust fund, "belongs to the respondent's wife" (Reason 2); and (*c*) that it arose from the specific investments which constituted the trust fund, and must be charged upon the husband accordingly "in the full amount, whether actually remitted to this country or not." Accordingly we have to consider two kinds of question. (*a*) Does the income of a trust fund "belong" to the beneficiary, so that the beneficiary is chargeable as if it arose and accrued to him directly as his, and, if so, (*b*) is the amount so chargeable the gross amount paid by way of interest or dividend on the investments, or only the net amount received by the beneficiary after deduction of the tax and other charges, which the trustees have necessarily to pay out of the gross income of the trust fund which comes to them?

My Lords, the position of the equitable tenant for life and of the investments which form the trust fund, is so clear, both in law and in equity, that, apart from any special prescriptions, express or implied, of the law relating to income-tax, there can, I think, be no doubt about them.

The trustee has the full legal property in the whole of the trust fund and the beneficiary has not. Apart from special provisions in particular settlements, which do not affect the general principle, the trustee is not the agent of the beneficiary, who can neither appoint nor dismiss him. She cannot require him to change or forbid him to change the particular investments of the fund. There is no liability on the beneficiary for the trustee's acts on the principle of *respondeat superior* and, unless the trust deed otherwise provides, the trustee must act without remuneration to himself and cannot in any case sue the beneficiary on any implied promise to pay. It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of a Court of Equity to enforce the trust and to compel the trustee to discharge it. This right is quite as good and often is better than any legal right, but it is not in any case one which for all purposes makes the trust fund "belong" to the beneficiary or makes the income of it accrue to him *eo instanti* and directly as it leaves the hand of the party who pays it. I do not understand that, so far, there was any contest. The appellant's argument is that, whatever may be the legal position of the capital and the equitable position of the trustee and the *cestui que trust*, as regards the right to the income for income-tax purposes the law is different and that under the Income Tax Act, 1918, and by virtue of some implication the "accrual" is to the beneficiary.

I put aside the contention that, if the respondent is not held liable, trustees will be liable to supertax on trust funds and beneficiaries will be outside the benefit of exemptions from tax. It is not in this indirect way that the general law can be set aside for the convenience of the Revenue. Supertax and exemptions depend on the sections which impose or confer them, not on some supposed incidence, arising argumentatively from provisions as to the subject-matter which attract tax, or as to the extent of it. Supertax is chargeable in respect of the income of an "individual" from all sources. Even in the easiest case of a trustee to accumulate income, no one would say that his trust was a "source of income" to him as an "individual," as, in the case of several trustees, they are not "an individual" at all. The case of exemptions is similarly dependent on the construction of the relevant section.

It is not a private instrument, like a will, that can determine the question whether a fund is taxable or whether Lady Archer-Shee is chargeable in respect of it. That turns on the legislation, which deals with her rights, legal or equitable, for the purposes of taxation. It follows that it is on the terms of the Income Tax Act, 1918, or on some decided construction which binds your Lordships, that the Inland Revenue can alone find authority for the present contention that the person "entitled to" the income is the beneficiary, and a rule of "income-tax law," which so completely and uncompromisingly disregards the regular law of trusts and the ordinary law of property, is one that must be enacted beyond doubt or question.

The scheme of the Act is that income is taxed—that is, income which somewhere has been received, and persons are assessed to the payment of that tax. The income taxed and the charge upon it are, or should be, expressly and uniformly described on definite principles, but assessment is a matter of convenience, now on this plan and now on that. There is a good deal of practical advantage in tax-gathering on this indefinite scheme, but all the same the advantage must be taken *cum onere* and, if the right to charge and to assess is not to be found in the Act either in express terms or by necessary intendment (including what is called "the scheme of the Act"), the Crown fails. I have looked without success for either express words or a necessary implication that would enable the Revenue to tax a subject who is only an equitable tenant for life, as if she was both the beneficiary and the trustee in one, or to claim that securities and shares belong to her, as to which she has only a right to compel the administration of the trust. The rules applicable to Case IV. and rule 1 of those applicable to Case V. of Schedule D clearly apply to legal owners and, if words properly apt to charge them are also to charge equitable owners, it can be done only by ignoring the difference in this matter between law and equity.

On the argument for the appellant that the equitable tenant for life of the income of this trust estate may be directly chargeable there are two separate questions, (*a*) whether she can in any case be chargeable in respect of the difference between the gross income of the trust and the net income, which the trustees properly retain, and (*b*) where, as is here the fact, the whole fund and the income of it are abroad, whether she can be chargeable at all, in respect of income arising from foreign possessions other than securities, stocks, shares, or rents, which is not remitted to the United Kingdom? The first question would equally affect the case, where fund, trustee and beneficiary are all here; the second arises only where there is property abroad. It does not seem to matter whether the income aimed at is said to arise from or to accrue to or to belong to this or that property or person. In the present case, where the person assessed can only be the beneficiary or her husband for her, authority has to be shown for taxing her in respect of something that is not here and that she does not get. In others, however, the position of the trustee would arise for consideration, if the trustee were here.

I do not know of any provision which, clearly or at all, imposes either collection at the source or vicarious liability on a trustee, as such, as against the beneficiary, and in the case of foreign possessions, as in this case, there are express provisions to the contrary. The debatable question is generally one of the person to be assessed, without deciding any-

thing about ownership or its rights. There is, however, no question here as to the person to be assessed; he must be Sir Martin Archer-Shee. Counsel for the Inland Revenue pointed to no authority that made his liability depend on anything but the nature and extent of his wife's right to the property which is charged.

In the present case it happens that the settlement is in the simplest form. There is only one tenant for life and, during her life, there is no other object of the trust to be considered. We hear of no matters in which a conflict between income and capital and their respective interests has arisen, nor of any business carried on by the trustee, as to which the more complex case of trading profits would replace the plain case of dividends paid. If there had been annuitants with a prior right to be paid or several beneficiaries entitled to share in the income, if there had been reversioners, who could claim that part of the annual receipts was in the nature of accretions to capital, if there was a trust for accumulation or a power to vary the amounts payable from time to time as between minors, the impracticability of saying that any or all of the beneficiaries entitled to income owned the whole or any part of that income from the moment when it became payable and was paid and to the full extent of the amount paid, would be evident. The same rule of "income-tax law" must, however, be applicable to all these cases. No doubt it is true that an accountant could always more or less simply appropriate certain fractions of each incoming and each outgoing to each object of the trust in a uniform proportion. That, however, is done by making assumptions, which may not correspond to the facts, and by computing accordingly. The trustee may in his discretion pay one beneficiary out of the money collected from a security, another out of a payment of rent, and a third out of the profits of a business. He may, on the other hand, if he thinks fit, pay everything received into one account and then draw on that account generally in favour of each beneficiary. In either case it is plain that no specific dividend or interest payment "belongs" in any proper sense of the word to any particular beneficiary. The distribution rests with the trustee, so long as he complies with his duties. A series of accounts could be made out between the trustee and each beneficiary, crediting the latter with a fraction of each item of income and debiting him with a fraction of each item of outlay, in such a way that, on aggregating all the separate accounts, the debits and credits would exactly correspond to the trustee's general account of his trust. Similarly, by appropriation of payments in the trust bank account, the source out of which any given payment was made can be calculated. Neither process shows anything material to the nature of the beneficiary's right. They both go only to the measure and discharge of it in money.

The fact appears to be that it has all along been the policy of the Legislature in regard to income-tax to keep aloof, as far as possible, from questions of title and to confine itself, as far as possible, to questions of administration. Money within the United Kingdom is taxed where it is most conveniently found, and, though that is *prima facie* in the hands of its owners, in a vast number of cases it is otherwise. Collection at the source is effected by express provisions, which enable specified persons to pay the tax thereon to the Revenue directly and in the first instance, and authorize them to deduct it against another person who is placed under a statutory obligation to allow it; *e.g.*, under Schedules A and C, and No. 20 of the General Rules. As Lord Cave says in *Blott's* case (37 *The Times* L.R., 762; [1921] 2 A.C., 171), a company pays as taxpayer and then deducts; it does not pay as agent for the shareholder. Where the person to whom the money belongs is out of the country, his agent, who is here and handles the money, may be taxed for him. In some cases, mostly similar to this, the assessment and charge are made on the trustee here for the beneficiary abroad. Nothing in this scheme catches the taxpayer who is in the United Kingdom and whose trustee and trust fund are not.

On suitable occasions the Act deals expressly with the respective positions of trustee and beneficiary and distinguishes between legal and equitable ownership, *e.g.*, section 37 (i.) (*a*), "hereditaments . . . belonging to any hospital . . . or vested in trustees for charitable purposes"; section 103 (1) and (3), in which the case of a trustee "who has authorized the receipt of profits arising from trust property by the person entitled thereto," is distinguished from that of an agent or receiver, and also from that of a "person, who, in whatever capacity, is in receipt of . . . profits or gains . . . of or belonging to any other person, who is chargeable in respect thereof." Section 54 (4), and Schedule C, General Rule No. 2 (*d*) proviso, make express special provisions for substituting the acts of beneficiaries for the action of trustees, which would in general be alone material, and, in one single case, for the elimination of the trustee as owner of the trust securities and the substitution of a beneficiary, who, in that single case, is to be "deemed" to be the person owning the securities, though, in general, of course he is not.

I come now to the decisions which were supposed to be in point. The appellant contended epigrammatically that "for income-tax purposes the trustee is eliminated," a contention which goes far and unwarrantably beyond the words of the Act. The authority on which it was rested, *Singer v. Williams* (36 *The Times* L.R., 659; [1921] 1 A.C., 41, at p. 65), turned on the question whether or not the trustee, resident here, was chargeable. The fund was abroad, and he had authorized the beneficiary, who was abroad also, to collect the income abroad where it arose. The difference between legal and equitable rights only came in question because it enabled the Inland Revenue to argue that the legal owner alone was chargeable, and that the income must be deemed to have accrued or arisen to him, that is to say, here. There is no such contention in the present case, nor was the distinction between the gross amount collected by a trustee and the net amount duly distributed by him to the beneficiaries one which arose on the facts of *Singer v. Williams* (*supra*). The decision of the House was that the trustee was not chargeable to tax here, and sundry expressions used, to the effect that the beneficiary resident here is chargeable, are only correlative to the *ratio decidendi* in its actual form and have no reference to the questions now in debate. Again the case of *Lord Sudeley v. Attorney-General* (13 *The Times* L.R., 38; [1897] A.C., 11) is said by Lord Justice Sargant to be in its general reasoning precisely applicable. The points referred to there were, first, the local situation, for the purposes of English taxation, of an equitable right to have an estate administered, in which the testatrix was interested as a residuary legatee at the time of her death, and, second, the question whether for such taxation her interest was to be deemed to be confined to a specified fraction of the residuary estate, corresponding to her share under

her husband's will, or to be extended to the whole of that residuary estate. In applying this to the present case the learned Lord Justice says that Lady Archer-Shee has not any specific right to any particular item of income, but, following Lord Herschell's reasoning, only an equitable right to have handed over to her the net income of the estate, subject to all proper deductions, which right of hers is a form of property situate in New York, in whose Courts it would have to be asserted. I think the reasoning of this judgment is correct. It is immaterial that in *Lord Sudeley's* case (*supra*) the estate of the husband of the testatrix had not yet been administered, whereas here, no doubt, this has been long ago accomplished. Nobody at any rate has argued the contrary, and the point does not need discussion. Furthermore, the rules of Case 4 of Schedule D, which are applicable on this occasion, say expressly that, where no money has been remitted to this country, the taxpayer here is not chargeable in respect of foreign possessions, other than stocks and shares, securities and rents.

Lady Archer-Shee, for the reasons already given, does not for income-tax purposes, in my view, own, and is not entitled to, any of the stocks, shares, securities, or real property that form part of the New York trust estate. These belong to the trustee company, to which also the annual payments made in respect of them, by way of rent, interest or dividends, "arise," "accrue," and "belong." All that she has is a right, in the *forum* of the trustee and of the trust fund, to have the trust executed in her favour under an order to be made for her benefit by the appropriate Court of Equity, and this "possession" neither consists in the trust's investments or any of them, nor is situated here. It is "foreign."

I am, therefore, of opinion that the appeal fails. I attach no importance to the obvious slip, made in one of the judgments in the Court of Appeal, as to money having been remitted to Lady Archer-Shee here and I need say no more about it, as I do not think that it affected the reasoning of the judgment appealed from.

Lord Atkinson.—My Lords: The testator in this case, Alfred Pell, the father of Lady Archer-Shee, in the sixth paragraph of his will, dated May 4, 1899, directed that all his real and personal estate, except what was thereinbefore disposed of, should be held in trust by his executors and trustees; that they should, during the life of his wife, apply two-thirds of the income and profits thereof to her use, and the remaining one-third to the use of his daughter, or any issue whom she (*i.e.*, his wife) might leave surviving her. He then provided for the event which has in fact occurred in these words: "In the event that my said wife shall die leaving no issue by me her surviving the whole of the said income and profits shall thereafter be applied to the use of my daughter Frances during her life."

The testator then by the ninth paragraph of his will appointed his wife and John Pierpont Morgan, Junior, to be executors of his will and trustees of all the trusts created or declared thereby. He gives his executors the very widest powers of dealing with, selling, investing or disposing of his real and personal estate, and changing any of the investments upon which any portion of it might be invested. He further provided that if the executor, John Pierpont Morgan, Junior, should decline to qualify or act as an executor or trustee under his will, or should die, resign or become incapacitated, he authorized his wife, or in case of her death or incapacity his daughter Frances, to nominate and appoint some trust company organized under the law of New York State as executor and trustee in his, Pierpont Morgan's, place or stead, such appointment to be made in writing and duly acknowledged by her, and to be filed in the office of the Court in which his will had been proved. The trust company so appointed was to become one of the executors and trustees of his will, and was to perform all the duties, and have all the powers, authority, and discretion, as if it had been appointed by his will. This last provision is curtailed by that which follows in section 10. By this latter section he confers upon the trust company power to retain any investment of which he was seized or possessed, and also the power to invest and re-invest his estate, in any securities which might be approved of in writing by his wife or daughter and by the said trust company.

It is found in the case stated that the testator died before the year 1904, and that his wife died in that year. Mr. Pierpont Morgan, Junior, on her death became the sole trustee and executor under the testator's will. This gentleman seems to have occupied that position for a period of about ten years; presumably he discharged the duties belonging to it till he retired in the year 1914. Lord Justice Sargant, in giving judgment, said ([1927] 1 K.B., at p. 127): "No importance is to be attached to the fact that the trust fund in this case was originally formed or was derived from a residue, because having regard to the date at which the testator must have died, we must assume that the estate has been quite fully administered long ago, so that here we have a definite and specific trust fund."

I quite concur, but may one not justly assume that the words "long ago" extend to the year 1914, when Mr. John Pierpont Morgan terminated his ten years' administration of the estate? It would be strange indeed if a business man like him, who, unless he belies his name, is skilled in financial affairs, should not have completed the work of this administration in that length of time. If he had done so, it would have furnished a reason for his retirement. Then, when he did retire, one finds this young lady, Miss Pell, who, it is contended, has now no property in or rights to this fund beyond the right in equity, by suit presumably, to compel the trust company to pay to her the portion of the income to which she is entitled, dominating the situation, and by written instrument duly acknowledged and filed in the Court named, appointing not a named company but some company, *i.e.*, some company which she may select, to fill the office of executor and trustee instead of Mr. John Pierpont Morgan, Junior, retired. The choice is left with her. In addition, her powers and responsibility are not ended there. She has, under section 10 of the will, power over the investment and re-investment of her father's estate in any securities, in that her consent is necessary for any such operation. I think it is not an unreasonable inference from these matters that the life interest given to her by her father's will had become vested in her, and that the trust company which she had appointed were merely her agents to administer the fund for her and in her interest. If that be so, payments necessarily made properly in the administration of the fund are made in her interest and on her behalf, and, in my view, are made with her money.

The learned Master of the Rolls is in error in supposing that the trust company remit what they receive from the trust fund or any portion of it to the respondent's wife in this country. That is evident from the following paragraph in the case stated:—

"In the year 1914, the said J. Pierpont Morgan, Junior, resigned the trusteeship, and under the power

conferred by section 9 of the said will the Trust Company of New York, being a company constituted under American law and resident in the State of New York, was appointed to be executor and trustee of the will. The fund constituted under section 6 of the will consisted of foreign government securities, foreign stocks and shares, and other foreign property.

"During the three years ending 5th April, 1925, the appellant was married to the said daughter (Frances) of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Company of New York have paid over such part of the sums which they received from the said fund as they considered to be income, as the same accrued, to her order at Messrs. J. P. Morgan and Company's bank in New York while retaining in their own possession such sums as they thought might be required to comply with the income-tax or other provisions of American law."

But even with that correction I am unable to understand what precisely is meant by the two following passages in the judgment of the Master of the Rolls ([1927] 1 K.B., at pp. 120, 122). They run thus:—

"It appears from that statement of fact that what they remit is not what I will call the dividends in specie in their actual form; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. They do not remit the whole of the income from the profits but they remit a sum which has lost its origin or parentage; it has lost the shape of dividends, share warrants, or the like, and it is merely a sum of money which represents the balance after payment of the sums which would properly fall upon the trust."

"But is this sum income arising from securities? In *Singer v. Williams* (36 *The Times* L.R., 659; [1921] 1 A.C., 41) it was decided that shares in a foreign trading company are foreign possessions and are not foreign securities within Case IV. of that schedule, and the present Lord Chancellor gave an indication or definition of what is the meaning of the word 'securities.' This lump sum of money, this balance, does not appear rightly to fall within the words of Case IV., r. 1, as income arising from 'securities.' Exactly what those securities are it is unnecessary at present to define or to determine, but, from what I have already said, it is plain that this balance has lost its original character as being dividends from debentures or shares or the like, and it appears to me that it does not fall within Case IV., r. 1, as income arising from securities."

The trustees undoubtedly do not remit to the beneficiary the income of the fund in specie, if that means, as I suppose it must mean, forwarding to her the dividend warrants, cheques, and such like things received by them in payment of debts due to the fund. It would be unbusinesslike and ridiculous to do so. What the trustees properly and rightly do is to cash those dividend warrants and cheques, &c., and pay into the bank of the beneficiary the money which they thus receive. If the trustees paid into the bank of the beneficiary all the income of the fund which they received, retaining nothing, I assume, on the reasoning in these paragraphs, that there would be no loss of origin, no loss of "parentage," of any portion of the sums paid in. If that be so, I am utterly unable to understand how the retention by the trustees in their own hands of a portion of the income which they receive in order to pay lawful claims upon the fund, and charges which probably the lady herself would have had to pay or get paid for her, if she was resident in New York, and which the trustees will have to account for fully, can change the "origin or parentage" of the residue of the income received, lodged with the bankers of the beneficiary.

This residue has no doubt lost the shape of dividends, share warrants or the like, but so would the entire income of the fund if it had been lodged in the same way with the lady's bankers.

On the first of those two paragraphs it would appear to me as if nothing can preserve the true character and origin and parentage of the income paid to the beneficiary through her bankers unless that be done by lodging with those bankers the dividends, share warrants and the like received by the trustees but not cashed. With all respect I am quite unable to concur in this reasoning. I think it misleading.

An idea similar to that expressed in the two passages quoted from the judgment of the Master of the Rolls seems to me to underlie the following passage from the judgment of Lord Justice Warrington as he then was. The passage runs thus ([1927] 1 K.B., at p. 126):—

"They therefore found that the income arising or accruing to this lady in the present case is not the actual income derived from the various sources of investment, but that it is such sum as the trustees from time to time considered to be the income, while retaining in their hands the sums which are referred to in the findings of the Commissioners."

This passage would appear to indicate that in order to satisfy the word "accruing" or "arising" to the lady the trustees should remit to her all the dividend warrants, cheques received by them, and such like, in payment of the income, with the consequence which I have already mentioned. The lodgment of the entire income with her bankers would not apparently satisfy these words, or if it would, how and why the lodgment of 95 per cent. of the income, 5 per cent. being retained to satisfy some lawful claim upon the fund, which the beneficiary, if she was resident in New York, would probably have had to pay, would not satisfy them I cannot understand. The trustees do not, I think, properly speaking, consider what is to be the income which the beneficiary is entitled to receive. They lodge the whole income, less what they consider it is necessary to retain to discharge lawful claims upon the fund. I am unable to follow the reasoning that leads to the conclusion that, by the deduction of these sums, the character of the balance lodged changes; and acquires a character different from that which the entire income would have borne if it had been lodged.

Lord Justice Sargant expresses his view of the case in the following passage:—

"The learned Judge has summed up the position, in my judgment, perfectly accurately in a passage of his judgment which I will now read. He says this: 'What this lady enjoys is not the stocks, shares, and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees to administer this property during her life so as to give her the interest of it, and so on, according to the provisions of the trust. Her interest is merely an equitable one and it is not an interest in the specific stocks and shares constituting the trust fund at all.'"

He apparently considered that in that state of things the reasoning of the Judges and the members of the House of Lords who took part in the case of

Lord Sudeley v. Attorney-General (13 *The Times* L.R., 38 ; [1897] A.C., 11) was applicable to this case. That case has been frequently referred to in the argument in this case, and, almost consistently, the important point decided is disregarded. That point was, that the claim upon or against the residue of a testator's property could not be enforced until the testator's estate had been fully administered, and the net residue, which might ultimately be nothing, ascertained. Lord Justice Sargant himself states that it must be presumed, owing to the lapse of time, that the testator's estate has been fully administered. The remarks of the Judges to whom the learned Lord Justice refers, have reference to the fact that the testator's estate had not been fully administered, and do not, it appears to me, help to the conclusion at which the learned Lord Justice has in this case arrived.

The evidence set out in the case stated is extremely scanty. It does not indicate with any particularity the sources from which the trust fund is derived, whether it be from foreign "Government securities, foreign stocks and shares, or other foreign property." I have had the pleasure and advantage of reading the judgment about to be delivered by my noble friend Lord Wrenbury. It is, I think, clear and convincing. I concur with him in his view of the case, and approve of the suggestion that he makes as to a reference back to the Special Commissioners to restate the case by setting forth the particulars which he has indicated.

Lord Wrenbury.—My Lords : Section 1 of the Income Tax Act, 1918, enacts that income-tax for any year "shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules marked A, B, C, D, and E." I note here the words "all property."

Schedule D enacts that tax under that Schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing (i.) to any person residing in the United Kingdom "from any kind of property whatever, whether situate in the United Kingdom or elsewhere." It further enacts that tax under the Schedule shall be charged under certain Cases and after specifying five Cases it adds :—

Case VI.—"Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule." No words could be more plain to include all annual profits of every kind.

In the case of a person residing in the United Kingdom, therefore, the tax is imposed upon *all property,* whether situate in the United Kingdom or elsewhere and whether described in any of the five Cases or not.

Case V., however, which relates to "possession out of the United Kingdom," consists of two parts. The former has to do with "stocks, shares, or rents in any place out of the United Kingdom"—the latter with "possessions out of the United Kingdom other than stocks, shares or rents." In the latter case the tax is to be "computed only on the full amount of the actual sums annually received in the United Kingdom."

The result of the above may be shortly stated by saying that in the case of a person residing in the United Kingdom all his property whatever, situate in the United Kingdom or elsewhere is charged to tax, but, if he shows that a particular part of his property is within Case V. (2), then the tax is computed only upon so much of the income as is actually received in the United Kingdom.

In this case the taxpayer is a British subject resident in England. The property from which the income is derived is in America. The income is not remitted to this country. The case states that the income has been paid to Lady Archer-Shee's order at Messrs. J. P. Morgan and Co.'s bank in New York. It stops there, and does not go on to state that it has not been remitted by New York to this country but it is admitted at the Bar that this is the case. In these circumstances the question is whether the income is such that in that state of facts it is taxable to income-tax.

The income in question is income of Lady Archer-Shee under a gift in the will of her father Mr. Alfred Pell, of New York, in the following terms :—

"I direct that all my real and personal estate except what is hereinbefore disposed of be held in trust by my executors and trustees as follows . . . (3) that" (in an event which happened) "the whole of the said income and profits shall thereafter be applied to the use of my said daughter Frances during her life." Lady Archer-Shee is the said daughter Frances.

The date of Mr. Pell's death does not appear, but it was before 1904. It is not disputed that the estate has been fully administered. The Trust Company of New York have been appointed as, and now are, trustees of the fund, and it is not disputed that the funds are now in their hands as trustees upon the trust above stated.

The securities, stocks, and shares are liable to American income-tax and the Trust Company of New York are entitled to commission or other payment for their services. Subject to these Lady Archer-Shee is during her life entitled to the income arising from the securities, stocks and shares, and foreign possessions.

In this state of facts Lady Archer-Shee's interest under her father's will is beyond all question "property." The question for determination is what is the nature of that property, is it a "possession out of the United Kingdom other than stocks, shares, or rents" within Case V. (2) ? To escape taxation the respondent must establish that it is.

What, then, is the property to which Lady Archer-Shee is entitled ? The will is an American will. The law of America is in an English Court a question of fact. In the case stated by the Special Commissioners there is no finding as to what is the American law in the light of which the construction of Mr. Pell's will is to be ascertained. We have not heard that there has been any agreement between the parties on the point, and I have not traced that there has been any reference to it in the course of the proceedings. The members of the Court of Appeal do not appear to have considered the matter. They, and in particular Lord Justice Warrington, seem to have treated the question for decision as purely a question of fact, and without any finding as to the American law as a question of fact they contented themselves with referring to paragraph 4 of the case and founded themselves upon the statement that there is paid over to Lady Archer-Shee's account only such part of the sums which the trustees have received from the funds as they considered to be income. My Lords, the question is not what the trustees have thought proper to hand over and have handed over (which is a question of fact) but what under the will Lady Archer-Shee is entitled to (which is a question of law). The trustees, of course, have a first charge upon the trust funds for their costs, charges, and expenses, and American income-tax will be a tax which they would have to bear and which would fall

upon the beneficiary. But this does not reduce the right of property of the beneficiary to a right only to a balance sum after deducting these. If an owner of shares deposits them with his banker by way of security for a loan he is not reduced to being the owner of a balance sum, being the difference between the dividends on the shares and the interest on the loan. He is the owner of the equity of redemption of the whole fund. If a landowner employs an agent to collect his rents and authorizes him to deduct a commission he does not cease to be owner of the rents. Under Mr. Pell's will Lady Archer-Shee (if American law is the same as English law) is, in my opinion, as a matter of construction of the will, entitled in equity specifically during her life to the dividends upon the stocks. If, say, in January, £100, after deduction of American income-tax, was received for a dividend and there was nothing owing to the trustees which they were entitled to deduct, Lady Archer-Shee could, in my opinion, call upon them to pay her that £100. If such a property is not taxable it results that a person residing here, whether a British subject or not, could, by creating a foreign trust of stocks and shares and accumulating or spending the income abroad, escape taxation upon that income.

If the estate had not been fully administered I could well understand a contention that the right to whatever in administration might turn out to be the fund, the subject of this gift, was a "foreign possession," and fell under Case V. (2). But that is not the case. I have to read the will and see what is Lady Archer-Shee's right of property in certain ascertained securities, stocks and shares now held by the Trust Company "to the use of my said daughter." It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life. Her right is not to a balance sum, but to the dividends, subject to deductions as above mentioned. Her right under the will is "property" from which income is derived.

The statute itself provides for deduction of income-tax (see Schedule D, Cases IV. and V.); the commission payable to the Trust Company is a debt due from the beneficiary to the trustee—neither the one nor the other is relevant to the title of the beneficiary as distinguished from the amount which the beneficiary is entitled to receive by virtue of her title.

The case does not give particulars of the sources of the income beyond stating that the fund from which it arises consists of "foreign government securities, foreign stocks and shares, and other foreign property." "Securities" are the subject of Schedule D, Case IV. (1). "Stocks, shares, or rents" are the subject of Case V. (1). Foreign possessions, other than stocks, shares and rents, are the subject of Case V. (2). The first are taxable on the full amount arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject to deduction as there mentioned, including the deduction of any sum which has been paid in respect of income-tax in the place where the income has arisen (in the present case American income-tax). The second are taxable on an average of the three preceding years, whether the income has been or will be received in the United Kingdom or not, subject to deductions as before. The third are taxable only on the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, &c., on an average of three years.

To succeed on this appeal the respondent must establish that the securities, stocks, shares, and property of which Lady Archer-Shee is tenant for life are within Case V. (2). But in the absence of particulars as to the nature of the "foreign government securities, foreign stocks and shares and other foreign property," mentioned in paragraph 4 of the case stated, and of information upon which of them (*a*) the assessment has been made under Case IV. (1) on the amount arising in the year of assessment, and (*b*) under Case V. (1) on an average of the three preceding years, and (*c*) under Case V. (2) there has been no assessment at all because there has not been receipt in the United Kingdom, it is impossible to say whether the assessment is right or wrong. Your Lordships are not concerned with the figures. They are for the Special Commissioners. It is for them to make the assessment. But you are concerned with the principles upon which the Special Commissioners arrive at the figures, and without knowledge with respect to these it is not possible either to confirm or to disallow the assessment. The only information before the House is that upon an income of £12,000 an assessment has been made of £2,700. This is simply 4s. 6d. in the £ upon £12,000 and must have been made upon the assumption that the income arises from securities within Case IV. (1). The House has no means of saying whether this has been arrived at upon a right or upon a wrong principle.

The Master of the Rolls more than once in the course of his judgment says that the balance of the income is remitted to this country. This is not so. If the case were within Case V. (2) (which he holds it to be) there would be nothing to assess, because the income is not remitted to the United Kingdom. And all the members of the Court of Appeal fell into error, I think, in failing to treat the construction of the will as a matter of American law, and in deciding the case upon the footing that they were bound by a finding of fact in the case stated by the Special Commissioners that the income paid to the lady was not the actual income but such balance sum as the trustees considered to be income after retaining such sums as they thought might be required to pay American income-tax.

My Lords, in my judgment the appeal must be allowed and the matter referred back to the Special Commissioners to re-state the case by stating:—

(*a*) The particulars of the "foreign government securities, foreign stocks and shares, and other foreign property," sufficiently to show first, which of them are, in their opinion, "securities" within Case IV. (1), and, secondly, which of them are, in their opinion, "stocks, shares, or rents" under Case V. (1), and thirdly, which are, "in their opinion, possessions out of the United Kingdom other than stocks, shares or rents" under Case V. (2), and stating

(*b*) Which of these they have assessed on the income of the year of assessment and which on the average of the three preceding years, and

(*c*) Stating (as was admitted at the Bar) that the sums paid as stated in paragraph 4 of the case into the New York bank have not been in whole or in part remitted to the United Kingdom.

The order of Mr. Justice Rowlatt must also, I think, be discharged and the case referred back to the Special Commissioners with a direction as above stated. Any costs paid under the orders below must be repaid as the Court upon the re-hearing shall direct. The appellant will have his costs here and below.

Lord Carson (read by Lord Blanesburgh).—My Lords: I do not think it necessary, having regard to the full discussion which has taken place in the speeches which have been already made, to discuss

the sections of the Income Tax Act, 1918, or the Schedules which have been already referred to. The question which emerges from these is whether the money paid by the trustees of the will of Alfred Pell to the order of Lady Archer-Shee at Messrs. J. P. Morgan and Company's bank in New York or any part of it, though not remitted to this country, was chargeable to income-tax under the rules of Case IV. of Schedule D, in so far as it was interest arising from securities, and under the first rule of Case V., in so far as it arose from stocks or shares; the contention being on behalf of the respondent that in the circumstances of the case the sum so transferred constituted in the hands of the respondent's wife a foreign possession, and did not come within the rules mentioned as being either interest arising from securities or from stocks and shares.

It is, I think, essential in the first place to remember that the property which it is sought to tax in this case was in the hands of the trustees, to use the words of Lord Justice Sargant, "a definite and specific trust fund" to the whole of the income and profits of which the respondent's wife was entitled under the will of her father Alfred Pell. Had the residue been still undetermined or had the share of Lady Archer-Shee been a proportion only of the income or profits of the residue other questions would, no doubt, arise. The Special Commissioners in the case stated have found that the fund constituted under section 6 of the will (being the residue mentioned before) consisted of foreign government securities, foreign stocks and shares, and other foreign property, that the respondent's wife was entitled to have the whole of the income and profits from the said fund applied to her use, and that the Trust Company of New York (as trustee) had paid over such parts of the sum which they received from the said fund as they considered to be income, as the same accrued, to her order at a bank in New York, whilst retaining in their possession such sums as they thought might be required to comply with the income-tax or other provisions of American law. The Special Commissioners also held that the income receivable by the wife of the respondent from the Trust Company of New York arose from "the specific securities, stocks, shares, rents, or other property which constituted the trust fund." My Lords, in these circumstances I cannot myself draw any distinction between such a trust fund and one where specific securities, stocks and shares were vested in trustees to pay the rent and dividends to a *cestui que trust* for life. In my opinion upon the construction of the will of Alfred Pell, when once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Singer v. Williams* (36 *The Times* L.R., 659; [1921] 1 A.C., 41, at p. 65), and in my opinion the Master of the Rolls correctly stated the law when he said ([1927] 1 K.B., at p. 123): "In considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to the trustees."

The Master of the Rolls, however, yielding to the argument so put forward by the respondent, held ([1927] 1 K.B., at p. 120) that, having regard to the facts found, "what they remit is not what I will call the dividends in specie in their actual form; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. . . . It has lost the shape of dividends, share warrants, or the like." In aid of this view he cites certain statements made by noble Lords in this House in the case of *Attorney-General v. Lord Sudeley* (13 *The Times* L.R., 38; [1897] A.C., 11), and amongst others that of Lord Halsbury at page 15: "It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist." My Lords, with great respect to the Master of the Rolls, I do not think either his own reasoning or the quotations upon which he relies have any application to a case such as the present when, as I have already pointed out, we are dealing with "a definite and specific trust fund." My Lords, I am unable to understand why or how the character of the sum paid to the respondent's wife ever became changed, or, as the Master of the Rolls graphically says, "was no longer clothed in the form in which it was originally received, having no trace of its ancestry," simply because the deductions due by law have been made and because it has been mixed up with other trust moneys by the trustees. It is, in my view, in the same position as if the trustees had arranged to have the interest and dividends paid directly to the respondent's wife and she had discharged the necessary outgoings in accordance with the law. Whether the necessary outgoings according to law were discharged by the trustees or by the *cestui que trust* cannot, in my opinion, make any difference. I think the appeal should be allowed, but as it is evident that no distinction was made at the hearings before the Special Commissioners or Mr. Justice Rowlatt between the amounts which consisted of securities or stocks and shares or other foreign property, and as different considerations apply under the income-tax law to these different classes of property, I agree that the matter must be referred back to the Special Commissioners, and as a consequence that the order of Mr. Justice Rowlatt must be modified or discharged.

Lord Blanesburgh.—My Lords: The ultimate question in this appeal turns upon the description which in income-tax phraseology ought properly to be applied to the moneys paid during the two years in question by the Trust Company of New York to the order of Lady Archer-Shee, the respondent's wife, at Messrs. J. P. Morgan and Company's bank there. None of these moneys have been received in the United Kingdom. It is that fact which, if his contention as to their true description be correct, enables the respondent to say that he is not liable to pay income-tax in respect of them, either in whole, in part, or at all.

Lady Archer-Shee's interests arise under the will of her father, an American citizen, domiciled at his death in or about the year 1904 in the State of New York. The Trust Company of New York are the present trustees of his will. In them the residuary settled estate is vested. That estate, now ascertained as a corpus, consists, it is found in the case, of foreign Government securities, foreign stocks and shares, and other foreign property. The entire interest, dividends, and profits of these are received by the trustees. Upon them the trustees are chargeable with American income-tax, as, if they were English trustees, they would be chargeable with United Kingdom income-tax. Being, however, resident Americans, they are

no more chargeable with that income-tax upon these "foreign" receipts than would any other resident American citizen receiving them on his own account. It is convenient to note at once the reason, and the only reason, why in this case the trustees are not alone liable for this income-tax upon these receipts as such. The point is not without significance, because Lady Archer-Shee's position in relation to these receipts is, of course, in no way affected, so far as her rights under the will are concerned, by the accidental nationality of the trustees for the time being.

In the events which have happened the trustees hold the settled residue upon trust to apply its income and profits to the use of Lady Archer-Shee during her life. She has no interest in the corpus. In default of issue surviving her the entire settled residue, subject to a payment thereout of $50,000 to a niece of the testator, is to be held in trust for Columbia College, in the city of New York. It follows that Lady Archer-Shee is in no sense in control of the fund. The trustees are as much trustees for those entitled in remainder as for herself.

It was in pursuance of the trust in her favour that the payments referred to were made. Their nature is stated in the case. They were payments over by the trustees of "such part of the sums which they received from the said fund as they considered to be income, as the same accrued, . . . while retaining in their own possession such sums as they thought might be required to comply with the income-tax or other provisions of American law."

There can, I think, be no doubt as to the meaning of that statement. It means that the payments made to Lady Archer-Shee were payments of all that remained of a fund of miscellaneous income receipts after there had been paid or retained thereout sums deemed by the trustees to be sufficient to discharge the trust and other outgoings that had first to be provided for. The payments represented, in other words, the actual net residuary income available for the tenant for life, ascertained and only ascertained after payment or provision had been made of or for all prior claims against the gross residuary receipts. The income which the lady received was the income of a totality, not of particular items of property. Such seems to me to be the meaning of the statement.

Its implications, however, are no less clear. No suggestion of irregularity on the part of the trustees being made, the statement implies that Lady Archer-Shee had no right, during these two years over which the payments extended, to demand more than she received or to demand any of it at any earlier date than she received it. More important still, the statement, I think, implies, for the same reason, that until the moneys paid to her were actually paid over she had neither property in them nor right to receive them. The proper result of any account taken would have shown—so much the statement implies—that the liability of the trustees to pay, and in the precise amounts, accrued only at the respective times at which the payments were actually made. Accordingly, if the statement in the case must be accepted by your Lordships, it is with reference and with reference only to a fund so circumstanced that the question of the liability of the respondent for income-tax in respect of it must be determined.

And, my Lords, although the statement with its implications, appears, superficially, to be concerned as much with law as with fact, it is, in truth, a statement of fact only. As such, it is one by which your Lordships are, I think, bound. For the law which is referred to is, or should be, the appropriate American law by which the rights and duties of the trustees of this American testator's will are defined and the nature of the interest thereunder of Lady Archer-Shee is determined. The true effect of American, as of any other foreign law, is in England a question not of law but of fact. As such therefore this statement must, I think, be regarded, and, if so, it must be accepted by your Lordships. This was, I conclude, the view of the Court of Appeal. If it was, I agree with it.

But, my Lords, I am the more ready without further inquiry to accept the statement with all its implications as a correct finding of the American law ascertained by the Special Commissioners like any other fact, because I am myself satisfied that if this were the will either of a Scottish or of an English testator, the Special Commissioners' statement would be exactly paralleled. In other words, the case is not one in which the position is at all affected by any speciality of American law.

I take the case of a Scottish will first, because in relation to such a will your Lordships have the assistance of a decision of the First Division of the Court of Session in a case very close to the present. In *Murray v. Commissioners of Inland Revenue,* cited in argument and decided on June 18, 1926, (No. 245 Tax Cases), the facts were that the appellant's father by his will gave his residuary estate on trust for the appellant and her sister equally during their respective lives and directed the trustees to pay the expenses of management of the trust. The position in other words is indistinguishable from the present. There the gross income of the estate, after deducting an annuity of £70 payable to the testator's widow under an ante-nuptial marriage contract, was £608 0s. 2d., and the whole of it suffered income-tax in the hands of the trustees. The appellant's only other income was £10 War Loan interest, and for the purposes of a claim for repayment of income-tax in respect of personal allowance, &c., she contended that her taxed income under her father's will was one half of the gross income of the estate, *i.e.,* £304 0s. 1d., without any deduction in respect of the expenses of the management of the trust. The First Division, at the instance, in that case, of the Crown—there is a certain piquancy in that fact—repelled the claim : "It is as plain as day," said Lord Clyde in delivering judgment, "that if a life-renter returns his or her income what he returns is precisely what he gets and nothing more nor less. It is as plain as day that the total revenue which arose from the residuary estate was not the income of any of the life-rent beneficiaries in the residuary estate, but, on the contrary, was the income of the trustees who were administering the residuary estate. It was for them to pay the full income-tax which the receipt by them of that income made incident upon them. It was for them to pay whatever may have been the expenses of administering it, and after meeting those expenses to divide the income of the residue among the life-rent residuary beneficiaries. But there was no justification whatever either under the statute or, as far as I can see, in any view consistent with common sense for the course taken here."

Lord Sands is equally express and refers to an aspect of the matter which is very relevant in the present case. The plaintiff's view, he says, was that one half of the £608 0s. 2d. belonged to her. And he continues, "That would be a sound view no doubt if any expenses that were incurred before any payment was made to her had been expenses incurred by somebody she had employed to collect the money, because then these expenses would have been her expenses if

they had been incurred, as I say, by someone whom she was free to employ or not to employ. But that is not the situation. The expenses which were deducted before any payment was made to her were incurred not by anyone she employed but expenses incurred by the trustees whom the truster had appointed to manage his estate and whom he had directed to pay all necessary charges of administration before any division took place." Lord Blackburn gives as an illustration that which is the present case. "The lady in this case is seeking to recover income-tax upon an income taxed at source. If the position had been just the other way about, and if she was making a return of her income for the purpose of having the income-tax assessed upon her income, I entertain no doubt whatever that she would have returned the sum which she actually received from the trustees as her income under the trust disposition and settlement of her father." "What the appellant was entitled to under the bequest," said Lord Ashmore, "was only one half of the full residue after deduction of the appropriate proportion of the expenses of the trust management."

I have cited these judgments at length because the report of them may not be readily accessible. The decision shows, I think, clearly that the statement made in the case here by the Special Commissioners would be an exact representation of Lady Archer-Shee's position if a Scottish Court were in relation to her father's will the forum of construction and administration.

And, my Lords, speaking for myself, I cannot doubt that the same would be true if this were an English will with its residuary funds vested in English trustees. In that case, Lady Archer-Shee's only specific interest in the income of the residuary estate would be an interest in that income, cleared of all proper administrative or other payments thereout ranking in priority to any beneficial interest of her own.

The right of the trustees to retain moneys to answer these payments *in praesenti* or even, in a proper case, *in futuro,* is undoubted (see, *e.g., Stott v. Milne,* 25 Ch. D., 710, at p. 715). Their duty, themselves to execute their trust, is equally undoubted. No receiver of the gross residuary income could be obtained against them except on proof of misconduct, actual or contemplated, and then only in a suit for the execution of the trusts of the will. In other words, the interest in the eye of a Court of Equity of Lady Archer-Shee in the gross income of the estate is not that of a mortgagor in the property charged but is exactly analogous to the interest of a residuary legatee of corpus before that residue has been actually ascertained. I agree with Lord Justice Sargant that to the case with which we are here concerned the reasoning of this House in *Lord Sudeley v. Attorney-General* (13 *The Times* L.R., 38 ; [1897] A.C., 11) in relation to an unascertained capital residue is precisely applicable.

It is, of course, merely an accident that Lady Archer-Shee is sole life tenant. During the life of the testator's widow each was entitled to a moiety of the residuary income. The position was in no way different then, and it would have been in no way different, however numerous were the persons entitled to share the income between them. It would, however, be difficult to suggest, if the body of life beneficiaries were numerous, that there could be any normal right in any or all of them together other than a right to require the trustees to account for their receipts and payments in a due course of administration. Such, in my judgment, was Lady Archer-Shee's right and, in the absence of misconduct, no other.

My Lords, her position from an English point of view, could not, I think, be better put than it is by Mr. Justice Rowlatt in his judgment. "What this lady enjoys," he says, "is not stocks, shares, and rents or other property constituting the trust fund under the will ; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees to administer this properly during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in the specific stocks and shares constituting the trust fund at all. There is no doubt about the correctness of that proposition."

I agree in that statement, and it is clear that, basing himself upon it, the learned Judge would have decided the case in favour of the present respondent had he not misapprehended the effect of *Singer v. Williams* (36 *The Times* L.R., 659 ; [1921] 1 A.C., 41) by failing to note, amongst other things, that the foreign dividends there in question had been *in forma specifica* actually received by the foreign beneficiary by the direction of the trustee.

Be that, however, as it may, it is now, I think, agreed on all hands that if the view of the will so expressed by the learned Judge be correct, the respondent here must succeed. For, my Lords, what Lady Archer-Shee actually received at her bank in New York was, on that view, not income from securities, stocks, shares, or rents in any place out of the United Kingdom, but was, in the language of the Income Tax Act, 1918, "income arising from possessions out of the United Kingdom other than stocks, shares, or rents," income which while chargeable to income-tax is only so chargeable to the extent to which it is received in the United Kingdom.

Such equally is the position if the result be reached by reference to the statement in the case—the proper foundation as I conceive for your Lordships' judgment —or by reference to the Scots Law as expounded in the judgments which I have cited.

My Lords, I confess to a sense of relief in being able to reach this conclusion. If the alternative view prevails and the respondent is charged with income-tax according as the sums paid to his wife can, on dissection, be traced in their different parts to income received by the trustees from "foreign government securities, foreign stocks and shares, and other foreign property" respectively, a burden is placed upon him which, as it seems to me, he cannot discharge, and an inquiry is set on foot which may never be capable of answer. For, in view of the statements in the case, it is, to my mind, more than doubtful whether the trustees themselves could trace the payments to their sources. They are, of course, in no way concerned with any question of United Kingdom income-tax, and for the purposes of their own administration they have no intelligible purpose to serve by appropriating their retentions to any particular receipts, either rateably or in any other way, and I cannot suppose that they have ever done so. In any case, the respondent, who is not a beneficiary under the testator's will, could not require the trustees to do anything so entirely superfluous, and in the absence of any such declared appropriation he would himself be quite unable to furnish any of the statements X. or XI. (1) of the Fifth Schedule to the Act which on this footing would be required of him. These practical difficulties confirm me in the view that this is not the kind of case to which either of these statements has any reference at all.

It has been suggested that the view of this case which I have taken may encourage evasion of a tax

which ought to be paid. With reference to that, I would only observe that before 1914 no foreign income of any kind was taxed unless it was received in this country. In 1914, with what almost seems an arbitrary exception, such income, arrived at as is prescribed in the statute, is now taxed whether received in this country or not. All that is involved in the view which I have taken is that this particular interest of Lady Archer-Shee is at present within that exception. It will rest with the Legislature to introduce the necessary amendment to the Act if, in its view, the time has come for limiting the exception by now excluding such a foreign possession as that of Lady Archer-Shee from its benefit.

My Lords, I do not doubt that the actual form of Mr. Justice Rowlatt's order was adopted in the circumstances stated by the noble and learned Viscount on the Woolsack. It was a form which effectively concealed the difficulties involved in the principle thereby adopted. But, like my noble and learned friend, I deprecate, in any event, any further inquiry in this case. With him, however, I am of opinion that this appeal should be dismissed altogether.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Boulton, Sons, and Sandeman.]

K.B. Div. (Avory, J.) } 1927. July 15.

FORBES, ABBOTT, AND LENNARD, LIMITED v. GREAT WESTERN RAILWAY COMPANY.*

Negligence — Vessel in dock—Condition as to sole risk of owners of vessel—Injury in lock through negligence of dock-owners' servants—Whether dock-owners protected by condition—Whether lock included in "dock."

The defendants, who were the owners of Chelsea Dock and of a lock connecting it with the River Thames, received the plaintiffs' barge into the dock on the condition that "All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." While the barge was in the lock on its way out from the dock to the river, it was damaged through the negligence of the defendants' servants.

Held, (1) that the words of the condition were not adequate to exempt the defendants from liability for the negligence of their servants, and (2) that although for some purposes, such as the jurisdiction of the dock-master, the word "dock" might include the lock, yet the condition did not clearly and unambiguously apply to the lock so as to exempt the defendants from liability.

His Lordship delivered a considered judgment in this action in favour of the plaintiffs, Forbes, Abbott, and Lennard, Limited, who were the owners of a barge, and who claimed damages for injury thereto occasioned by the negligence of the servants of the defendants, the Great Western Railway Company, while the barge was being passed from Chelsea Basin through the lock connecting the basin with the River Thames. Both basin and lock belonged to the defendants. The defendants denied negligence, and further said that the barge was in the lock at the plaintiffs' sole risk. They relied upon public notices affixed to the lock.

The jury found for the plaintiffs on the issue of negligence, and the damages were agreed at £175.

Mr. Charles, K.C., and Mr. Rowland Thomas appeared for the plaintiffs; Mr. Schiller, K.C., and Mr. Wilfrid Lewis for the defendants.

Mr. Justice Avory, in giving judgment, said:—In this case the jury found that the damage to the plaintiffs' barge, resulting from the grounding of the barge in the defendants' lock, when she was leaving the defendants' dock called the Chelsea Dock or Basin, was caused by the negligence of the defendants' servants.

Mr. Schiller, on behalf of the defendants, submits, notwithstanding this finding, that the defendants are entitled to judgment on the ground that condition No. (1) of the terms and conditions on which the defendants receive barges into Chelsea Dock, of which the plaintiffs are to be assumed to have had notice, exempts them from liability for such negligence. The condition is in the words following:—

"All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock."

In support of his submission, Mr. Schiller contends that the word "dock" which is found in this condition includes the lock, and that the terms used are sufficient to exclude any liability for damage caused by the negligence of the defendants' servants. Two questions therefore arise for determination: (1) Whether the terms of the clause are sufficiently clear and unambiguous to exempt the defendants from liability for any such negligence; and (2) whether such exemption extends to a case where damage is caused in the lock by such negligence. If the word "dock" in the clause in question does not include the lock, then *cadit quaestio*.

Upon the first question several cases have been cited bearing upon the owner's risk clause, each of which has fallen to be decided upon the particular words used. In *Reynolds v. Boston Deep Sea Fishing Company* (38 *The Times* L.R., 429), a case somewhat analogous in the facts to the present case, the words which were held to be sufficient to exempt were:—

"No liability whatever shall attach to the company for any accident or damage done to or by any vessel either in taking her to the slip or when on it or when launching from it."

These words are obviously more specific and comprehensive than those in the present case. Applying the test laid down by Lord Justice Scrutton in the case of *Rutter v. Palmer* (38 *The Times* L.R., 555; [1922] 2 K.B. 87, at p. 92), I think in the present case there were possible risks other than of negligence to be provided against by the defendants, and that, in any event, the words used are not adequate to exempt the defendants from liability for the negligence of their servants.

Upon the second question, I have been referred to the Harbours, Docks and Piers Clauses Act, 1847, sections 2 and 83, where the word "dock" is defined in section 2 to include "the works connected therewith"; and to the West London Extension Railway Act, 1859 (22 and 23 Vict., c. cxxxiv.), sections 4, 50, and 164. Although I do not doubt that for some purposes, such as the jurisdiction of the dock-master, the word "dock" may include the lock, it appears to me that the terms and conditions, including No. 1, upon which the defendants rely, apply only to the dock as distinguished from the lock; see, particularly,

* Reported by J. W. Hall, Esq., Barrister-at-Law.

condition No. 7. In any view I think that condition No. 1 does not clearly and unambiguously apply to the lock as distinguished from the dock so as to exempt the defendants from liability.

For these reasons I come to the conclusion that the plaintiffs are entitled to judgment for the agreed amount of damages.

[Solicitors—Messrs. Keene, Marsland, Bryden, and Besant ; Mr. A. G. Hubbard.]

K.B. Div. (Horridge, J.) 1927. July 21.

KETTLE v. DUNSTER AND WAKEFIELD.*

Bills of Exchange — Company — Receiver for debenture-holders — Signature as drawer — Words of description—Surrounding circumstances—Intention of parties—Right of receiver to sue acceptors—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 26 (1) (2).

By the Bills of Exchange Act, 1882, s. 26, subsection 1 : "Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon ; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." By subsection 2 : "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

The plaintiff, who had been appointed receiver on behalf of the debenture-holders of a limited company, sued the defendants as acceptors of a number of bills of exchange. The bills were signed by "R. Kettle, Receiver, Ford Paper Works (1923), Limited" as drawer. They had been accepted in respect of goods supplied by the company to the defendants, and the plaintiff had stated that it must be "clearly understood that I am in no way accepting any liability or responsibility whatever in respect of the orders themselves." The defendants contended that these were "surrounding circumstances" from which the inference should be drawn that the plaintiff did not intend to make himself personally a party to the bills and that, therefore, he was not entitled to sue upon them.

Held, that the above were not "surrounding circumstances" from which the intention of the parties could be inferred, and that such intention must be gathered from the terms of the document alone ; that the words "Receiver, Ford Paper Works (1923), Limited" were words of description only, and that the bills did not purport to have been drawn on behalf of the company. The plaintiff, therefore, was entitled to recover against the defendants upon the bills.

Chapman v. Smethurst (25 *The Times* L.R., 383 ; [1909] 1 K.B., 927) and *Elliott v. Bax-Ironside* (41 *The Times* L.R., 631 ; [1925] 2 K.B., 301) followed and applied.

The plaintiff in this action, Mr. Russell Kettle, who had on March 1, 1926, been appointed receiver on behalf of the debenture-holders of the Ford Paper Works (1923), Limited, sued the defendants, Messrs. Dunster and Wakefield, of Blackfriars House, New Bridge-street, London, E.C., upon a number of bills of exchange accepted by them. The bills were dated on various days between April 16 and April 30, 1926, and were accepted by the defendants in respect of deliveries of paper by the above company to the defendants. They were accepted "payable at Midland Bank, Limited, 5, Princes-street, E.C." and the acceptances were in every case forwarded to the plaintiff with the drawer's name left blank, and were subsequently signed by "R. Kettle, Receiver, Ford Paper Works (1923), Limited," as drawer. The bills having subsequently been dishonoured upon presentation, the plaintiff sued the defendants for £6,365 6s. 9d., the amount of the bills and interest thereon, after the deduction of a sum due to the defendants. The defendants contended that the bills were drawn, on the face of them, on behalf of the company and that the plaintiff was not entitled to sue personally upon them. They further contended that they were entitled to set-off against their liability, if any, in the action an equivalent part of moneys due to them from the company for alleged fraudulent misrepresentation and breach of warranty.

On the appointment of the plaintiff as receiver, the defendants had on March 4, 1926, written to him expressing a desire that he should continue to execute certain pending contracts for the delivery of paper to them, and had added the words "subject to your not being involved in litigation now pending." An action had been commenced by the defendants against the Ford Paper Works (1923), Limited, and another company on August 14, 1925.

The Hon. R. Stafford Cripps, K.C., and Mr. D. B. Somervell appeared for the plaintiff ; Mr. D. N. Pritt, K.C., and Mr. B. B. Stenham for the defendants.

Mr. Justice Horridge.—In this case the plaintiff claims upon a number of bills of exchange, and the defendants say, first, that he is not entitled to sue on the bills of exchange because they are drawn, on the face of them, on behalf of a company of which he is receiver and, further, that, if he is entitled to sue, they are entitled to set off against him a claim which they had made against the company in another action and which they repeat in this action.

The facts of the case are that Mr. Kettle was appointed receiver on behalf of debenture-holders on March 1, 1926, and took possession on March 2. Up to the time when he was appointed receiver there had been numerous transactions between the Ford Paper Works (1923), Limited, of whose assets he was appointed receiver, and the defendants. There were at the time orders which had not been executed and which were lying on the premises of the Ford Paper Works. The litigation, as I have said, was pending between the defendants and the Ford Paper Works (1923), Limited, and other parties. The position, therefore, was that Mr. Kettle could, if he had liked, have not gone on with any contracts or made any further deliveries of paper to the defendants. The

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

defendants, as appears by the letter of March 4, to which I shall refer later, were desirous of having the orders completed. That being the state of affairs, the correspondence, to which I shall refer later, passed between the defendants' solicitors and Mr. Kettle. After that correspondence had passed, a number of deliveries were made by the works, on the instructions of Mr. Kettle, to the defendants. When the payment became due, invoices, made out by the Ford Paper Works (1923), Limited, were forwarded by them to Mr. Kettle, who sent on to the defendants the invoices and bills for their acceptance with the drawer's name left blank; the defendants accepted the bills, and a sample of the letter in which they enclosed such acceptances is to be found at page 30 of the correspondence: "Herewith we hand you our acceptances for £1,637 17s. 10d., due August 13, instalment on account for week ended April 10." Those acceptances are the ones on which the plaintiff sues in this case, and the acceptances are admitted all to be in the same form. The form in which they are drawn is: "On August 10 next after date pay to my order" and "for value received," and they are signed: "R. Kettle, Receiver, Ford Paper Works (1923), Limited." On behalf of the defendants it is said that these were bills drawn, on the face of them, on behalf of the Ford Paper Works (1923), Limited.

The cases with regard to this matter are very well summarized in a judgment of Lord Justice Scrutton, in the case of *Elliott v. Bax-Ironside* (41 *The Times* L.R., 631; [1925] 2 K.B., 301, at p. 308). The learned Lord Justice there refers to the case of *Leadbitter v. Farrow* (5 M. and S., 345), where Lord Ellenborough gave the judgment, and to the judgment of Chief Justice Cockburn in *Dutton v. Marsh* (L.R., 6 Q.B., 361, at p. 364), and he says: "Those cases were before the Bills of Exchange Act, and when Parliament came to codify, and to some extent alter, the law in that Act, they did so in this way." Then he cites section 26, subsection 1 and subsection 2. Subsection 1 is: "Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability"; and then subsection 2, which is an addition to the law in the sense of being for the first time incorporated in any statute, says: "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." That was the portion of the section which was construed in the case of *Elliott v. Bax-Ironside* (*supra*). Now the law as laid down previously seems to me to be summarized by the quotation which he gives from Chief Justice Cockburn's judgment in *Dutton v. Marsh* (*supra*): "The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state that they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus v. Melrose* (3 H. and N., 177) fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented." It was argued before me that in looking at the face of these documents I must take into consideration all the surrounding circumstances; but when those surrounding circumstances come to be analysed they seem to me not to be surrounding circumstances at all. It was said that I must take into account the fact that the company had supplied all the goods; secondly, that I must take into account the fact that in the witness-box Mr. Kettle said that he would have been very much surprised if he had been told he was liable; and, thirdly, it was said that I must look at the letter which he wrote on March 4, in which the expression occurs: "It must be clearly understood that I am in no way accepting any liability or responsibility whatever in respect of the orders themselves." All those matters to me seem not to be surrounding circumstances at all, but evidence from which I am asked to infer the intention of the parties in making the document. Now, I cannot look at those matters at all, in my view. What I have to do is to take the document itself and from that, and from nothing else, except surrounding circumstances which may really be surrounding circumstances, draw an inference as to what it means. I think that is quite clear from the case of *Chapman v. Smethurst* (25 *The Times* L.R., 383; [1909] 1 K.B., 927, at p. 930), where Lord Justice Kennedy quotes, with approval, the language of Mr. Justice Channell: "I am of the same opinion on both points. I agree with Mr. Justice Channell when he says that the question 'depends upon the intention of the parties, which intention I think must be gathered from the terms of the document alone.'" Now, applying those tests to this document, I am clearly of opinion that the words "Receiver, Ford Paper Works (1923), Limited" are only words of description and that the documents do not purport to have been made on behalf of the company at all, and that therefore Mr. Kettle is both liable to be sued and able to sue upon these bills of exchange.

Beyond that, a further question arises in regard to the set-off. I think it is clear law, and it really has not been substantially contradicted by Mr. Cripps, that apart from these documents, to which I am shortly going to refer, there would have been no answer to the set-off, because the claim in respect of these bills of exchange is a claim made by Mr. Kettle as receiver for the debenture-holders. It is clear law that the receiver for the debenture-holders is the agent of the company. Therefore, these bills in respect of which he is suing are bills which he held as agent for the company, and as against him and apart from the documents to which I am going to refer, I think the defendants would have been entitled to set off any cross-claims which they had against the limited company. But it is said that these documents amount to an agreement which, at any rate in equity, would bar the defendants' right of set-off. To my mind, the question is: What do these documents mean? Let me look at the circumstances in which they were written. Mr. Kettle had just taken possession as receiver. As I read the letter of March 4 the defendants were desirous that he should continue to execute the orders. He himself could not, in my view, have been joined in any way as a defendant in the then action which was being raised by the defendants against the company, because it

was entirely in respect of transactions before he was appointed receiver. Therefore I have, in that state of circumstances, to make up my mind what is the true meaning of the words "subject to your not being involved in litigation now pending." Am I to put upon them the literal construction : "subject to your not being made a party to a pending action," or am I to read them : "We will not avail ourselves of the matters in the pending litigation by using them in any way against you." I have no doubt myself that both parties knew about what they were intending to agree, and I have no doubt myself that what the liquidator intended to protect himself from, and what the defendants knew he intended to protect himself from, was the prior claim against the company being used against him as a set-off. He consented to deliver the goods of the company in respect of which liability would arise, and, on the whole, I have come to the conclusion that the real meaning of the words "subject to your not being involved in litigation now pending," must be this : that there was an agreement not to raise matters which were the subject-matter of that action against the company in any way in respect of transactions which Mr. Kettle agreed to execute on their behalf. It is said that there is no consideration for this agreement. What might have been the position if the agreement had remained purely unexecuted I do not say ; but here in pursuance of these letters the receiver has himself caused the company to deliver goods and has given ample consideration for the agreement. For these reasons my judgment must be for the plaintiff for the whole amount claimed.

[Solicitors—Messrs. Drake, Son, and Parton ; Messrs. Russell and Arnholz.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. July 21.

REX v. COMMISSIONERS OF CUSTOMS AND EXCISE—EX PARTE PEGLER.*

Intoxicating liquors — Tied house — Increase of duty — Apportionment by Commissioners of Customs and Excise — Tenancy entered into after the Act — Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 46.

Section 46 of the Finance (1909-10) Act, 1910, which provides for the apportionment between landlords and tenants of "tied" houses of the increased licence duties imposed by that Act, does not apply to tenancies entered into after the Act came into force. So *held* by Lord Hanworth, M.R., and Sargant, L.J. (Scrutton, L.J., dissenting).

Decision of the Divisional Court (43 *The Times* L.R., 441) affirmed.

This was an appeal by the applicant, Mr. Frederick Pegler, the licensee of the City Arms, Bell-lane, Gloucester, from a decision of a Divisional Court—Mr. Justice Avory and Mr. Justice Talbot, Mr. Justice Swift dissenting (43 *The Times* L.R., 441)—discharging a rule *nisi* for a writ of *mandamus* directed to the Commissioners of Customs and Excise commanding them to hear and determine the proportion of the increased duty payable in respect of the appellant's licence under section 46 of the Finance (1909-10) Act, 1910.

Mr. Pegler contended that the Commissioners were bound to hear his application, and that the section authorizing an apportionment of the increased duty was not limited to licences and licence-holders existing at the date when the Act came into operation, but applied to covenants and agreements entered into after the date of the Act. The Commissioners contended that the section related only to covenants, agreements, and licences in existence at the date when the Act was passed.

By section 46 of the Finance (1909-10) Act, 1910 :—

"Where a licence-holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence-holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

Mr. Pegler originally became tenant of the City Arms from Messrs. Arnold, Perrett, and Co., Limited, under a lease dated August 31, 1911, containing a covenant by the tenant to pay

"all rates, tithes, taxes, charges, assessments, duties, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, which are now or may at any time hereafter be assessed, charged, or imposed upon the said demised premises or the owner or occupier in respect thereof, the landlords' property tax alone excepted."

There was also a covenant to purchase all liquor from the landlords. The lease was renewed to Mr. Pegler on April 15, 1912 ; to Mr. Pegler and his wife (owing to his war service) on November 4, 1916 ; and to Mr. Pegler on March 5, 1920, that being the subsisting lease and containing the same material covenants as the original lease.

The landlords' business was acquired in 1924 by the Cheltenham Original Brewery Company, Limited, who were now the landlords.

On April 28, 1926, Mr. Pegler, by his solicitors, applied to the Commissioners to determine the proportion of the increased licence duty payable under the Finance (1909-10) Act, 1910. The Commissioners declined to do so on the ground that the section only applied to agreements in existence at the date of the passing of the Act. Mr. Pegler then obtained a rule *nisi* for a *mandamus*.

The Divisional Court, Mr. Justice Swift dissenting, discharged the rule, holding that the section applied only to agreements and covenants by licence-holders which were in existence when the Act was passed.

Mr. Pegler appealed.

Mr. Roland Burrows appeared for the appellant ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. W. Bowstead for the Commissioners ; and Mr. Mitchell Banks, K.C. (with whom was Mr. Croom-Johnson, K.C.) for the landlords.

The Master of the Rolls, in giving judgment, stated the question at issue, and said that the facts of the case were fully set out in the judgment of Mr. Justice Swift. By the Finance (1909-10) Act, 1910, section 43, increased duties were imposed on licences

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

for the sale of intoxicating liquors. The charging section recognized that the new duties created a new situation, owing to the anomalous and peculiar conditions of the liquor laws. Section 43 provided for an adjustment of duty in the case of any licences granted between July 1, 1909, as from which date the duties were first charged, and September 30, 1909. A number of provisions collected in section 53 were labelled "Temporary Provisions."

Section 46 dealt with the case of the tied tenant. The section was intended to meet the new situation and to mitigate the difficulties which might thereby arise for tied tenants under existing tenancy agreements. It opened with words which were agreed by all parties to be colourless. They might be operative at any time, or they might be restricted to leases in existence at the date of the Act. The Court must look at the context to ascertain the meaning of the opening words. In his opinion the object of the section was to restore freedom of contract and to leave the parties free to deal by agreement with a situation which neither of them could have contemplated. The words "notwithstanding any agreement to the contrary" obviously reopened the matter as between the parties. The words "any increase of the duty payable in respect of his licence occasioned by this Act" appeared to refer to matters introduced or brought about by the Finance (1909-10) Act, 1910.

The parties might agree if they could; if not, the matter must be determined by the Commissioners, upon certain principles, proportionately to the increased rent of the premises or the increased prices of liquors. If the section were to apply to agreements entered into after the Act was passed it would give an opportunity to the tied tenant to reopen a contract into which he had entered with full knowledge of the provisions of the Act. The words of Baron Parke in *In re Knight* (1 Ex., 802), in which he said that the words of an Act might be reasonably construed to mean "notwithstanding any agreement subsisting between the parties at the time of the passing of that Act," were applicable. He (his Lordship) had found no assistance from the cases which had been cited—*Wooler v. North-Eastern Breweries* (26 *The Times* L.R., 129; [1910] 1 K.B., 247) and *Watney, Combe, Reid, and Co., Limited v. Berners* (31 *The Times* L.R., 449; [1915] A.C., 885).

It was suggested that some assistance might be afforded by section 2 of the Finance Act, 1912, since repealed. The observations of the Solicitor-General were well founded that, if the construction contended for by the appellant was right, it would have been necessary in 1912 not only to provide for cases of agreements made before the passing of the Act of 1910, but also for cases where leases or agreements had been made since 1910—and that the Act of 1912 did not do. The interpretation which he (his Lordship) thought that the Finance (1909-10) Act, 1910, ought to bear brought it into line with section 2 of the later Act. Beyond that he could get no assistance from the later Act. The purpose, he thought, of section 46 was to restore freedom of contract in those cases where it was necessary to restore it. After the passing of the Act the parties were free to contract how the licence duties should be borne. He agreed with the judgments delivered by Mr. Justice Avory and Mr. Justice Talbot below. The appeal should be dismissed, with costs.

Lord Justice Scrutton said that the case was a very difficult one, as was shown by the dissent of a Judge below and by the dissent which existed in this Court. He had come to the conclusion that the decision of Mr. Justice Swift was right and that the appeal ought to be allowed.

If he (his Lordship) could gather from the language of the Act any scheme which necessitated the adoption of a particular meaning he was entitled to adopt it. Some things he could not do; he could not, for instance, look at what the Minister in charge of the Act said about it in Parliament; nor could he look at a comment in a text-book by a writer who happened to be the draftsman of the Act. He could not speculate as to the facts as a means of construing the Act. He entirely agreed with the observations of Lord Sumner, sitting in the Court of Appeal, in the case of *Watney, Combe, Reid, and Co. v. Berners* (30 *The Times* L.R., 577; [1914] 3 K.B., 288, at p. 297), where he said:—

"I think we are not entitled to make any assumptions about the policy of the sections, but have simply to construe them. It seems to have been the view of the Divisional Court that the Legislature could not have meant a liquor-seller to make a profit out of the increase of duty, at any rate not out of a landlord. I think this is an assumption, not a construction. It is an accident that the claimants here are brewers; they succeed, if at all, as mesne landlords. We were given numerous illustrations, by means of hypothetical figures, of the way in which the section might work on alternative constructions of it. These would be very proper for the consideration of those who enacted the section. I think them of no assistance for us, who have only to construe it. When grammar fails, arithmetic will not help us out; so I do not discuss them. The words of this section exactly fit the case before us, and it is only by assuming a limited object for the enactment that a limitation can be put on its words. I have no knowledge of the object in view beyond the enactment itself, and no right to use it if I had any."

He (Lord Justice Scrutton) proceeded to deal with the section, acting on those observations, with which he thoroughly agreed. Having read section 46, his Lordship proceeded. Did the words "where the licence-holder is bound" mean "is bound at the date when the Act was passed"? He thought not. The ordinary meaning of those words in the English language was "is bound when the case comes before the Commissioners to determine it." In *In re Stevens—Ex parte M'George* (20 Ch. D., 697), Sir George Jessel, discussing the meaning of the words "being a trader" in section 6 of the Bankruptcy Act, 1869, said:—

"What do the words mean? Their literal meaning is carrying on trade at the time when the act in question is committed. If there had been no prior statutes and no prior decisions, I do not suppose the point could have been decently argued."

And in *In re Pulborough School Board Election* (10 *The Times* L.R., 349; [1894] 1 Q.B., 725) the words "where a debtor is adjudged bankrupt" were held not to have a retrospective effect but to apply to the present time.

He thought that the words in the present Act related to the time when the Commissioners met to consider whether they had jurisdiction to apportion the increased licence duty between landlord and tenant. But was there anything in the section itself to show that a meaning other than the literal meaning should be put on the words, and that they meant "is bound at the date of the passing of the Act"? Those words were not used in the Act, but they were used in the Finance Act, 1912, and might have been inserted by Parliament in the Act of 1910 if they had desired to do so.

The Solicitor-General had argued that the presumption was that Parliament desired to restore freedom of contract. Two of the Judges in the Court below also largely rested their judgments on the presumption that Parliament was not interfering with liberty of contract. On the contrary, Parliament had constantly interfered and prevented parties from making bargains except on the terms of an Act of Parliament. Four years before the Finance (1909-10) Act, 1910, was passed, the Courts having held that workmen could contract out of the Workmen's Compensation Act then in force, Parliament, by the Workmen's Compensation Act, 1906, prohibited agreements to contract out of the Act, but expressly permitted agreements fixing the amount of compensation payable.

Parliament had constantly interfered between landlord and tenant in favour of the tenant, who was deemed to be a person in need of protection. That was the origin of the Rent Restriction Acts.

He thought that the later words of the section now in question were equally consistent with either interpretation. Not much light could be got from *Wooler v. North-Eastern Breweries* (26 *The Times* L.R., 129 ; [1910] 1 K.B., 247). In *Watney, Combe, Reid, and Co., Limited v. Berners* (30 *The Times* L.R., 577 ; [1914] 3 K.B., 288 ; 31 *The Times* L.R., 449 ; [1915] A.C., 885) three of the Judges took the view that the Act of 1910 applied to contracts entered into after it was passed. He agreed that that was not the point which they had to decide in that case, but it was some consolation to a Judge who was in a minority to find three Judges in another case who were in agreement with him.

Nor could he get any light from a view of the whole Act as to the policy of the Legislature. If the tenant had a tied house, then he could put part of the increased duty on the landlord ; if he had not, but his house was free, then he could not do so. He (his Lordship) could not derive any policy from that. For the reasons stated, he came to the conclusion that the view taken by Mr. Justice Swift was right and that the appeal ought to be allowed.

Lord Justice Sargant said that he agreed with the judgment of the Master of the Rolls. The question was to what time the word "is" was referable, the date of the passing of the Act or the time when an application was made for an apportionment. He differed from the judgment just delivered in thinking that "is" might mean either one or the other, and that the question which time was meant must be determined by the rest of the section. Did not the words "notwithstanding any agreement to the contrary" refer to an agreement in existence at the passing of the Act? No doubt Parliament had often interfered with freedom of contract. But where, of two equally admissible constructions, one led to an interference with freedom of contract and the other did not, the latter should be adopted. He (his Lordship) saw no necessity for Parliament to limit freedom of contract in the future under the Act, and he saw in the section definite indications that such was not the intention. The words "so much of any increase of the duty as may be agreed upon" entirely let in freedom of contract. It was perfectly competent for the tenant to agree with the landlord that he should only deduct an agreed proportion of the increased duty. Therefore he thought the words "notwithstanding any agreement to the contrary" were only to prevent any existing contracts from being rendered unfair to the tenant. The words used were much more apt to refer to an increase of an existing burden on the tenant. In the case of future contracts the amount that would be paid by the tenant could hardly be described as an increase of licence duty payable under the Act. If any indication was to be found as to the meaning in the Finance Act, 1912, section 2, it was so faint that it could not be compared to the very definite words of the existing section. The case was very similar to that of *In re Knight* (1 Ex., 802), where Baron Parke held that the reasonable meaning of an Act was that the "agreement to the contrary" referred to existing tenancies. The case of *Watney, Combe, Reid and Co., Limited v. Berners* (31 *The Times* L.R., 449 ; [1915] A.C., 885) was of a very different nature. There the House of Lords declined to sanction the introduction of any additional words to explain the meaning of an Act. Here the earlier words of the section were equally capable of either interpretation. The applicant, in his Lordship's judgment, had failed to make out his case, and the appeal would be dismissed, with costs. The landlords would also be entitled to their costs.

[Solicitors—Messrs. Maitland, Peckham, and Co., for Messrs. Lane, Martin, and Co., Gloucester ; the Solicitor of Customs and Excise ; Messrs. Godden, Holme, and Ward, for Messrs. Haddock and Pruen, Cheltenham.]

Court of Criminal Appeal.
(Lord Hewart, C.J., Avory and Salter, JJ.)

1927. July 26.

REX v. HARRIS.*

Criminal Law—Procedure—Right of Judge to call witness—Close of defence—Limitation on right—Something arising *ex improviso*.

On a criminal trial the right of the Judge to call a witness, after the close of the case for the defence, is limited to cases where in the course of the defence something has arisen *ex improviso* which no human ingenuity could foresee.

The Court quashed the conviction of Dora Harris, who had been sentenced at the Liverpool Quarter Sessions on June 9, 1927, to 15 months' hard labour for receiving stolen goods in circumstances which are fully stated in the judgment of the Court.

Mr. Maxwell Fyfe appeared for the appellant ; Mr. Lynskey for the Crown.

Mr. Justice Avory, in giving the judgment of the Court, said that five persons were charged before the Recorder at the Liverpool Quarter Sessions with stealing goods and with receiving them knowing them to have been stolen. The two male prisoners, James William Benton and Keyran Meagher, who were charged with stealing, pleaded guilty. The three women, Dora Harris, Lily Sing Sai, and Catherine Lightburn, were charged severally with receiving. The case proceeded with the two admitted thieves in the dock, and evidence was given for the prosecution establishing some sort of *prima facie* case against the three women. Thereupon each of the women went into the witness-box and gave evidence that she had bought the goods without knowing that they had been stolen, and each was cross-examined. That concluded the case for the defence. The Recorder then said to the prisoner Benton :—

"Benton, are you prepared to give evidence?"—"Yes."

* Reported by J. W. Hall, Esq., Barrister-at-Law.

The Recorder.—"I am asking you to give evidence here. I simply want you to tell the truth. You must not imagine you are getting any advantage whatever from what you say."

Benton.—"Yes."

The Recorder.—"I think it is more satisfactory we should hear the boy on the subject. The prosecution, as is usual in these cases, do not call him. I think we might as well. I do not know what he is going to say, but I have some idea."

Benton was then called, undoubtedly making the case against Harris much stronger than before. His examination in chief was conducted by the Recorder, who then said :—

"It is the practice in a case like this to allow cross-examination, though there is no claim as of right. Of course, I permit you to cross-examine the boy, Mr. Fyfe."

At the conclusion of Benton's evidence the Recorder seemed to have formed the view that there was no case against Lightburn, and he directed the jury to return a verdict of "Not guilty" in her case. No suggestion or invitation seemed to have been made to Dora Harris whether she would like to go back into the witness-box. In the result she was convicted.

In these circumstances two questions arose for determination in this Court : (1) Whether the course taken by the Recorder in calling the prisoner at that stage was in accordance with the regular practice at a criminal trial ; (2) assuming that there was no irregularity, whether the Recorder gave the jury the appropriate warning as to the danger of convicting on the evidence of an accomplice.

It had been clearly laid down by the Court of Appeal that in a civil suit the presiding Judge had no right to call a witness without the consent of the parties. It also seemed clearly established that that rule did not apply to a criminal trial, where the liberty of the subject was at stake and the only object was to ensure that strict justice was done between Crown and subject. The two cases of *Reg. v. Chapman* (8 C. and P., 558) and *Reg. v. Holden* (8 C. and P., 606) established the right of the Judge to call such a witness. In none of the cases had there been laid down any definite rule limiting the point in the proceedings at which the Judge might exercise that right, but it was obvious that injustice might be done to an accused person unless some limitation were put on the right. The Court adopted the rule laid down by Chief Justice Tindal in *Reg. v. Frost* (4 State Trials, New Series, 86, at p. 386) :—

"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins ; but if any matter arises *ex improviso,* which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown."

That applied only to a witness called by and on behalf of the Crown, but the Court thought that it should apply also to the case where the Judge called a witness in a criminal trial after the close of the case for the defence—*i.e.,* that it should be limited to something arising *ex improviso* which no human ingenuity could foresee. His Lordship also referred to the observations of Baron Bramwell in *Reg. v. Haynes* (1 F. and F., 666).

In the present case there was a further objection to the course adopted, because Benton had been in Court during the whole trial. When he was asked to give evidence he must have understood that he was being asked to supplement the case for the prosecution. He was a prisoner who had pleaded guilty and had not been sentenced, and had, therefore, everything to gain by doing what he thought would be pleasing to the Recorder.

Without laying down any general rule that in no case could a Judge call a witness after the close of the case for the defence, the Court thought that in this case it was irregular and calculated to prejudice the trial of this woman Harris.

The Court had also to consider whether, this witness having been called, a proper warning was given to the jury. His Lordship read the warning which was in fact given in the summing up, and said that with all respect to the Recorder it appeared to be defective in exactly the same way as the warning in the case of *Rex v. Beebe* (41 *The Times* L.R., 635). The appeal must be allowed and the conviction quashed.

[Solicitors—Mr. John A. Behn, Liverpool ; the Town Clerk, Liverpool.]

Court of Appeal. (Bankes, Atkin, and Lawrence, L.JJ.) 1927. July 13.

SOUTH STAFFORDSHIRE MINES DRAINAGE COMMISSIONERS v. ELWELL AND SONS.*

Rating — Statutory body — Mine drainage—Power to levy rate—Mortgage of future rates—Cessation of drainage works—Survival of rating powers—South Staffordshire Mines Drainage Acts, 1873 to 1923.

A body of Commissioners was created by statute for the purpose of underground and surface drainage of a mining area with power to levy rates upon occupiers of mines. Power was also given them to borrow money upon mortgage of the produce of future rates, and this power was exercised. Owing to financial and other difficulties the Commissioners ceased to carry on drainage operations in 1919. In 1926 they levied a rate upon the defendants as occupiers of mines in their area. In an action by the Commissioners for the amount of the rate,

Held, that they were entitled to levy the rate notwithstanding the cessation of drainage operations.

Decision of MacKinnon, J. (43 *The Times* L.R., 471), affirmed.

This was an appeal by the defendants from a decision of Mr. Justice MacKinnon in an action by the South Staffordshire Mines Drainage Commissioners for £2,019 13s. 9d., arrears of drainage rates.

The plaintiffs, who were a statutory body, sued the defendants to recover certain sums alleged to be due as rates pursuant to the statutory powers of the plaintiff body. That body was constituted by an Act of Parliament of 1873, called the South Staffordshire Mines Drainage Act. There was a series of eight Acts of Parliament, beginning with that first one of

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

1873, and ending with the eighth one of 1923. It was provided by the first section of the Act of 1923 that this series of eight Acts should be cited together as the South Staffordshire Mines Drainage Acts, 1873 to 1923.

The purpose of the original incorporation of the plaintiff body was with a view to providing drainage of water for the South Staffordshire coalfield. The scheme of it was that the Commissioners were to provide drainage of two sorts—first, surface drainage, and secondly, underground or mine drainage. They were, by certain machinery provided in the first Act, to divide up the whole of the South Staffordshire coalfield into certain districts, which districts were to be treated as separate entities. It was provided by section 40 of the Act of 1873 that any particular district by a vote of its electoral members could contract itself out of the operations of the Commissioners as regards the underground mines drainage, though it remained liable to support the Commissioners and to pay rates in respect of the surface drainage. There were about five districts created under the first Act. These five districts included the Tipton district, which came into the scheme and remained in the scheme both as regards the mines drainage and the surface drainage. The other four districts contracted themselves out of the mines drainage and only remained in the scheme as regards the surface drainage. In the history of the operations of the Commissioners, especially as regards the Tipton district, they were faced to an increasing degree as time went on with two difficulties—first, the difficulty of the water, which defied their efforts to pump it or drain it, but, still more seriously, the increasing flood, not of water, but of indebtedness, and that arose more acutely as regards the Tipton district. These difficulties, particularly as regards indebtedness, culminated in 1919 in disaster. The Commissioners were unable, despite several schemes which in these successive Acts had been provided, to raise more money, and the water was becoming increasingly difficult to deal with, and in 1919, as regards the Tipton district, the whole of their pumps and apparatus for the underground mines drainage broke down and were disused, and as from August 31, 1919, there was no more pumping ; but under provisions in several of these Acts the Commissioners had raised money by mortgaging the future produce of the rates which they were entitled to levy, and had issued mortgage debentures to various persons who lent them the money, and since 1919, though no mines drainage had been done in the Tipton or any other district by the Commissioners, they have continued to levy rates in the manner prescribed by the Acts in order to provide funds, not so much for paying off the capital sum of the indebtedness—because that is beyond their powers—but to keep down the ever-increasing burden of interest upon it.

By sections 42 and 43 of the Act of 1873 the Commissioners were given power in respect of the surface drainage to assess and levy upon the occupiers of mines an annual rate, to be called the general drainage rate, to be assessed in respect of all minerals gotten from the mines within the drainage area, and, by section 43, as regards the mines drainage rate, they had power to assess and levy upon the occupiers of mines an annual rate in respect of all minerals gotten from such mines. The maximum amount of these rates was provided by various schedules. That was amended by section 23 of the Act of 1878, chiefly in the way of machinery. That section provided for half-yearly payments instead of the single annual payments. The Commissioners, purporting to act under the powers to levy rates thereby provided, served notices of the making of the rates on the defendants.

Shortly after the coal strike broke out in 1926, the defendants made an arrangement with the agent of Lord Dudley, who owned a large property in this South Staffordshire region and in this Tipton district. Certain letters passed between the defendants and the estate agent and the mineral agent of Lord Dudley.

On May 3, 1926, Mr. Hutton, the estate agent, wrote to the defendants : "Confirming my conversation with you this morning, I am prepared to give you the sole right of the coal pickings from the Conygree and Foxyard area so long as the general strike lasts," with certain exceptions. "After giving full consideration to question of price, I am prepared to accept 1s. 9d. per ton for the coal pickings, as I consider they are fully worth that figure." That the defendants agreed to by a letter of May 4. These letters dealt with coal pickings only, which meant not the winning of virgin coal but the collection of the remains, around old pit-heads, of coal which had been already won but had been wasted and dropped and otherwise not carried off. The operations of the defendants were extended by subsequent letters. On June 5, Mr. Clark, the mineral agent of Lord Dudley, wrote to them : "With reference to the interview you and your son had with Mr. Dudding and me at Dudley yesterday, enclosed I send you tracing showing the Foxyard area and Conygree area edged blue, under which you are to have the sole right of coal pickings," except certain parts. "As arranged yesterday the royalty payable by you for all coal and slack raised up to last night is to be 1s. 9d. a ton (2,240lb.), from thence onwards 3s. 9d. a ton (2,240lb.), you to supply the estates office with the tonnage of coal pickings taken away, and you to pay for the same each month. It is also understood that if Earl Dudley should wish to take away any of the coal pickings, you agree to sell the same on the basis of cost of getting it plus some remuneration for your superintendence and haulage, if any. It is also understood that the numerous little shafts which you have sunk and will sink will have to be filled up again at your cost." The defendants acquiesced.

Pursuant to that arrangement with Lord Dudley's agent, the defendants first of all arranged with a few men that they should go out into this area from which the defendants were given the sole right to get coal and get as much coal as they could, and the defendants would pay them 7s. 6d. a ton for slack and 15s. a ton for coal (described as not slack) loaded into carts. The men so employed increased in numbers considerably and the system came to be one under which a certain number of foremen of gangs, called "staff men," used to deal with the defendants, work with their gangs, get paid for the coal won, and settled with the members of their gangs. Under this system the defendants, according to the evidence, got more than 100,000 tons of coal.

The plaintiffs claimed, under the rating sections above referred to, to be entitled to recover from the defendants the rate assessed and levied on the defendants, as occupiers of mines, in respect of minerals gotten by the defendants from such mines.

Mr. Justice MacKinnon held that the plaintiffs were entitled to levy the rate notwithstanding the cessation of drainage operations (see 43 *The Times* L.R., 471).

The defendants appealed.

Mr. J. B. Matthews, K.C., Mr. L. J. Sturge, and Mr. Short appeared for the appellants ; Mr. H. H. Joy, K.C., and Mr. R. A. Willes for the respondents ;

and Mr. Tristram Beresford held a watching brief for Lord Dudley.

Lord Justice Bankes.—This is an appeal from a judgment of Mr. Justice MacKinnon, and the matter has been very fully argued. A great many sections of these Acts of Parliament have been referred to, but I will state my judgment in as few words as I may.

The action was brought by the South Staffordshire Mines Drainage Commissioners, who are a statutory body set up and continued under a series of Acts of Parliament commencing in the year 1873. The claim was for what was said to be the defendants' proper contribution to the mines drainage rate for the Tipton district for the two years June 24, 1925, to June 30, 1926, and for the first moiety of the rate from June 23, 1926, to June 30, 1927. The defendants objected to pay the rate on the ground that they were not liable. Before Mr. Justice MacKinnon and before us four points were taken; three of them went to the entire liability, the fourth went only to the liability in respect of the rate for the first of the two years. The three points that went to the whole claim were, first of all, that the coal which had been gotten by the defendants was not gotten by mining operations; the second was, that even if that were not so, Messrs. Elwell were neither occupiers nor owners of the mines, and for that reason they were not liable. The third ground was that, in the events which had happened, the Commissioners were no longer able to perform their statutory duties and obligations, and that under these circumstances it was not competent for them to assess a rate upon these defendants or anybody. The last point was that in respect of the claim for the first of the two years the rate had not been properly assessed.

Now these were the four points. In order to understand how the claim arose and what it was about, it is necessary just to give a short statement of the facts. These Commissioners were set up to deal with an area in South Staffordshire which is referred to in the statutes as the South Staffordshire coalfield. We have seen a drawing of a section of that coalfield, and it appears that the main seam, the thick seam, which is the seam which was worked in the district, lies to a depth, I think, of about 400 feet, or somewhere thereabouts, but there are upper seams, and very narrow seams; one of them, the uppermost, is only some 2ft. thick, and it outcrops to the surface or very near the surface in certain parts of the district. Owing to the thinness of the seam, it is apparently not a paying proposition to attempt to work it under ordinary conditions. The whole scheme of these statutes, so far as it related to the drainage of the area by pumping operations, had ceased to operate in 1919, owing to the fact that the water had overcome the pumping power of the Commissioners, and they were not really in a position to deal with the water; they had no money, and pumping operations had practically ceased; the mines had become flooded, and coal was not being raised from the lower seam. In 1926 there came the coal strike, and then the conditions so altered that it became profitable to work this upper seam from the surface; Messrs. Elwell, seizing the opportunity in May of 1926, apparently commenced working an area in this coalfield. It was on June 5, 1926, that the representative of the royalty owner, Lord Dudley, whose estates were carried on by, or had been merged into, a private company, the Himley Estates Company, wrote a letter which defined the position of Messrs. Elwell in reference to this area. He begins by saying: "With reference to the interview you and your son had with Mr. Dudding and me at Dudley yesterday, enclosed I send you tracing showing the Foxyard area and Conygree area edged blue, under which you are to have the sole right of coal pickings, excepting under Clarke's take, Wall's take, the area sold and Baggott's take, shown approximately on the same plan." We have seen the tracing, and it shows a very considerable area, and it shows these excluded portions. "As arranged yesterday the royalty payable by you for all coal and slack raised up to last night"—which shows that they had been working for some time before this letter was written—"is to be 1s. 9d. a ton (2,240lb.), from thence onwards 3s. 9d. per ton (2,240lb.), you to supply the estates offices each week with the tonnage of coal pickings taken away, and you to pay for the same each month. It is also understood that if Earl Dudley should wish to take any of the coal pickings, you agree to sell the same on the basis of cost of getting it plus some remuneration for your superintendence and haulage, if any. It is also understood that the numerous little shafts which you have sunk and will sink will have to be filled up again at your cost." Under this authority Messrs. Elwell commenced to work, and there is no doubt as to the system of working adopted, and there is no doubt that it was not a question of getting out a few hundredweights of coal about which it might be said *de minimis* and you cannot apply the term "mining" in respect of it—by the system which was adopted they raised and disposed of considerably more than 100,000 tons. Now what was the method adopted? This letter refers to the permission to work under the surface, and it speaks about "the numerous little shafts which you have sunk and will sink" which will have to be filled up. The system has been quite clearly described—"little pot-holes" Mr. Matthews chooses to call them: that is only his opprobrious expression. They were in fact holes, and in reference to getting coal from below the surface the mining expression in reference to such a hole is a shaft, and a shaft may be a deep shaft, or it may be a very shallow shaft, but the proper expression, with deference to Mr. Matthews, in reference to any hole by which you seek to get coal perpendicularly from the surface, is a shaft, and it is so described in this letter which I have just read.

These shafts varied in depth, as one may imagine, because coal was reached at distances from the surface which varied possibly according to the lie of the coal, possibly according to the lie of the surface, but in some cases they were as deep as 30 feet. In my opinion the hole, whether it is 30 feet deep or 20 feet deep, is properly described as a shaft, and it is properly described as a shaft within the meaning of the Mines Act. I think anybody who dug a hole 30 feet deep for the purpose of getting coal, lead, or any other minerals, and left it unfenced on the ground that it was not a shaft, would find himself in difficulty. However, these holes were dug, and in my opinion they are properly called shafts. From the bottom of these shafts coal was obtained by driving adits following the coal. I do not know whether the coal lies flat, or whether it dips—there must be some sort of a dip, or else it would not come to the surface, I imagine. The coal was followed and it was followed underground so long as it was safe to follow it without incurring the expense of timbering, or without getting into any difficulty with regard to ventilation. As soon as the point was reached when the men who were working thought it was dangerous to proceed further, what they did was, they ceased to work there and proceeded to sink—I think that is the right word—another small shaft, and conduct the operations underground from a new position.

Now we have heard a great deal about what constitutes a mine, and we have had a great many cases referred to. It is a difficult question in many cases. I think in all the cases you find that it is laid down that the question what constitutes a mine may be properly said to be partly a question of law and partly a question of fact, but it is always largely a question of fact, and what I think is accepted as a very good test, if not a conclusive test, is whether the mineral, be it what it may, is worked underground or not so as to leave the surface untouched, and also, I think, one has to consider the nature of the mineral. Here it is coal, it is coal approached by means of a shaft, coal worked by an underground working, and in my opinion it is impossible successfully to contend that this mineral—amounting to 100,000 tons—was not got by mining operations, and by mining operations which constituted the place where the operation was carried out a mine. That disposes of one of the main points which were taken by the defendants.

The second point was that they were not occupiers, and they sought to establish that in this way. It was said on their behalf that in the first instance they employed five or six men, who were in the position of gangers, I suppose, if there had been a lot of navvies, and they allowed them to do the work and to get as many people as they liked to help them to work. The terms were that they were to be paid so much a ton, and that they would distribute the money so earned among those who had worked under them ; but so many men were out of work, and so obviously easy was it to raise coal under these conditions in considerable quantities, that a very large number of men offered themselves, and they were allowed to go to work in this area upon the condition that whatever coal they raised should be placed at the disposal of the defendants at a certain price per ton and put into their carts, the defendants sending their carts to the mouth of the shaft. Having regard to the definition in the Act of "occupier," it seemed to us—the point does not seem to have been taken before Mr. Justice MacKinnon, at any rate he does not seem to refer to it—quite obviously under these circumstances the defendants came within the statutory definition of occupier in section 3 of the Act of 1873, which is : "The expression 'occupier' means any person actually working any mine or entitled to work such mine, and includes any lessee so working a mine." When it was pointed out to Mr. Matthews that, having regard to this form of working, it could not really be seriously argued that Messrs. Elwell, his clients, were not persons either actually working in this way in the mine or entitled to work such mine, and that under the circumstances they came within the definition of occupier, Mr. Matthews did what he does not often do, he gave up the point. That disposes of the second point.

Now I shall take the fourth point, which deals only with the first assessment. The point is this—on the face of it it is a very good point and remains a good point until you ascertain the facts—the awards of the arbitrators in respect of this particular area have to be made in June or July of each year—in fact, the award was made in June of this particular year. There are two provisions in the statute which it is material to consider : one is a provision dealing with the case where an award has been made but it may become necessary to amend that award because the quantity of coal gotten is either more or less than the estimated amount in the award, and that is dealt with by section 24 of the Act of 1878 ; and there is a later section, section 30 of the Act of 1891, which allows the Commissioners to assess and levy the rate upon every occupier who may commence his occupation after the general yearly assessment. In this case the defendants commenced their operations towards the end of the year of assessment, and it was not a case, therefore, where it was possible, at that late stage, to amend the existing assessment, because in fact there was no existing assessment in respect of their particular working. What the Commissioners in fact did was to proceed under section 30 and make an assessment on the footing that the defendants had commenced their occupation after the general yearly assessment, and having done that they proceeded afterwards to amend. Now the point was made upon the assumption that no assessment had been made under section 30, but that the Commissioners had made a mistake and had dealt with the matter as though they were in a position to amend an existing assessment. Mr. Matthews contended that that assessment was bad. The learned Judge in his judgment came to the conclusion that an assessment was made under section 30, and having been made under section 30, and having been made during the year of assessment, it was competent for the Commissioners afterwards to amend that assessment. If the learned Judge was right in his conclusion of fact that the assessment under section 30 was in fact made, and was in fact made during the year of assessment, Mr. Matthews's point from that point of view fails, and it now appears that what happened apparently at the trial was that the learned Judge had the witness up on to the Bench, or close to him, and he explained the book in which the assessment is entered, and satisfied the Judge that the assessment was in fact made during the year of assessment.

The learned Judge does not deal with that point at length, but simply states his conclusion that the assessment had been made. During the discussion in this Court the point has been made plainer by the production of the resolution making the assessment under section 30, and that resolution appears to have been passed during the year of assessment. Mr. Matthews says that it is not sufficient, because he says it does not constitute an assessment unless there is not only the passing of the resolution, but the entering of the fact of the resolution having been passed in the assessment book, and notification to the person assessed. The answer to that seems to me to be this: It cannot be necessary as a matter of common law, it can only be necessary if it is a requirement of the statute that the entry should be made in the book, and that notice should be given to the person assessed in order to constitute a good assessment. Apart from any such statutory provision, it seems to me to follow that if Commissioners are given the power to make the assessment, and they do meet and they do fulfil all their statutory requirements with regard to meeting—that is to say, a majority, and all the rest of it—and they do formally pass a resolution making the assessment, that constitutes a good assessment within the meaning of the statute. I think, therefore, that point fails.

Now the third point, which is undoubtedly the most important, is one which requires a very careful and full examination of the statutes, and I do not propose to follow the arguments that have been addressed to us, but merely to summarize my conclusions. The point taken is, that by analogy to such authorities as *Aiton v. Stephen* (1 App. Cas., 456), or by analogy to such rules of law as are applicable to the case of franchises and markets and tolls, a person cannot claim a statutory or other

toll or payment unless he is able and in a position to prove that he is capable of performing the duty or the obligation in respect of which the payment is to be demanded and to be made. It is admitted that no authority directly bearing on the point can be found. This is not surprising, because it seems to me that the principle is wholly inapplicable to this particular collection of statutory duties and obligations. One has to bear in mind, and as far as one can to summarize, what the position created by these statutes is. The South Staffordshire coalfield was liable to flooding, and liable to extensive flooding, because of the number of mines without sufficient barriers between them, and because of the surface water which had accumulated and was finding its way underground and drowning out the whole of the available mineral, so that unless there could be some combination of the mineral owners it would be impossible to work the coal in the district. For that purpose the first Act of 1873 was passed, which recites the difficulties, and, shortly speaking, was passed for the purpose of meeting the difficulties and overcoming them if possible. This was the scheme : There was to be a body of Commissioners representative of the district, and the Commissioners had power to appoint arbitrators. The arbitrators were to consider the needs of the district, the amount required in order to cope with the difficulties, and then as far as possible, first of all, to ascertain the amount that was required to meet and counter the difficulties, and also it was within their province to consider the position of individual mines, and to consider how far they were likely to be benefited, or how far they were contributing to the mischief, and generally, if in their opinion it was equitable, to treat certain particular mines either by relieving them to some extent or by requiring them to bear a greater burden ; it was in their jurisdiction to do that. Having made their award, the Commissioners were then to assess the various mines. The amount of the rate and the way in which it was to be ascertained were set out in a schedule. I will just deal with one—the later schedule—which I think is in the Act of 1878. Form A of the Second Schedule there gives the form for the general drainage rate, and Form B the form for the mines drainage rate. In each case the rate is so much per ton of mineral, and it is noticeable, I think, in reference to Mr. Matthews's argument, that the general drainage rate is 1d. per ton on the various kinds of minerals described, "raised" out of all mines within the drainage area. In the mines drainage rate it is so much per ton on the various forms of minerals "gotten" from all mines within the area. I should like just to call attention to this, which seems to me not immaterial when one is considering Mr. Matthews's argument : that where a drainage rate is leviable over an area and ascertained per ton of mineral raised, as a matter of business it follows that it is the royalty owner, the mineral owner, who has to bear, at any rate to some extent, and very often to a large extent, the drainage rate, because anybody who wants to work the mineral, in considering what royalty he is prepared to pay, and can afford to pay, will always take into consideration the fact that he is liable, and will become liable, to the drainage rate. Therefore it seems to me, as a matter of course, to follow that where any such scheme as this is in operation it is the royalty owner who, to a large extent, has to bear whatever the drainage rate may be, although the drainage rate is recoverable from the occupier. In this particular case these defendants, Messrs. Elwell, elected to commence this very large operation of mining, and elected to commence it within this drainage area, but under circumstances in which the mines were not troubled with water, and therefore no doubt it is open to them to say that this drainage scheme, and these drainage operations, even if they were in full operation, would have no effect upon them ; they would not have benefited them in any way, but, of course, if the pumps had been working they could not have raised the argument which they have raised. They would have had to pay the rate, although it did not benefit them in the least. Their argument is that, because in 1919 the Commissioners had to shut down operations for want of funds and inability to cope with the volume of water, they are no longer in a position either to assess anyone, or any mine, or to demand a rate. The answer to that seems to me to be this : It is quite true that when you read the earlier sections you come to the conclusion that the primary duty of the Commissioners was to deal with the water trouble by pumping operations, and that they were under a statutory duty to do that, and to take the necessary steps in order to raise the money to enable them to fulfil that statutory duty ; but it is plain from the recitals in the statutes themselves that there came a time when they were unable to perform that statutory duty for want of money, and an appeal had to be made to the public to subscribe the necessary funds to enable them to raise a sum which it was thought at that time would be sufficient to enable them to continue operations with some reasonable hope of paying the interest on any money that the public subscribed.

The second set of statutes, if I may use that expression, consisted of statutes passed for the purpose of enabling money to be subscribed by the public, and it seems to me that, although it was a secondary purpose, from the time when these statutes were passed the statutory obligation of the Commissioners to raise whatever money could be raised in the interests of the persons who had lent the money was just as strong and just as binding as their original statutory obligation to carry out the pumping operations. It does not seem to me, in the face of this scheme of legislation, that it is possible to contend that the Commissioners were no longer performing their statutory duties, because their statutory duty to raise a rate upon every ton of coal mined within the area was just as strong as their statutory obligation to continue pumping as long as they had funds to enable them to do so, and when you find that this very large amount of coal, over 100,000 tons, was raised within this area by mining operations from mines—when you find that, what answer would the Commissioners have received, if they had said to anyone who was entitled to complain in reference to the performance of these duties : "We are not going to attempt to get any drainage rate in respect of these tons of coal, because we cannot any longer carry out the pumping operations" ? The answer would be : "You are under an equally peremptory statutory duty to raise a rate on every ton of coal in the interests of the people who advanced the money in the hope of saving this scheme." It does not seem to me to be an answer to that to say : "The thing is in a hopeless position now ; any money we raise will be of so small an amount that really if it went into the pockets of the persons who lent the money, it would be such a small amount that it ought not to be considered." Until Parliament intervenes, and it may be that the time has come when Parliament should be asked to intervene, the statutory duty upon the Commissioners is absolute, and they must in respect of every ton of

coal raised within this area by mining operations levy the rate even though it appears in the events which have happened to be unlikely that the persons for whose protection that statutory duty was imposed would benefit by it.

That is my view about the construction of these statutes as a whole, and so the answer is the one which Mr. Justice MacKinnon gave. Taking these points one by one they fail, and the result is that the plaintiffs are entitled to succeed, and the appeal must be dismissed, with costs.

Lord Justice Atkin.—This is an action brought by the South Staffordshire Mines Drainage Commissioners in pursuance of a series of Acts dating from 1873 and extending to 1923. The Commissioners were incorporated by the Act of 1873, which is an Act that recites : "Whereas there are within the portion of South Staffordshire and East Worcestershire known as the South Staffordshire coalfield large mines of coal, ironstone, and other minerals, some of which are already so flooded with water as to prevent the working thereof, whilst the working of others is impeded and rendered more costly by the flow of water into them either immediately from the surface or from other mines, or by percolation, and large bodies of water are now collected and are increasing in exhausted and abandoned mines, the irruption of which water into existing workings will not only prevent those workings, but has been and is likely to be destructive to human life : And whereas the mining operations within the limits of this Act have disturbed the surface of the soil, and have thus diverted the ancient water-courses and have caused ponds from which the water flows into the mines : And whereas the purposes of this Act are to remedy the existing mischiefs and to prevent the recurrence thereof, and for those purposes it is of great public and local importance that provision should be made—For disposing of the surface water falling or flowing into or pumped from the mines within the limits of this Act, so that the same shall not find its way into the mines within those limits ; For pumping out the water already collected in mines still working, or in disused mines ; and For preventing as far as may be the accumulation of water in any such mines, whether by percolation or irruption or otherwise : And it is expedient that Commissioners should be appointed." It then proceeded to give the Commissioners powers which included the appointment of arbitrators to divide the area into various districts, and the function of the arbitrators was primarily—that is to say, in the first instance—to develop a scheme, or a number of schemes, for the proper pumping of the particular district. These schemes, when approved by the Commissioners, were to be carried out by them. For the purpose of raising the necessary money there was power in the Commissioners to levy rates upon the occupiers of mines within the district, and there is a series of elaborate provisions as to the way in which these rates are to be assessed and are to be levied. For this purpose the arbitrators are to be employed annually—each year the arbitrators are to decide what tonnage rate will be required in the forthcoming year for the purpose of meeting the expenses under the Act. Their power was limited to saying what the amount of the tonnage rate should be within a limit of 6d. per ton for coal raised. That was altered afterwards, I think in 1894, to 9d., which is the maximum now ; but the arbitrators were not only to do that, they were to survey the whole of the mines upon the occupiers of which an assessment was to be made, and they were to take into account the special conditions of each mine. They had power to exempt certain mines altogether from being liable to the rates, and they could apportion the rate which they were to fix between the other mines. In the words of the Act as now amended, that is, by the Act of 1878, they were to make draft awards as to the amount per ton of mines drainage rate that would be required to be levied upon minerals in each drainage district for the drainage of mines, and they were to take into account the amount of reduction per ton to be made in the mines drainage rate in favour of any particular mine or mines in any such district or sub-district in consideration of the circumstances of such mine or mines in relation to the other mines or mine in such district or sub-district, and they were to take into account the total exemption of any particular mine or mines, if any, in any such district or sub-district in consideration of the circumstances of such mine or mines in relation to the other mines or mine in such district or sub-district, and they were to make a draft award which was to be submitted to the Commissioners. They could hear the parties who were interested in the award, and after hearing such parties then the final award would be made, and upon the final award it would be for the Commissioners to assess the occupiers of the different mines and to levy on them the rate which had been allowed by the arbitrators.

Section 43 of the Act of 1873 provides : "The Commissioners shall also, after the settlement of the award or awards of the arbitrators relating thereto, assess and levy upon the occupiers of mines an annual rate in respect of all minerals gotten from such mines and such rate . . . shall be fixed according to the scale with respect to each drainage district"—that is, the scale the arbitrators have fixed—"and (if the award shall so prescribe) with respect to the particular mines in each district which the award of the arbitrators shall have prescribed ; and the said mines drainage rate shall in no case exceed in respect of each class of mineral mentioned in the said Schedule II. the amount specified." As I said, originally it was 6d. and it is now 9d. That procedure is supposed to have been gone through, and must be assumed to have been gone through, in the case of the assessments made upon the defendants in this case for the year ending June 30, 1926, and the year ending June 30, 1927. The defendants have been assessed to a rate by the Commissioners, and for that sum they are being sued in pursuance of the powers in the Act which authorizes the Commissioners to proceed by action. They say in the first place that, inasmuch as the power under section 43 is to assess the occupiers of mines, (*a*) that from which they are raising coal is not a mine, and (*b*) they are not occupiers, and therefore the assessment was wrongly made upon them. The position was that the working of coal in this particular area arose by reason of the great coal strike last year. It appears to me from the documents and from the evidence that has been given that the defendants were in fact working mines in the area under powers which had been granted to them by the document to which my Lord has referred. There is a very extensive area in which they are entitled, with certain small exceptions, to work the coal, no doubt to work it, as it was called, by picking it and to work it below a certain seam, which seam either outcropped or was very near the surface. The way in which the defendants proceeded in the first instance was by agreeing with six or seven men that they would in fact win the coal and they would then sell

the coal to the defendants at 15s. per ton, and that the defendants would then have the disposal of the coal. The defendants paid a royalty to Lord Dudley's company. No doubt the scheme of only employing six or seven men was enlarged, at first against the will of the defendants, for it became apparent that a large amount of coal was to be got and a large amount of profit was to be made, and apparently numbers of gangs of men proceeded to work in this area with the eventual consent of the defendants, and they all worked upon the same terms. I think it is probably right, as Mr. Matthews has said, that they were all sub-licensees of the defendants, but larged against the will of the defendants, for it became the result was that a very large tonnage was raised and the workings took different forms, going deeper below the surface at some places than at others, but in some cases forming holes or shafts as much as 30 feet deep, and then after the shaft, which apparently went into the seam, was sunk—the coal was excavated as far as the area of the shaft—the men proceeded to run tunnels or roads as far as they could either into the coal or along the face of the seam so that they could win the coal in these roads or tunnels. It appears to me that that is certainly mining and these were mines. They were, if you please, miniature mines as compared with the full grown, fully developed, mine with which we are familiar, but the whole process seems to me to be entirely the same, and there is no doubt that, even if some degree of underground working is necessary before one can say that there is a mine, here there was that underground working. I think this coal was obtained from coalmines, and I am quite clear that these works were within the purview of these Mines Drainage Acts and were mines.

The other question is whether or not the defendants, who adopted this procedure, were occupiers of the mines. We are relieved from considering the somewhat difficult questions which arise in rating cases when you are considering questions of rating for Poor Law purposes, because there is a definition of occupier in the Act of 1873, in section 3, which no doubt was intended for the purpose of obviating these difficulties. That section says : "The expression 'occupier' means any person actually working any mine or entitled to work such mine." I myself have no difficulty at all in coming to the conclusion that the defendants here were working these mines through their sub-licensees, from whom they bought the coal at the surface and loaded it into carts, and therefore, as far as that is concerned, the assessment seems to me to have been regular.

I think perhaps this is a convenient moment to deal with the point taken in Mr. Matthews's argument as to whether the first assessment was irregular. The point that was made about it was this : The defendants only began this working in May, 1926, within the last two months of the ordinary year which terminated at the end of June, 1926, and therefore they were not included in the first assessment that was made in the ordinary course of business by the Commissioners at the commencement of that year, but they were in fact assessed, and they were given notice, as we know, in July of an amended assessment which purports to be made under section 24 of the Act of 1878. Mr. Matthews says that that can only refer to an amendment of an assessment already made, and that there was no assessment which could be amended under section 24 of the Act of 1878, and he says, "Inasmuch as you have only served me with notice of an amendment of an assessment you cannot rely upon any powers to assess me." The power to assess an occupier who is not included in the original assessment is given by the Act of 1891, section 30, which says : "The Commissioners shall assess and levy the mines drainage rate in each drainage district of the drainage area on every occupier who may commence his occupation after the general yearly assessment shall have been from time to time made," and what is, I think, a very material provision :— "Every such assessment shall in all respects take effect as if made at the time when the general assessment was made." It was, I think, proved that the Commissioners did make an additional assessment in pursuance of that section upon the defendants in June, 1926, for we have their minute, and their minute is dated June 23, 1926. The additional assessment is in fact entered up in the assessment book of the Commissioners, though I think it is fairly plain that it was not completed until at any rate July 10, 1926. I think it is plain also from the correspondence that notice of that assessment was in fact given to the defendants, because they returned it in their letter of July 13, 1926, and it was sent back to them by the Commissioners on July 15, 1926. Therefore I think the position is that an assessment was made and notice of it was given to the defendants in July, 1926. The assessment was made in June and notice was given on or about July 10, 1926, and then notice of the amended assessment was given on July 30, 1926.

Now I am not disposed to discuss the question raised by Mr. Matthews as to whether an assessment can be said to be complete until the notice has been given. I think it is very likely that that may be so, but his further point is that the assessment was not made within the year of assessment, within the year in which the rate was due. As to that all I can say is that I see in the Act no provision which compels the assessment to be completed within the year for which the rate is claimed, and it appears to me that the provision as to assessing persons who come into occupation after the year has begun might be found quite unworkable if the words were as rigid as that. I know of no principle of law which compels us to come to that conclusion. Unless there are statutory provisions to the contrary, an assessment may be a good assessment though it was not made within the actual year, provided that it is *bona fide* made for the purposes of that year. Therefore it seems to me that the defendants fail.

Now there was a further point that was raised by Mr. Matthews, or sought to be raised by him, and that was to the effect that section 30 could not be operated at all in the case of an occupier of a new mine because, it is said, the scheme of the Act plainly shows that it was intended that the arbitrators should have the opportunity, in the first instance, by their draft award of considering whether any mine, the occupier of which was to be assessed, should be exempted altogether or should have the rate reduced on taking into consideration the relation of his mine to the other mines, the question being as to the extent of the benefit that he really received from the drainage operations, past or present, of the Commissioners. I say nothing about that because I am satisfied that that point was waived by agreement in the Court below. I think it is a point which may deserve serious consideration hereafter, but it is one which is not open to the appellants in this case, and therefore I say no more about it.

That only leaves the other and very substantial point which is raised by Mr. Matthews. He says that in the circumstances that have happened the

Commissioners have lost their power of levying any rate at all for the purposes of the Act. If recourse is had to the evidence of the history of these Commissioners from the year 1873, it is plain that in this Tipton district it has proved to be a career of disaster. As early as 1891 the Commissioners had borrowed a sum of over £200,000. There were difficulties then in the repayment of these sums and in providing for the interest, and it was thought that if more money were borrowed and thrown into the flood there would be more chance of improving the pumping operations and getting more coal and raising more money from the rate, and thereby achieving the purposes of the Act, but unfortunately these expectations were disappointed. In August, 1919, the works of the Commissioners were apparently overwhelmed by water, and from about that time they did no pumping at all; the only pumping that has been done has been the pumping that was done by the Birmingham Canal Company with a view to supplying themselves with water. The report of the engineer for the year in question, the first year, says that the Commissioners did no pumping during that year directly or indirectly; therefore the money that was levied from the defendants was clearly not levied for the purpose of pumping, which Mr. Matthews says was the primary obligation for which the Commissioners were entrusted with their statutory power.

Now I think there is a good deal to be said for that proposition, speaking generally. One is very familiar with the grant of powers of levying money, by way of toll, to persons who have been given special powers of levying the toll either by charter or by grant, or some other way. In these cases the right to levy a toll has always been granted with a duty corresponding, either a duty of maintaining a ferry, or repairing a highway, or repairing a bridge, and so forth. In these cases it has frequently happened that the person who neglects the duty for which he is granted the right of toll is subject to indictment or other appropriate remedy, and there is no doubt also that there are cases where he has ultimately failed to perform his duty and has also been held necessarily to have forfeited his right to toll. That does not extend merely to cases of grants by charter or otherwise, but in the case of *Aiton v. Stephen* (1 App. Cas., 456) it was applied by Lord Cairns in the House of Lords to a case of a grant of a right of toll under a statute where the owner of a harbour was granted the right of demanding a toll for boats laid up in the harbour, and where he had refused to allow the fishermen to beach their boats on the part of the harbour that belonged to him. It was held that he was only granted by the statute the right to demand a toll in consideration of his performing his statutory duty of allowing the fishermen to lay up their boats in the ordinary way, in that case by beaching. For my part I am inclined to think that that might very well apply to statutory powers of levying rates—that is to say, if the person to whom is entrusted the statutory power of levying a rate for the purpose of performing a statutory duty has ceased to perform that duty altogether, I think it may well then be said, not that the Act of Parliament has come to an end, because I think the statute continues—it is an odd position to say that statutory rights and duties can be terminated by the will of the parties in these circumstances—but I think it may very well be said that the person who is granted the statutory right is not in fact exercising his statutory right for his statutory purposes, and therefore that is an objection, and a valid objection, to his seeking to enforce the right. In this particular case there can be no doubt, I think, under the statutes, that there are duties imposed upon the Commissioners to raise money by these rates for the purpose not only of making the actual drainage works and carrying out the drainage, but also for the purpose of recouping themselves the money which they have borrowed and of providing the interest for the persons who have lent the money on the faith of these statutory powers. That the obligations for these purposes still have to be carried out in the sense that money is still due there can be no question at all, as I will shortly mention. It appears to me, therefore, in the circumstances of this particular case, that it is impossible to say, in view of the very specific obligations imposed upon the Commissioners to levy the rate for the purpose of raising the interest as long as that interest remains unpaid, that the Commissioners are guilty of any irregularity, or are not levying the rate for some of the statutory purposes.

That being so, I think it is impossible in law to say that the Commissioners are not within their rights, but at the same time I feel bound to say that it appears to me a matter of great public importance that light should have been thrown upon the circumstances of these Commissioners, and upon the existing state of things in reference to the Tipton district, because the state of things at the present moment as disclosed in the accounts of 1926—and these are the only accounts that we have got—is that at the present moment there is due for principal—that is to say, for money lent—a sum of £472,000, and there is now due for interest and arrears of interest from the Commissioners for the same district no less than a sum of £390,000—that is, a sum of £862,000 altogether. It also is shown by these accounts that after raising from tonnage rates a sum of £1,500 odd, which is £400 or £500 more than it was the year before as shown by the report of the receiver, by reason of the windfall occasioned by these pickings during the strike, the total revenue only came to £1,500, and the expenditure was £1,981, which was merely the expenditure for meeting the general charges, which means rent of offices, and so on, apportioned to each district, and a sum of about £400, or something less, for the inspectors who find out that there is £1,500 worth of tonnage in the district which can be levied, and £400, I suppose, as an apportioned charge for the receiver's remuneration; so on revenue account there is a deficit of £400, and that deficit has to go to meet an annual amount of interest due of £16,230. It is a matter of interesting calculation as to the period of time at which a deficit of £400 a year will finally wipe out a total indebtedness of over £800,000 with an annual amount of interest due of over £16,000, and there are no prospects, or no substantial prospects, of any alleviation in that position. Such amount at any time as will go to the creditors will be something quite infinitesimal, and to attempt to pay them by these means would be something like the attempt to drain the South Staffordshire area with a tea-spoon. But the position in law in view of our decision is this, that for all time, because these obligations exist for all time, it would be possible to levy these rates upon the persons who are liable to pay any toll at all in this particular district, and it appears that for all time the ultimate destination of the money so paid will be more likely to go to meeting the expenses of officials who no doubt thoroughly earn their money than to affording any prospect at all of making any kind of diminution of the growing load of debt. Of course, if matters of this sort were

put before the Court in the course of ordinary litigation, it would be the duty of the Court to put a stop to them at once, and to see that the necessary steps were taken to wind up a body which was in that position, but that, of course, is not the function of this Court in relation to this statutory body. All that I can say is that I think these facts and circumstances do suggest that it is very much to the advantage of the public that both in this district and elsewhere the Mines Department should direct their attention to this matter and should obtain some legislative provision for terminating such an extremely unsatisfactory state of things. In the meantime, I think the proposition of law must be that the Commissioners retain their right to make these levies, and therefore they were right in making this claim. As regards the point that has not been dealt with, it is of course open on any other future occasion, but at present it appears to me that the judgment of the learned Judge was right, and that the appeal must be dismissed, with the usual consequences.

Lord Justice Lawrence.—I agree. Speaking for myself, I am quite content to let the case rest on the careful judgment of Mr. Justice MacKinnon, with which I fully agree and to which I do not think I could usefully add anything.

[Solicitors—Messrs. Greene and Underhill, for Mr. J. A. Shephard, Tipton; Messrs. Sharpe, Pritchard, and Co., for Messrs. J. E. Underhill and H. Taylor, Wolverhampton.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. July 29.

ALBEMARLE SUPPLY COMPANY, LIMITED v. HIND AND CO.*

Lien — Hire-purchase agreement — Taxicabs — Repairs — No authority to hirer to create a lien — Possession parted with for limited purpose.

The plaintiffs let three taxicabs to B. on hire-purchase agreements which provided that B. should not have authority to create a lien on the taxicabs in respect of repairs. Up to May 1, 1925, the cabs, with the consent of the plaintiffs, had been garaged at the defendants' garage and B. owed the defendants the balance of a general account for garage rent, goods supplied, and washing, cleaning, and repairing the cabs. The defendants had never been aware of the terms of the agreements between B. and the plaintiffs. On May 1, 1925, the plaintiffs terminated the agreements as B. was in arrear with his payments, but the defendants refused to hand them the cabs, asserting that they had a lien for repairs. In an action for the delivery-up of the cabs and damages for their detention,

Held, that the lien might attach notwithstanding the provision that B. should not have authority to create a lien, and that, although the defendants did not have continuous possession of the cabs, yet since, in letting B. take them out to ply for hire, they parted with possession without any intention to abandon the right of lien, the action failed.

Decision of Swift, J. (43 *The Times* L.R., 652), affirmed.

This was an appeal by the plaintiffs from a decision of Mr. Justice Swift (43 *The Times* L.R., 652) in an action of detinue.

The plaintiffs, the Albemarle Supply Company, Limited, claimed from the defendants, Messrs. Hind and Co., the delivery-up of three motor-taxicabs, which they alleged to be their property, or the value of the taxicabs, and damages for their detention.

The defendants denied that they had detained the taxicabs from the plaintiffs, and alternatively said that, if they had detained the taxicabs, they had done so under a lien to which they were entitled.

The plaintiff company, among other things, let out taxicabs on the hire-purchase system. On May 3, 1921, September 13, 1922, and May 5, 1923, they let three Fiat taxicabs to one John Botfield on hire-purchase agreements. The agreements were in the same terms. They provided for the payment of hire and for the purchase of the vehicle when a certain sum had been paid by the hirer to the plaintiffs.

By clause 5 of each agreement it was provided that the hirer should not have, or be deemed to have, any authority to pledge the credit of the owners for repairs to the vehicles, or to create a lien upon the same in respect of such repairs. In 1925, the hirer being in arrear with the rent payable under each of the hire-purchase agreements, the plaintiffs terminated the hirings by a letter of May 1 of that year.

At that time the taxicabs were garaged, to the knowledge of the plaintiffs, at the garage of the defendants, and had been garaged there for a considerable time. Botfield had, between May 9, 1924, and May 5, 1925, become indebted to the defendants in sums amounting to £1,222 7s. 10d for garage rent, goods, washing, cleaning, and repairs of five taxicabs which he kept there. He made payments generally on account, leaving a balance of £94 11s. 1d.

Mr. Justice Swift held that the defendants were entitled to appropriate payments made to them up to the last moment, so as to leave a balance owing for repairs in respect of each taxicab and to base a lien thereon; that the defendants could assert a lien on the taxicabs, though when they claimed to retain them they had not ascertained the amount due in respect of each of them; that the defendants' lien attached, notwithstanding the provision in the hire-purchase agreements; and that the lien might exist although the defendants allowed Botfield to take the taxicabs out from time to time to ply for hire. The learned Judge therefore dismissed the action.

The plaintiffs appealed.

Mr. E. W. Cave, K.C., and Mr. A. E. Woodgate appeared for the appellants; Serjeant Sullivan, K.C., and Mr. Martin O'Connor for the respondents.

The Master of the Rolls, in his considered judgment, said that, by a letter dated May 12, 1927, the defendants had purported to make an appropriation of the sums received from Botfield so as to leave only their charges for repairs still owing. They could not do that, because the accounts had been delivered week by week, and Botfield had made weekly payments, and the defendants had appropriated the amounts so paid so as to leave a balance outstanding, made up of the balance previously due and the week's charges for supplies and work done. The accounts could not be opened up and re-adjusted, so as to substantiate the claim that the whole of the balance was due for repairs alone. In any event, however,

* Reported by H. Langford Lewis and G. T. Whitfield-Hayes, Esqs., Barristers-at-Law.

a portion of the balance was due in respect of repairs. While the plaintiffs relied upon clauses 4 and 5 of the hiring agreements, as preventing Botfield from creating any lien which would prevent their obtaining the return of the taxicabs, the defendants, though knowing that Botfield held the cabs under hire-purchase agreements, did not know of the precise terms of the conditions contained in those agreements. That such a repairer's lien arose as a right of the repairer was clear from the decisions in *Keene v. Thomas* (21 *The Times* L.R., 2 ; [1905] 1 K.B., 136) and *Green v. All Motors, Limited* ([1917] 1 K.B., 625), and clauses 4 and 5 did not defeat the right of the defendants, which was a right derived not from Botfield, but against Botfield upon the execution of the repairs. Such a right could not be defeated by an unknown condition in the agreements between Botfield and the plaintiffs.

It had been argued that the lien was lost by the despatch of the taxicabs from the garage for use in the ordinary course. But there was evidence that an agreement had been made by the defendants with Botfield in December, 1924, that the taxicabs, even if permitted to leave the garage for use, should be treated as being "in pawn." In his (Lord Hanworth's) opinion the defendants had a right of lien upon the three taxicabs in their possession. Botfield could not have complied with the terms of his agreement to keep the taxicabs in repair without the lien arising in favour of the defendants if their account for those repairs was unpaid.

There remained the question whether the defendants lost their lien by demanding a sum beyond the true sum for which their lien was good. In many cases of lien it was not possible to name the exact sum due, as in *Huth v. Lamport* (16 Q.B.D., 735). The plaintiffs for their part had refused to recognize any claim for lien at all. They were not ready to make any tender to satisfy it. On the whole, it did not seem that the defendants had lost their right by making a larger demand : see *Scarfe v. Morgan* (4 M. and W., 270) and *Dirks v. Richards* (4 M. and G., 574). The appeal must be dismissed, but, as each side had pressed for too much, there would be no costs of the appeal.

Lords Justices Scrutton and Sargant delivered judgments to the same effect.

[Solicitors—Messrs. Amery Parkes and Co. ; Messrs. Edmond O'Connor and Co.]

K.B. Div. (Roche, J.) } 1927. July 29.

IN RE PRIOR AND OTHERS.*

Insurance (Unemployment)—Excepted employments — "Agriculture" — "Horticulture"—Meaning of these expressions—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), Schedule I., Part II. (*a*).

By Part II. (*a*) of the First Schedule to the Unemployment Insurance Act, 1920, "agriculture" and "horticulture" are employments excepted from the Act.

Held, that persons are employed in agriculture and horticulture when employed upon any operations done about the production, preparation, or transfer of the products of farm or garden or orchard in the best saleable condition to a first buyer or to a salesman or agent for sale if one be employed, or to a distinct business under one proprietorship. But if the industrial status and occupations of the employed persons are such that, though they are working about or in connexion with a farm or garden or orchard, they may properly be said to be essentially pursuing their own special occupations, they are not employed in agriculture or horticulture within the meaning of this rule.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

His Lordship delivered a considered judgment in these six issues referred to him by the Minister of Labour under section 10 of the Unemployment Insurance Act, 1920. The applicants were Thomas Rochford and Sons, Limited, Lowe and Shawyer, Limited, and the executors and trustees of E. C. Adcock, deceased.

All the cases raised the same question—namely, whether persons employed, in one case as a foreman and in the other cases as regular or seasonal workers, in preparing the produce of nurserymen and market gardeners for transport (*e.g.*, by trimming and bunching cut flowers, grading fruit, and packing) were "employed in horticulture" within the meaning of exception (*a*) of Part II. of the First Schedule to the Unemployment Insurance Act, 1920.

Mr. C. W. Lilley appeared for the Minister of Labour ; Mr. Hubert Hull intervened by leave for the Minister of Agriculture and Fisheries ; Mr. Harold Murphy for the Farmers' Union and the executors of Mr. Adcock.

Mr. Justice Roche, in giving judgment, said :—These cases came before me by way of reference by the Minister of Labour, pursuant to section 10 of the Unemployment Insurance Act, 1920, in order that I might decide whether the six persons concerned in the six cases are employed persons within the meaning of that Act so as to be insurable thereunder.

The substantial question is the same in all the cases, and is the question whether these persons, hereinafter described as the employees, are employed in horticulture, which is an employment excepted by the First Schedule to the Act.

The employees, one man and five women, are all of them employed by horticulturists or nurserymen, growers of fruit, tomatoes, plants, and flowers, which are sold by the employers either to florists or to buyers in Covent Garden or other markets. The man Prior is a foreman ; the women are workers engaged, some for the whole year, and others for particular seasons. The work of the women, so far as is now material, consists in preparing the products of their employers for sale—*e.g.*, by trimming and washing the plants, selecting and bunching cut flowers, grading the fruit and tomatoes, and packing for dispatch all these products. Prior is a foreman in superintendence over such of these operations as are necessary in the establishment of his particular employers. The cases, therefore, are sufficiently various to raise well the point for decision, but, in the view at which I have arrived after a full argument and after consideration, the variety of the circumstances gives rise to no distinction in principle or in result.

Sitting in my capacity as the Judge appointed to deal with questions under this Act, I have not infrequently lacked the advantage of an argument between opposing counsel. In such cases Mr. Lilley for the Minister of Labour has, at my request, assisted me much by presenting both sides of the question, but

in this case, by reason of the appearance of counsel for the Minister of Agriculture and for the Farmers' Union, as well as for some of the employers, who have put the case for uninsurability, Mr. Lilley has been left free to present the case for insurability, unembarrassed by any other conflicting duties.

The interest of the Ministry of Agriculture in this matter is considerable, because amongst other reasons the administration of this Act and of the Agricultural Wages (Regulation) Act, 1924, impinge upon one another.

I have derived much assistance from the clear and forcible arguments addressed to me by all three of the counsel engaged.

The contentions on the two sides may be summarized as follows :—

A.—For the Minister of Labour : That the employees are engaged in processes forming a part of the marketing of products and not in their culture or production, and therefore they are not employed in horticulture and are insurable.

B.—For the other interests : That these and all persons employed by producers and engaged in making produce ready for the consumer or for the buyer from the producer are employed in horticulture or agriculture, as the case may be, and therefore are employed in excepted employments.

Contention A, in my judgment, gives much too narrow a construction to the words of the exception. It is in reality based on the proposition that no marketing is within the scope of horticulture or agriculture.

Contention B, in my judgment, is a little, but not much, too wide. It needs some qualification and some re-statement, which I will hereafter specify. But the matters in which it requires qualification do not, in my opinion, affect the present cases, and the result at which I have arrived is that these persons are engaged in horticulture and are not insurable.

My reasons are as follows. Contention A is based on an expression occurring in the course of my judgment in the case of *In re Daniels Brothers* (92 L.J., K.B., 229). Messrs. Daniels were at the same time seed growers and seed merchants. Martha Wright was engaged in separating and purifying the seeds grown and vended by Messrs. Daniels. I held that she was engaged in the harvesting and not in the marketing of the seeds and was, therefore, employed in horticulture. By the word "marketing" in that case I was referring to the vending or merchanting of seeds by Messrs. Daniels as seed merchants. I did not intend to lay down, and in fact did not lay down, a general proposition that all marketing operations were outside the scope of agriculture and horticulture.

The contrary proposition is, I think, involved in my reasoning in *Vellacott's* case (38 *The Times* L.R., 113 ; [1922] 1 K.B., 466). It is also expressly laid down by Lord Constable in his judgment in *Dryburgh's* case ([1926] Sc. L.T., 99). I desire respectfully to concur with and to adopt the learned Lord's opinion on this point. I desire also to make it clear that I do not rest my decision in this case on any predominance of the horticultural elements in the occupations of these employees over other elements. I rest it on a conclusion that the operations upon which they were engaged, and their work therein, were entirely horticultural within the meaning of this Act. The elements of skill and knowledge of plants were great in Prior's case, appreciable in the case of some of the women, slight and perhaps negligible in the case of the casual workers, but nevertheless they were, in my judgment, each and all doing horticulturists' work.

I was referred to a transcript of the judgment of Mr. Justice Brown in the High Court of Northern Ireland, deciding the case of *In re Hatrick* (unreported) under this Act. The transcript does not set out the facts of the case with any fullness, but I gather that the facts were such as to lead the learned Judge to the conclusion that Hatrick, the employer, had a milk-vending business as distinct from his farming business, and that the employee in question was not employed on the farm or in agriculture. I should respectfully concur in the conclusion that a whole-time milk roundsman, though employed by a farmer, was, by reason of the provisions of section 47 (2) of the Act, and by reason of his own industrial status and occupation, not employed in agriculture. I should regard the case as a parallel to that with which I myself dealt and which I decided in the case of a lorry driver, the case of *Vellacott* (*supra*). But if there is any conflict between the decision in *Hatrick's* case and the decision in *Dryburgh's* case (*supra*) I prefer the latter. I desire to make it plain that in my judgment retail milk distribution in a village or adjoining a town may be and often is part of a farmer's operations, and that persons employed therein are employed in agriculture unless they are special employees such as I conceive a whole-time milk roundsman to be.

I hope I have now made plain my reasons for my decision and the qualification which I attach to the contention that, in the main, I adopt. The qualification is the exclusion from the exception of certain specialized workers whose own industrial status or occupation is not agricultural or horticultural. I may, however, add as an illustration of such a specialized worker the clerk or bookkeeper who may be employed on or about a large farm or estate but is not, in my opinion, employed in agriculture.

There remains one other matter. After I had intimated what my general view on the question was, counsel for the Minister of Labour and for the Farmers' Union asked that I should, if I found it possible, formulate a general rule applicable to the industries of agriculture and horticulture for the purposes of the working of this Act in this class of case. I do so with some reluctance, as it is difficult, if not impossible, to forecast what cases may arise in future. But I yield to the request with the reservation that I can only state a working rule such as I should adopt myself on my present information, and such as I should regard as open to correction and modification if circumstances make it necessary or desirable.

I further add that I asked counsel for the Minister of Labour and the Farmers' Union, the parties here concerned, after discussion before me, to submit to one another and to me a draft of a suggested formula, and that they have done so. I have derived further assistance from their joint efforts, and have in part adopted the result. But, while they have given me this valuable assistance, I assume all responsibility for a formula or working rule in terms as follows :—

"Persons are employed in agriculture and horticulture when employed upon any operations done about the production, preparation, or transfer of the products of farm or garden or orchard in the best saleable condition to a first buyer or to a salesman or agent for sale if one be employed, or to a distinct business under one proprietorship as in *Daniels'* case (*supra*). But if the industrial status and occupations of the employed persons are such that, though they are working about or in connexion with a farm or garden or orchard, they may properly be said to be essentially pursuing their own special occupations,

they are not employed in agriculture or horticulture within the meaning of this rule."

The formal conclusion of this matter is that I answer the question referred to me in the negative in all six cases.

[Solicitors—The Solicitor to the Ministry of Labour ; the Solicitor to the Ministry of Agriculture and Fisheries ; Messrs. Ellis and Fairbairn.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. July 20.

CLARK v. WESTAWAY.*

Betting—Betting duty—Bookmaker—Certificate—Carrying on business without—Conviction—Previous conviction on same transactions for keeping betting house—Whether bar to second conviction — Betting Act, 1853 (16 and 17 Vict., c. 119), s. 3—Finance Act, 1926 (16 and 17 Geo. V., c. 22), s. 17 (1) (*b*).

A conviction of a person for keeping a betting house under s. 3 of the Betting Act, 1853, is not a bar to his conviction, arising out of the same transactions, for carrying on business as a bookmaker without a proper certificate under s. 17 (1) (*b*) of the Finance Act, 1926.

This was a case stated by justices of the peace in and for the county borough of Bootle.

At the Court of Summary Jurisdiction sitting at Bootle an information was exhibited by the respondent, Clarence Clifton Westaway, one of his Majesty's officers of Customs and Excise, under the Finance Act, 1926, against the appellant, Arthur Clark, for that he between December 6 and December 19, 1926, at the county borough of Bootle did carry on business as a bookmaker without having in force a proper certificate as by section 15 (1) (*b*) of the Finance Act, 1926, was required, whereby, and by force of section 17 (1) (*b*) of the Act, he was liable in respect of such offence to an Excise penalty of £100. The information was heard on March 17, 1927, when the Court convicted the appellant and imposed a fine of £25 or one month's imprisonment.

The appellant, being aggrieved and dissatisfied with this determination as being erroneous in point of law, applied to the justices to state this case setting forth the facts and the grounds of the determination for the opinion of the Court.

Upon the hearing of the information the following facts were proved or admitted :—

(1) That the appellant had on January 5, 1927, been committed for trial at the then next Liverpool Assizes by the justices in the Court of Summary Jurisdiction aforesaid, and on February 1, 1927, had been convicted before Mr. Justice Greer for that he the said appellant on and between December 7 and 18, 1926, being then the occupier of a certain house and yard at 176, Wadham-road, Bootle, unlawfully did keep or use the said house and yard for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races and football matches contrary to the statute in such case made and provided.

(2) That on December 17, 1926, one Richard Henry Benson made a cash bet with the appellant at the premises aforesaid, but received no revenue ticket.

(3) That on December 18, 1926, the said Benson made a cash bet with the appellant at the aforesaid premises, but received no revenue ticket.

(4) That on various occasions between December 9 and 18, 1926, bets were made by divers persons with the appellant at the said premises.

(5) That on entering the premises aforesaid on a warrant the police found a large quantity of betting slips and money therein.

(6) That the appellant had in November, 1926, applied at the Customs House, Liverpool, for a bookmaker's licence for ready-money betting, but the clerk there said "I can't give you that as a ready-money betting certificate."

On the part of the appellant it was contended that (1) the conviction under section 3 of the Betting Act, 1853, was a bar to a conviction under section 17 of the Finance Act, 1926 ; and (2) section 17 of the Finance Act, 1926, did not apply to illegal betting.

On the part of the respondent it was contended that :—(1) The said previous conviction was not a bar to a conviction under section 17 of the Finance Act, 1926 ; and (2) section 17 of the Finance Act, 1926, applied to illegal betting.

The attention of the justices was drawn to the following authorities :—*Reg. v. Miles* (6 *The Times* L.R., 186 ; 24 Q.B.D., 423) ; the Interpretation Act, 1889, section 33 ; the Finance Act, 1926, sections 15, 17, 18 ; *Inland Revenue Commissioners v. von Glehn and Co.* (36 *The Times* L.R., 463 ; [1920] 2 K.B., 553) ; *Saunders v. Baldy* (L.R., 1 Q.B., 87).

The justices were of opinion that (1) the said previous conviction was no bar to a conviction under section 17 of the Finance Act, 1926 ; and (2) section 17 of the Finance Act, 1926, applied to illegal betting. They accordingly convicted the appellant and fined him as stated.

The question upon which the opinion of the Court was desired was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Mr. Maxwell Fyfe appeared for the appellant ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Bowstead for the respondent.

The Lord Chief Justice said :—The first argument advanced on behalf of the appellant was that his conviction under section 3 of the Betting Act, 1853, was a bar to a conviction of him under section 17 of the Finance Act, 1926. It seems to me that that point is disposed of by the provisions of the section itself, for it provides that "if any person . . . carries on business as a bookmaker without having in force a proper certificate . . . he shall (*without prejudice to his liability to any other penalty* or his liability to pay any sum in respect of duty under this Part of this Act) be liable, in respect of each offence, to an Excise penalty of £100."

The words which I have emphasized seem to make it clear that the penalty to which a person's conduct may expose him under that section is intended to be cumulative on any penalty to which that conduct may expose him under some other statute. This view is reinforced by the case of *Saunders v. Baldy* (L.R., 1 Q.B., 87), where it was held that a person using a trap for taking game without a certificate during the prohibited season was liable to a penalty under one section of the Game Act, 1831 (1 and 2 Will. IV., c. 32), although he might also be liable to penalties under another section. "I see no reason," said Chief Justice Cockburn (L.R., 1 Q.B., at p. 89), "why a man should not be liable to two penalties for the two offences—one against the laws for preserva-

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

tion of game, and one against the revenue, no matter at what season of the year. I think the respondent was guilty of the offence charged, inasmuch as he used an engine for the purpose of killing game without a certificate." In other words, the question whether the present appellant had been guilty of an offence under section 3 of the Betting Act, 1853, was wholly distinct from whether he had also exposed himself to a penalty under the Finance Act, 1926. There is, therefore, no room here for a plea of *autrefois convict*.

But what, I think, is the real point in this case was raised by the appellant's contention that section 17 of the Finance Act, 1926, did not apply to "illegal betting." That phrase, "illegal betting," is so concise as easily to be capable of concealing a fallacy. To say without qualification that some betting is "illegal" might easily convey the impression that the transaction of betting is *per se* illegal. That is not what is meant by the phrase, which refers to betting which is carried on in such circumstances that the person who is responsible as owner, occupier, or user of the place where the betting goes on renders himself liable to a penalty under the Betting Act, 1853. The argument advanced on behalf of the appellant really involves the proposition that, if a man contrives to carry on his betting in circumstances which expose him to punishment under the Betting Act, 1853, he is to escape the obligations which are imposed by the Finance Act, 1926. That proposition, when it is plainly stated, is doing what was referred to by Lord Haldane in *Minister of Finance v. Smith* (42 *The Times* L.R., 734 ; [1927] A.C., 193, at p. 197), when he said, with reference to the enactment under consideration there : "Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong." The words of section 17 (1) of the Finance Act, 1926, are quite general and comprehensive. They are "*any* person" who carries on business as a bookmaker. Section 18 (1) defines bookmaker as "any person" who receives or negotiates bets. In the present case the findings of fact are conclusive that on various dates the appellant acted as a bookmaker without a certificate. It is nothing to the purpose to say that there was a further ingredient in what he did—namely, that he did it in such circumstances as to commit an offence under the Betting Act, 1853. In my opinion, this case comes clearly within the terms of the statute, and to hold otherwise would be to insert in the Finance Act, 1926, a proviso excluding from the operation of the Act persons who happen to bet in such a way and in such a place as to expose themselves to penalties under other statutes. That would be a grotesque conclusion and one not to be arrived at unless the words of the statute clearly compelled it. I think, therefore, that this appeal fails and must be dismissed.

Mr. Justice Avory said :—On the first point—that the appellant's conviction under section 3 of the Betting Act, 1853, was a bar to a conviction under section 17 of the Finance Act, 1926—I entirely agree with the judgment of my Lord and I have nothing to add.

On the second point the contention on behalf of the appellant is that the words "bet" and "bookmaker" in section 18 of the Act of 1926 must be construed to mean a bet which is not contrary to law and a bookmaker who carries on business in a manner which is not contrary to law. The Attorney-General has sufficiently answered the point which is made about the word "bet" when he says that there is no such thing as an illegal bet as distinguished from a legal bet. That is very conspicuously supported by two passages in the judgment of Lord Halsbury in *Powell v. Kempton Park Racecourse Company* (15 *The Times* L.R., 266, at p. 267 ; [1899] A.C., 143, at p. 159) when he said that this statute of 1853 "prohibits opening a house, &c., for the purpose of the owner or occupier betting with persons resorting to the house so opened. It does not prohibit betting. It does not affect to deal with the betting of people unconnected with the house betting *inter se*." Later he said ([1899] A.C., at p. 162) : "But it is obvious that the Legislature has not prohibited betting at all, but prohibited keeping a house for betting."

Dealing with the word "bookmaker" in section 18 I see no ground for limiting it to a bookmaker who carries on his business in a manner which is not in contravention of the law. On the contrary, section 17, subsection 3, appears to me to contemplate that a bookmaker who holds a certificate may yet be convicted under the Betting Act, 1853, because it provides : "Any Court before which a bookmaker is convicted of any offence under this Part of this Act or otherwise in connexion with his business as a bookmaker may order him to be disqualified for holding a bookmaker's certificate. . . ." In other words, a person who infringes the provisions of the Act of 1853 may be ordered to be disqualified from holding a bookmaker's certificate under the Act.

For these reasons I agree that the main point in this case also fails.

Mr. Justice Salter.—I agree and I have nothing to add on either point.

The appeal was accordingly dismissed with costs.

[Solicitors—Messrs. G. J. Lynskey and Son, Liverpool ; Solicitor for Customs and Excise.]

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Phillimore, and Lord Carson.)
1927.
July 29.

DONALD CAMPBELL AND CO., LIMITED v. POLLAK.*

Practice—Costs—Trial without a jury—Refusal of Judge to give costs to successful party—Exercise of discretion — Appeal — Whether competent—Supreme Court of Judicature Act, 1873 (36 and 37 Vict., c. 66), s. 49—Supreme Court of Judicature Act, 1890 (53 and 54 Vict., c. 44), s. 5—Rules of the Supreme Court, Order LXV., Rule 1.

Where on a trial without a jury a Judge of the High Court, with the deliberate intention of exercising his discretionary powers as to costs under section 49 of the Supreme Court of Judicature Act, 1873, and section 5 of the Supreme Court of Judicature Act, 1890, has refused to give the successful party his costs and in so refusing has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, and where the Judge has refused leave to appeal, the

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by those enactments from entertaining an appeal from it.

This was an appeal by the plaintiffs from a decision of the Court of Appeal reversing an order of Mr. Justice Branson as to costs.

The respondent was formerly in the employment of the firm of Donald Campbell and Co., and, on the firm being converted into the appellant company, became a director of the company. The company had since gone into liquidation. Actions were brought against the respondent by the firm and the company and those actions were consolidated. They were tried before a Judge and jury and in each case the plaintiffs obtained a verdict and judgment in their favour. The Court of Appeal ordered a new trial of both actions. The House of Lords allowed the judgment in the action by the firm to stand, but affirmed the order of the Court of Appeal for a new trial of the action by the company.

At the retrial of the second action, without a jury, Mr. Justice Branson gave judgment in favour of the respondent, but without costs, his main reason for depriving the respondent of costs being that he had been guilty of improper conduct in the former action and that that conduct had induced the liquidator to bring the present action.

The respondent appealed, without leave, to the Court of Appeal against so much of the judgment as related to costs. The Court of Appeal (Lord Justice Bankes, Lord Justice Scrutton, and Lord Justice Atkin) allowed the appeal on the ground that the trial Judge, in dealing with the costs, was not entitled to take into account the proceedings in the other action and had, therefore, no materials upon which to exercise his discretion.

The company appealed against this decision of the Court of Appeal. A preliminary objection to the competency of the appeal on the ground that it was an appeal as to costs was disallowed by the House (43 *The Times* L.R., 495).

Mr. Stuart Bevan, K.C., Mr. Barrington-Ward, K.C., and Mr. E. F. Spence, K.C., appeared for the appellants; Mr. Jowitt, K.C., and Mr. Astell Burt for the respondent.

The Lord Chancellor.—My Lords: The preliminary objection to this appeal having been overruled, your Lordships are now called upon to dispose of the appeal. In expressing my opinion on the preliminary question, I have sufficiently stated the facts; and for the present purpose it is enough to remind your Lordships that Mr. Justice Branson, who tried this action without a jury, gave judgment for the defendant (the present respondent) without costs; and that, on an appeal by the defendant, without the leave of the Judge, against so much of the judgment as related to costs, the Court of Appeal set aside the judgment of the trial Judge and directed that judgment be entered for the defendant with costs. The question to be determined is whether the order of the Court of Appeal was right.

In order that this question may be answered, it is necessary to consider first the nature and extent of the jurisdiction of the Court of Appeal to review an order of the first Court as to costs. It is true that no question of jurisdiction was raised in the appellants' case on this appeal; but the jurisdiction of a Court does not depend on the pleadings or admissions of the parties to a suit, and, however such a question may emerge, it is (I think) impossible for this House to pass it by and to give its decision on the basis of the existence of a jurisdiction which may or may not have been conferred. I propose, therefore, first to deal with this question.

The jurisdiction of the Court of Appeal to review an order of the trial Court as to costs depends on statutes and on Rules of Court which have the force of a statute; and the enactments which were in force when the judgment in question was given were section 49 of the Supreme Court of Judicature Act, 1873 (now represented by section 31, subsection 1 (*h*), of the Supreme Court of Judicature (Consolidation) Act, 1925), section 5 of the Supreme Court of Judicature Act, 1890, and Order LXV., Rule 1, of the Rules of the Supreme Court. The terms of these provisions are as follows:—

Supreme Court of Judicature Act, 1873, *section* 49.—"No order made by the High Court or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order."

Supreme Court of Judicature Act, 1890, *section* 5.—"Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid."

Rules of the Supreme Court, Order LXV., Rule 1.—"Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

My Lords, at first sight these enactments would appear expressly to deprive the Court of Appeal of any jurisdiction to make the order now under appeal. Section 5 of the Act of 1890 provides that, subject to the Supreme Court of Judicature Acts and rules of Court, the costs of all proceedings in the Supreme Court are to be in the discretion of the Court or Judge. Rule 1 of Order LXV. repeats this enactment, but provides that in the case of a trial with a jury the costs shall follow the event unless the Court shall for good cause otherwise order; and the effect of this exception in the case of trial with a jury is to confirm and strengthen the absolute discretion which in an action tried without a jury is conferred upon the Court. It follows that in a non-jury case the costs are "by law left to the discretion of the Court"; and if so, then by the express terms of section 49 of the Act of 1873 an order as to those costs was not subject to any appeal except by leave of the Court making the order. The Legislature had directed that in this matter, as in others with which your Lordships are familiar, the order of the first Court should be final.

But very little time had elapsed after the passing of the Act of 1873 before an inroad was made upon the operation of section 49, and the breach then made in that section has grown to such an extent that it is (I think) necessary now to review the whole position. In making this review I do not propose to deal with those cases (such as *Foster v. Great Western Railway Company* (8 Q.B.D., 515) and *In re Mills' Estate* (3 *The Times* L.R., 61 ; 34 Ch.D., 24), in which a tribunal was held to have awarded costs without any jurisdiction to do so ; or with those other cases such as *The City of Manchester* (5 P.D., 221) and *Bew v. Bew* ([1899] 2 Ch., 467) in which a Judge had taken the mistaken view that he had no discretion as to costs : for in such circumstances a Court of Appeal may rightly intervene to decide the question of law. Nor is it necessary to refer to the cases which have arisen as to costs awarded under the County Courts Acts or the Arbitration Act, 1889, to which section 49 of the Supreme Court of Judicature Act, 1873, and the corresponding section of the Act of 1925 have no application ; or to the "good cause" cases, which relate to the costs of a trial with a jury. I propose to confine my attention to the reported cases, few in number, in which the Court of Appeal has allowed an appeal from the exercise by a Judge of the Supreme Court of his discretion as to the costs of a trial without a jury, no leave to appeal having been obtained.

The first of these cases is *Civil Service Cooperative Society v. General Steam Navigation Company* (20 *The Times* L.R., 10 ; [1903] 2 K.B., 756), in which the trial Judge (Mr. Justice Bigham) had given judgment for the defendants but, because the defendants had refused to refer the dispute to him as arbitrator, had ordered that the parties should bear their own costs. The defendants having appealed against the order as to costs, the Court of Appeal entertained their appeal and reversed the order, Lord Halsbury stating his reasons as follows :—

"No doubt, where a Judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned Judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Mr. Justice Bigham, and in the judgment of this Court, they are right ; and it practically comes to this—that the learned Judge has deprived the persons sued of what, *prima facie,* is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned Judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the Judge ; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the Judge to treat as grounds for the exercise of his discretion."

Lord Alverstone, the other member of the Court, agreed, saying that "if it appears that a Judge has not exercised his discretion, or has decided upon grounds which were not open to him, this Court can still deal with his decision" ; and he relied on *Granville v. Firth* (19 *The Times* L.R., 213), which, being a "good cause" case, was not in point.

In *King v. Gillard* (21 *The Times* L.R., 398 ; [1905] 2 Ch., 7), in which the defendants were sued for passing off their goods as the goods of the plaintiffs, Mr. Justice Kekewich had given judgment for the defendants, but had refused to order the plaintiffs to pay the defendants' costs on the ground that the wrappers in which the goods in question were sold contained untrue statements as to certain medals and awards. The Court of Appeal, while dismissing the plaintiffs' appeal on the merits, allowed a cross-appeal by the defendants as to costs on the ground that, even if the untrue statements on the wrappers were calculated to deceive the public, the wrong so done was a collateral matter and was not directly connected with the plaintiffs' case. Lord Justice Stirling added that the case was very near the line, and that, if the learned Judge had exercised his discretion on the ground taken by him combined with other facts of the case, it would have been difficult to interfere.

In *Edmund v. Martell* (24 *The Times* L.R., 25), an action by the landlords of a dwelling-house against the tenant for waste by converting part of the premises into a shop, Mr. Justice Sutton gave judgment for the defendant on the ground that the waste committed by her was of the species known as ameliorating waste, but he made no order as to costs because he thought that the defendant should have approached her landlords before making the alterations. The decision of the learned Judge as to costs was reversed by the Court of Appeal, which held that the defendant's failure to approach her landlords was not relevant to the question to be determined between the parties, and that the Judge had "not really exercised his discretion at all in the matter." It is noteworthy that in this case also Lord Alverstone relied on *Granville v. Firth* (*supra*), a "good cause" case.

Lastly, in *Ritter v. Godfrey* (36 *The Times* L.R., 144 ; [1920] 2 K.B., 47), an action against a medical practitioner for negligence, Mr. Justice McCardie, who tried the action without a jury, found for the defendant, but refused to order the plaintiff to pay the defendant's costs of action on the ground that the defendant, in repudiating the plaintiff's claim, had written some letters of an unsatisfactory and, indeed, of an insulting character. The defendant having appealed as to costs, the Court of Appeal took the view that the correspondence did not afford ground for the exercise of the judicial discretion to refuse to award costs to a successful defendant, and on that view set aside the judgment of the trial Judge and ordered that judgment be entered for the defendant with costs. Lord Sterndale, M.R., who concurred in this decision with much doubt, stated the principle as follows :—

"This was a case tried without a jury before the Judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial, and this Court cannot interfere with his discretion.

"On the authorities as they now stand the line between cases tried before a jury and cases tried by a Judge is very fine."

Lord Justice Atkin took a more decided view, saying :—

"In the case of a wholly successful defendant, in my opinion the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains. . . . I am aware of the inconvenience of fettering by rules the exercise of what in terms appears to be an unfettered discretion. But it is too late to contend for an arbitrary discretion over costs : some rules undoubtedly there are that control the discretion : and it seems hard to require a Judge to exercise his discretion according to rule, and yet not to be able to state what the rule is. Nor if the rule is to be formulated does it appear helpful to cast it in the negative form of a string of prohibitions leaving the guiding principles to be deduced from them."

Mr. Justice Eve took a similar view, holding that a Judge, however much he might disapprove of the defendant's behaviour, was not entitled to refuse him his costs unless he had material upon which he was prepared to hold judicially that the defendant had thereby created a mistaken belief in the plaintiff's mind, or that his misconduct was the real cause of the action being brought.

My Lords, these authorities appear to me to indicate a progressive tendency on the part of the Court of Appeal to review the exercise by trial Judges of their discretion as to costs, with the result that the Court has travelled far from the categorical terms of section 49 of the Act of 1873. The decision in the *Civil Service Cooperative Society's* case (*supra*) may no doubt be supported by the consideration, which obviously weighed with Lord Halsbury, that the trial Judge in that case had taken action, not upon materials which emerged in the trial itself, but upon his personal view that no trial should properly have been insisted upon ; and in such circumstances there may well have been ground for holding that he had not really exercised his discretion. But the fraudulent conduct of the defendants in *King v. Gillard* (*supra*) and in *Edmund v. Martell* (*supra*) the circumstance that the defendant had altered the character of the plaintiffs' property without consulting them, were surely sufficiently connected with the matters in dispute to entitle a Judge having a wide discretion to take them into account when awarding costs ; and the same may, I think, be said of the conduct of the defendant in *Ritter v. Godfrey* (*supra*) towards persons who had suffered a real sorrow while one of them was under his care. Further, the language used in the last-mentioned case by Lord Justice Atkin and Mr. Justice Eve, who expressed the opinion that the trial Judge in a non-jury case "must" give the successful defendant his costs except in certain cases which they defined, is difficult to reconcile with the statutes and rules which give him an absolute and uncontrolled discretion. Indeed, the rules laid down in that case by those learned Judges bear so close a resemblance to those which would guide a Judge in determining whether there was "good cause" for depriving of his costs a successful defendant in an action tried with a jury, that, if they are held to be binding, little or no difference will be left between the power of a Judge over costs in an action tried with a jury and that which the statute gives him in the case of a trial without a jury. A gloss upon the statute which leads to so complete a frustration of its purpose surely calls for very close and critical examination in your Lordships' House ; and, although some of the cases cited have stood unchallenged for a good many years, I do not think that it is too late for this House, which now for the first time has seisin of the matter, to review them. The protest of Mr. Justice North in *Walter v. Steinkopff* (8 *The Times* L.R., 633 ; [1892] 3 Ch., 489, at p. 500), and the doubts expressed by Lord Justice Stirling and Lord Sterndale in *King v. Gillard* (*supra*), and *Ritter v. Godfrey* (*supra*), have kept the question open ; and in any case the matter is one, not of mere procedure, but of statutory right, and no course of decision can override the statute.

My Lords, it appears to me that the true view is substantially that taken by Lord Sterndale in the above quoted passage in his judgment in *Ritter v. Godfrey* (*supra*), although I would express it in somewhat different language. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff ; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the Judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our Courts would never in fact be realized—a Judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a Judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.

Judged by these tests I doubt whether the decisions in *King v. Gillard* (*supra*), *Edmund v. Martell* (*supra*), and *Ritter v. Godfrey* (*supra*) can be supported ; and judged by the same tests I am satisfied that the order made by the Court of Appeal in the present case cannot stand. Even if the rules laid down in *Ritter v. Godfrey* (*supra*) were to be applied, I should find difficulty in holding that, in the present case, Mr. Justice Branson had no materials for the exercise of his discretion. The verdict on which the learned Judge proceeded was rendered in the consolidated action and was, therefore, part of the proceedings in the present action ; and it was frequently referred to in the evidence given during the new trial of this action. It was, therefore, fully before the learned Judge, and he was entitled to take it into account in considering whether the defendant had brought this litigation upon himself and to decline on that ground to give him the costs of the action. Further, although the verdict formed the main ground for the Judge's decision as to costs, he stated that other points also had weight with him and the influence of those other points on his mind could not be and was not estimated by the Court of Appeal. On the merits therefore, and assuming that the Court of

Appeal had power to interfere, I should be disposed to allow this appeal; and if your Lordships should agree with the view which I have expressed on the question of jurisdiction, it is clear that the appeal should succeed.

For these reasons I am of opinion that the order of the Court of Appeal should be set aside and the order of Mr. Justice Branson restored. But as the principal question discussed in this judgment was not raised by the present appellants either in the Court of Appeal or in their case for the present appeal, I am content that there should be no costs of the appeals to the Court of Appeal and to this House, except so far as such costs have already been disposed of on the hearing of the preliminary objection. I move your Lordships accordingly.

Lord Atkinson.—My Lords: I think it is well established that, when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts; a good deal of the arguments addressed to the House on behalf of the appellants in this case appeared to me to go the length of contending either that the discretion of the Judge was absolute and unfettered, or that, though the exercise of this discretion might have given free scope to whim or prejudice, it must be assumed that, where discretion is given to a Judge, it will always be properly exercised, the Judge not being bound to disclose the facts, if any, upon which he acted. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion which he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide and the Court of Appeal cannot interfere with the exercise of his discretion in this instance. I take this statement of the law, applicable to cases tried without a jury, from the judgment of Lord Sterndale, M.R., in the case of *Ritter v. Godfrey* (36 *The Times* L.R., 144; [1920] 2 K.B., 47, at p. 52). He said: "This was a case tried without a jury before the Judge alone, and therefore in the absence of an order by him, neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial, and this Court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a Judge is very fine. One other consideration applies to these cases. The principle as to the exercise of discretion is the same in the case of plaintiffs and defendants, but it is clear that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will."

My Lords, I think this judgment of Lord Sterndale contains a clear, condensed and accurate statement of the law and of the prevailing practice on the points with which it deals. He then proceeds to state what, in his view, is regarded as sufficient ground for refusing a defendant his costs. He says: "Speaking generally, I think it may be said that, in order to justify an order refusing a defendant his costs, he must be shown to have been guilty of conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought. This is so stated by Lord Justice Vaughan Williams in *Bostock v. Ramsey Urban District Council* (16 *The Times* L.R., 520; [1900] 2 K.B., 616)." This last is a very important case, because it follows the decision of the Court of Appeal in *Harnett v. Vise* (5 Ex. D., 307), and lays down the important principle, that in exercising his discretion under Order LXV., r. 1, in a case heard by a jury, a Judge is not confined to the consideration of the defendant's conduct in the actual litigation.

Lord Justice A. L. Smith, in giving judgment in the Court of Appeal in the former case (p. 622), said: "It seems to me that the Lord Chief Justice was right when on general principles he came to the conclusion that 'the Judge is not confined to the consideration of the defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation.'" The Lord Justice proceeded: "I say on general principles, because his attention does not appear to have been called to the case of *Harnett v. Vise* (*supra*), in which it was distinctly held by the Court of Appeal that the Judge is not confined, in considering the question whether there is good cause for depriving the successful party of costs, to the conduct of the parties in the litigation itself, but must consider the whole circumstances of the case and everything which led to the action. I think that in this case there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them, and which the Judge was entitled to take into consideration as constituting good cause for depriving the defendants of costs."

Lords Justices Vaughan Williams and Romer concurred. The last named Lord Justice, in delivering judgment, page 627 of the report, said: "It is clear that the 'good cause' referred to by Order LXV., r. 1, is not confined to cause founded upon conduct of the successful party in the course of the litigation. It might, for example, in the case of a successful defendant, be founded on conduct of the defendant outside the action, if the conduct were such as to have led the plaintiff reasonably to suppose that he had a good cause of action, and thus induced him to bring the action. I limit the proposition so as to show clearly that I do not consider that such conduct on the part of the defendant would constitute good cause within Order LXV., r. 1, if it had no reference to the action, and did not induce the plaintiff reasonably to believe that he had a right of action." In the case of *Harnett v. Vise* (*supra*), the action was brought by a doctor, who practised at Barnet, against the defendant and his wife for a letter written by the latter to an old lady named Perkins, who had for some time been confined in a lunatic asylum, but was at the date of the letter convalescent, warning her against having any further communications with the plaintiff and making reflections upon him. The defendant traversed the innuendoes alleged in the statement of claim, pleaded that the letter was a privileged communication and also pleaded a justification. The case was tried before Baron Huddleston, and a special jury. The Judge ruled that the letter was not a privileged communication, and the

jury found a verdict for the plaintiff for £10 damages. After the verdict had been returned the counsel for the defendant applied to the Judge to exercise his power under Order LV. (then the proper Order) and deprive the plaintiff of his costs on the ground that he had brought the libel on himself by his incautious conduct. The learned Judge acceded to this application and refused to allow the plaintiff his costs. An application was made by the plaintiff to the Exchequer Division to rescind this order and was refused. The plaintiff appealed to the Court of Appeal. The appeal was heard by Lord Justice James, Lord Justice Brett, as he then was, and Lord Justice Cotton. In delivering judgment, Lord Justice James, after referring to the amount of the damages awarded, said : "Every Judge would take it as a material element in considering whether the jurisdiction given by Order LV. is to be exercised or not. But it is the duty of the Judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of."

Of the many judicial criticisms which have been passed upon Order LXV., r. 1, and its application none is, I think, clearer and more helpful than that of Lord Justice Bowen, as he then was, in the case of *Jones v. Curling* (13 Q.B.D., 262), an action tried before a Judge and jury. Referring to Order LXV., r. 1, Lord Justice Bowen said : "That rule begins with placing in the discretion of the Court the costs of all proceedings in the Court, but then follows a provision by which in the event of a jury trial the costs are removed from the discretion of the Judge and are to follow the event, except in one case, which is, if the Judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the Judge, provided a condition precedent is fulfilled ; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause, then the Judge had no jurisdiction. It seems to me that on the true construction of this rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the Judge depends. When, however, this jurisdiction is established, then I think there is no appeal unless the Judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all." These last words are very significant, and mean that if the established facts of the case amount to such good cause as to give the Judge jurisdiction to exercise his discretion, he must exercise that discretion in such a way as to amount to a reasonable exercise of it. An exercise of it based on whim or prejudice would be insufficient. The Court, composed of Sir Balliol Brett, M.R., Lord Justice Bowen, and Lord Justice Fry, held that to be good cause within this rule there must be facts showing that it would be more just not to allow costs to follow the event as, for example, oppression or misconduct of either of the parties by which costs have been unnecessarily increased. In an appeal to this House in the case of *Huxley v. West London Extension Railway Company* (5 *The Times* L.R., 355 ; 14 App. Cas., 26, at p. 34) Lord Watson said that he would not attempt to define what good cause was, but that, in his opinion, it embraced everything for which the party is responsible connected with the sustentation and conduct of the suit and calculated to occasion unnecessary litigation or expense. He said : "So long as the Judge or Court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters ; they are acting within their jurisdiction, and their decisions are final and conclusive." So much for the case under the proviso to this rule. There remains the question what is the nature of the discretion conferred upon the Judge in cases tried by a Judge without a jury. Is it entirely arbitrary, subject to no qualification or restraint ? Must a litigant who has succeeded in a suit and has not been guilty of any misconduct of any kind be, on being deprived of his costs, content with the assurance that a Judge exercised his discretion properly, though he has not mentioned or even suggested what the grounds were upon which he based the exercise of that discretion ?

The decision in the case of *Kierson v. Joseph L. Thompson and Sons, Limited* (29 *The Times* L.R., 205 ; [1913] 1 K.B., 587), throws some light upon the question of judicial discretion as to everyday cases. The facts are stated with sufficient fullness in the head note and the judgment of Sir H. H. Cozens Hardy, M.R., concurred in by Lord Justice Buckley and Lord Justice Hamilton : "A workman who was in receipt of a weekly payment of 13s. 5d. from his employers as compensation for an accident within the meaning of the Workmen's Compensation Act, 1906, entered into an agreement to accept £100 in satisfaction of the employers' liability. The workman applied to the Registrar to have a memorandum of the agreement recorded. The Registrar, being dissatisfied as to the amount of the commutation, referred the matter to the Judge. Both parties appeared and supported the agreement. The Judge overruled the objection as to quantum, and directed the memorandum to be recorded, ordering the employers to pay the costs. The employers appealed from the order as to costs." The Master of the Rolls in giving judgment said : "Both the employers and the workman were then cited to appear and did appear before the Judge. The objection to the agreement was solely based on quantum and this objection the Judge overruled, and held that the memorandum should be recorded. Assuming, as I do, that the Judge had a discretion as to costs, it must be exercised judicially, and, in my opinion, it was not a judicial exercise of his discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs." (See also *Hudsons, Limited v. De Halfort* (29 *The Times* L.R., 257) and *Levy v. Johnson* (29 *The Times* L.R., 507).)

In *Ritter v. Godfrey* (36 *The Times* L.R., 144 ; [1920] 2 K.B., 47) Lord Justice Atkin criticized with great fullness and force all the cases I have referred to and some others ; he began his judgment thus : "In order to determine this appeal it seems to me necessary to pass in review some of the more recent authorities which have dealt with the provisions of Order LXV., r. 1. Costs are to be in the discretion of the Court or Judge." (The Judge who tried this case had refused to give the successful defendant his costs.) "If this discretion is absolute the appellant must fail ; if the discretion is limited, then the appellant must show that the exercise of the discretion in this case exceeded the proper limits. I think that it will appear from the authorities to be mentioned that the discretion of the Court or a Judge is not an absolute discretion, but must be exercised subject to

certain governing principles which in this appeal it seems to me necessary to ascertain."

He then divides the authorities into two groups, the first group comprising trials by a Judge and jury, and the second trials by a Judge alone, and he says : "Where the Courts have held that there is good cause for deprivation of costs after trial by jury, I think it clear that under similar circumstances after trial without a jury the exercise of the discretion in the same way must be justifiable." For the purpose of the present case, I pass over the learned Lord Justice's comments on the cases in which there was a trial by jury, and only refer to his criticisms on those cases in which there was no jury. The first case with which he deals is *Civil Service Cooperative Society v. General Steam Navigation Company* (20 *The Times* L.R., 10 ; [1903] 2 K.B., 756). The learned Judge who tried the case had deprived the successful defendants of their costs, apparently because they would not submit to the learned Judge himself, as arbitrator, what in the circumstances should be done. The learned Judge did not state why he had deprived the successful defendants of their costs. If his discretion was absolute there was an end of the matter. It could go no further. The Court of Appeal would not be concerned with the question whether he had grounds for the exercise of his discretion or not. The Court of Appeal took precisely the opposite view. Lord Halsbury, in giving judgment, after referring to what the Judge at the trial did, said : "That is not exercising a discretion upon materials properly before the Judge ; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the Judge to treat as grounds for the exercise of his discretion."

The next case to which the Lord Justice refers is that of *King v. Gillard* (21 *The Times* L.R., 398 ; [1905] 2 Ch., 7). It was a passing off action. The Judge held that there was no passing off, but deprived the defendants of their costs on the ground that there were misleading and untrue statements in the advertisement upon some of the defendants' packages which were calculated to deceive the public though they had no bearing on the question of passing off. It was held by the Court of Appeal that the defendants had not acted dishonestly but that even if they had been guilty of misrepresentation it had no relation to the plaintiffs' case, and was not therefore a ground on which the Judge had a discretion to deprive the defendants of their costs. The learned Lord Justice next refers to the case of *Edmund v. Martell* (24 *The Times* L.R., 25) heard in 1907. The Judge at the trial had deprived the defendant of her costs on the ground that before she had done one of the acts which were complained of by the landlords she ought to have consulted them. Lord Alverstone, who was presiding in the Court of Appeal, after referring to *Civil Service Cooperative Society v. General Steam Navigation Company* (*supra*), said that the case before them "was an *a fortiori* case. Mr. Justice Sutton thought that because the defendant did not approach her landlords on the matter of converting the house into a shop she should be deprived of her costs. That had nothing to do with the grounds of the action." Lord Justice Buckley, as he then was, said : "The facts upon which a Judge could exercise his discretion in depriving a successful litigant of costs must be facts relevant to the question to be adjudicated upon as between the plaintiff and the defendant. The Judge had no power to deprive the successful litigant of costs because in some matter not material he might think that that party should have behaved, say, with more courtesy or consideration. These were not matters upon which the Court could act."

To *Higgins v. Higgins and Co.* ([1916] 1 K.B., 640) Lord Justice Atkin next refers in *Ritter v. Godfrey* (*supra*). It was a case under the Workmen's Compensation Act, 1906. The Judge in such cases is given by the Act the same discretion as to costs as is given by the terms of Order LXV., r. 1. There the Judge had made a declaration of liability, and had ordered the employers, who were considered by the Court of Appeal to have been successful, to pay the costs. Lord Justice Bankes, in giving judgment, at page 643, said : "By par. 7 of Schedule II. of the Workmen's Compensation Act, 1906, the costs of and incidental to the arbitration and proceedings connected therewith are in the discretion of the arbitrator, just in the same way as the costs of proceedings in the High Court are in the discretion of the Judge where the case is not tried by a jury under Order LXV., r. 1. In both cases, however, the discretion is fettered by a well-accepted rule which was stated by Lord Halsbury in *Civil Service Cooperative Society v. General Steam Navigation Company* (*supra*) in these words : 'No doubt, where a Judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.'" Lower down, at page 60, Lord Justice Atkin proceeds in *Ritter v. Godfrey* (*supra*) to lay down three principles by which a Judge may be able to discern whether the materials necessary to support the exercise of his judicial discretion exist in any given case. The principles he shortly stated as follows :— "In the case of a wholly successful defendant, in my opinion the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains. These principles require further expansion. By (1) is meant—has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action. The authority for this is *Bostock v. Ramsey Urban District Council* (*supra*). It is wide, for in terms it is not limited to unreasonable or improper conduct, or to conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract and most actions of tort is due to the effect upon the plaintiff's mind of defendant's conduct, and the effect is at any rate to induce a belief that the plaintiff has a good cause of action, it would appear to follow that provided the belief was reasonable the Judge in all such cases has grounds for depriving a successful defendant of costs. I presume *e converso*, there would be grounds for dealing with a successful plaintiff's costs when his conduct has induced the defendant reasonably to believe that he has a good defence. I am inclined to think, therefore, that the propositions in *Bostock v. Ramsey Urban District Council* (*supra*) should be read subject to the first, if not also the second of the limitations suggested above—*i.e.*, subject to the conduct being unreasonable or improper, and being conduct other than that which constituted the alleged cause of action." Mr. Justice Eve delivered a clear and able judgment to the same effect.

In my view, it necessarily follows from those authorities that, if a defendant in a case tried before a Judge alone could be charged with fraud and successfully defends himself against that charge, he may yet be deprived of his costs if he has been guilty of misconduct coming within one of the kinds indicated by Lord Justice Atkin. There is no principle or rule of practice that, if a defendant accused of fraud obtains from either a Judge or a jury a decision that he is not guilty of the fraud, he is necessarily entitled to his costs whatever his conduct and cannot be justly deprived of them.

Mr. Justice Branson, at page 62 of the Appendix, when dealing with the two actions which were brought, the one by the firm against Pollak and the other by the liquidator against the same man, explains the relation in which they stood to each other, and points out that it is the company's claim of which he is now endeavouring to dispose. He then, at page 92 of the Appendix, when giving judgment, spoke as follows : "I do not think it is either necessary or desirable that I should go in great detail through all the many facts of this long and troublesome action, which has lasted some nine days before me. I think it is sufficient for me to say this, that in my view the real reason why the action was brought by the liquidator, and the real reason which forced him, in my view, in the proper execution of his duty, and also the creditors of the company, to bring the action, was the fact that Mr. Pollak had, in his dealings with Said, begun with a concealed partnership with Said, of which every trace was kept out of the books, and that, so far as anybody looking at the books is concerned, once it appears that Pollak was a partner with Said in the first of the transactions in which Said took part, there is nothing to show when he ceased to be a partner. I think a man who puts himself into that position has only himself to blame if anybody who is concerned to make him liable on the contracts with Said which follow brings an action against him in respect of them. That is the main ground put forward by the liquidator for the course which he asks me to take in the matter, and it is the main ground upon which I accede to the request that he makes. The real reason why I am doing what I propose to do in this case is, as I have stated, the fact that I believe that if it had not been for Pollak entering into this partnership with Said in the way in which he did, and keeping all the record out of the books which would lead anybody to know it, and keeping the knowledge of it from his subordinates in the department, this action need not have been brought. It was his fault that it was brought, because his conduct, and guilty conduct, in a matter which is outside the immediate cause of action which is being brought against him here, and so satisfies every one of the limitations which are stated by Lord Justice Atkin, is the real cause of the initiation and the prosecution of this litigation. The result is that I think this is one of those cases in which it is clear that the defendant has brought the litigation upon himself, by the way in which he has behaved himself, and consequently is an appropriate case in which, in the exercise of the discretion which in such cases I possess, I should say that I make no order for costs."

The Court of Appeal appear to me to have based their decision on this ground, that Pollak was not estopped by the verdict of the jury against him from denying that he was dealing improperly in speculating with Said, of which no mention was made in the books of the firm, or by the finding of the jury that he did not inform the other members of the firm that he was doing so ; that accordingly it was open to Pollak to deny on oath both the accusation which the jury in the first action found to be true, that he reiterated the statement which he had made at the first trial on these points, and that none of the members of the firm were produced on the second trial as they were upon the first to prove that Pollak never asked for or got the consent of his co-partners to the course of dealing which he pursued. Mr. Justice Branson held that Pollak was not guilty of the fraud charged against him on the second trial, but notwithstanding this he was clearly of opinion that he was shown to be guilty of misconduct, which he indicates and describes, of a character which entitled the Judge to deprive him of costs. That is a wholly different thing—if the learned Judge was entitled to take into consideration the whole circumstances of the case and everything which led up to the action. As the cases of *Harnett v. Vise* (*supra*) and *Bostock v. Ramsey Urban District Council* (*supra*) decide that he was so entitled, then there were, in my opinion, some grounds to support his order. And if there were, he had jurisdiction to make it, and neither the Court of Appeal nor this House has any jurisdiction to interfere with his order because they are of opinion that the grounds were insufficient. In my view the appeal succeeds.

Lord Carson (read by Viscount Dunedin).—My Lords : I agree with the motion proposed by the noble Viscount on the Woolsack. I am not at all sure that the course of legal decisions has not gradually so circumscribed the discretion given to a Judge as to costs in cases tried by him alone without a jury as to render such discretion almost nugatory. Indeed, Lord Justice Atkin, in the quotation made by the noble Viscount from his judgment in *Ritter v. Godfrey* (36 *The Times* L.R., 144 ; [1920] 2 K.B., 47), seems to lay down that such discretion must be exercised under formulated rules which appear to me to leave very little "discretion" to the Judge. It is not surprising, therefore, in this state of the authorities that protracted litigation as to costs only should ensue, involving in some cases a rehearing of the action and a reproduction of the evidence and documents used at the trial in order to enable a full inquiry as to whether the Judge has acted within the rules laid down in the cases already decided. This, I think, is a result quite contrary to what was intended by the provisions of the Judicature Acts and the Rules of the Supreme Court already quoted, which drew a clear line as to costs where issues were tried before a Judge and before a jury respectively. It seems strange that in the course of so many authorities so little attention has been given to the 49th section of the Supreme Court of Judicature Act, 1873. The words of the section are clear and explicit and deal not with the exercise of the discretion, but with the question whether the discretion is conferred upon the Judge and, in my opinion, no matter what the practice may have been hitherto, we are bound to give full effect to them. The only question which we have to determine under that section is, was the order of Mr. Justice Branson as to costs made in a case where the costs are by law left to the discretion of the Court ? The very basis of the appeal is that the learned Judge had such a discretion and, indeed, that could not be disputed. In such a case the section says that the order made by the Judge is not subject to appeal, and therefore neither the Court of Appeal nor this House is competent to entertain such an appeal.

Whilst, therefore, it is, of course, true that a Judge ought to exercise his discretion judicially, whether

he has done so or not is a question which cannot be raised on appeal as to costs unless the Judge gives leave as provided by the section.

Lord Dunedin and Lord Phillimore concurred in the judgment of the Lord Chancellor.

[Solicitors—Messrs. Bull and Bull ; Messrs. Wedlake, Letts, and Birds.]

Railway and Canal Commission. (Sankey, J., Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C.) 1927. July 27.

IN RE APPLICATION OF TILMANSTONE (KENT) COLLIERIES, LIMITED.*

Mines — Coal-mine—Working facilities—Ancillary right—Carrying away coal—Conveyance over land outside lease—Jurisdiction to sanction—Aerial ropeway—National interest—Grant of sanction—Mines (Working Facilities and Support) Act, 1923 (13 and 14 Geo. V., c. 20).

The erection of an aerial ropeway which the Court had originally refused to sanction (43 *The Times* L.R., 349) was now sanctioned by the Court on the production of fresh plans.

This was an application for the sanction of the erection of an aerial ropeway from Tilmanstone Colliery to Dover Harbour for the purpose of transporting coal to the coast.

Sir Arthur Colefax, K.C., and Mr. P. Gordon Bamber appeared for the applicants ; Mr. H. P. Levy for Sir John Ellerman ; Mr. H. L. Murphy for the Postmaster-General ; Mr. Hubert Hull for the Commissioners of Crown Lands ; Mr. F. J. Wrottesley, K.C., and Mr. Adams for the Channel Steel Company, Limited, and Pearson and Dorman Long, Limited ; Mr. H. M. Giveen for the Secretary of State for War ; Sir John Simon, K.C., Mr. W. E. Tyldesley Jones, K.C., and Mr. Bruce Thomas for the Southern Railway Company ; Mr. A. Moon for the East Kent Light Railways Company ; Mr. Robert Fortune for Shell Mex, Limited ; Mr. J. G. Joseph for the Dover Harbour Board ; and Mr. N. C. Armitage for the Rev. E. Thompson.

Mr. Justice Sankey said that judgment would be given on the main issue, but it must be understood that it was subject to certain conditions being complied with. On the last occasion when the application was before the Court (43 *The Times* L.R., 349) the Commissioners agreed that the proposed ropeway was in the national interest, but a difficulty arose with regard to the facts which were then placed before them. The scheme was incomplete in its inception, and based upon inaccurate and illusory plans, and the Court therefore felt that it would not be doing its duty if it sanctioned that scheme. Now, however, the plans were entirely different.

The ropeway would pass over the land of 23 private persons, Government Departments, companies and corporations. Protective bridges were to be erected, and apparently all the public authorities who had control of the roads were satisfied with regard to the safety of the persons passing beneath the ropeway. It was alleged by the Tilmanstone Company that the proper and efficient working of the minerals and the conduct of their business would be unduly hampered if permission to construct the ropeway were not granted. They further alleged that the rates quoted by the Southern Railway for conveyance of the coal to Dover Harbour, including sums to the East Kent Light Railway, were excessive.

The ropeway, his Lordship said, would provide a much shorter means of transit, and the colliery company submitted that they would be able to convey coal to Dover at an inclusive rate lower than that quoted by the Southern Railway, and further, that they would be able to regularize their output and thereby effect economy in production. It must be remembered that, whereas it was 11 miles by railway to Dover, it would be only seven by the proposed ropeway.

Turning to the question of national interest, his Lordship said that the colliery company maintained that it was of national importance that the ropeway should be erected and that if they were unable to obtain cheap transport for their minerals to the seaboard the colliery would have to close down. They also pointed out that there was no economic alternative to the ropeway as the rate was so low that the Southern Railway could not compete with it. That appeared to be so from the estimates which had been put in. The applicants had stated further that the output of coal before the stoppage due to the coal strike was 1,000 tons a day, that that output would be doubled within three months if the ropeway were sanctioned, and that it would be gradually increased to 4,000 tons a day. It was self-evident that if the output increased so would employment.

A large number of persons had appeared in opposition to the application, but all had been satisfied with the exception of three. The joint opposition of the Channel Steel Company, Limited, and Pearson and Dorman Long, Limited, was prominent. The former owned land over which the ropeway would pass, and the latter were now the owners or leaseholders of a large area of the Kent coalfields. They owned two collieries, one of which had an output of about 4,000 tons a week, and it was hoped that the other would produce about a million tons annually in the course of the next three years. They said that they did not think it right that one colliery company should have the monopoly of the eastern arm at Dover Harbour for the purpose of exporting coal and that if the Tilmanstone Company obtained a monopoly it would sterilize their (Pearson and Dorman Long's) efforts so far as exporting coal from Dover was concerned.

His Lordship referred to the opposition of the Southern Railway and the East Kent Light Railway, which, he said, was similar. The Dover Harbour Board was governed by a number of Acts of Parliament, and they had to obtain the consent of the Southern Railway to any expenditure of a particular kind. Under the scheme the board were to contribute £25,000 towards the cost of the ropeway at the Dover end, for which they were to be remunerated at the rate of 6 per cent. The position taken up by the Southern Railway was that if the scheme were sanctioned some of their responsible officials would recommend the directors not to veto the expenditure by the harbour board.

In addition to that, the railway had raised the question of the Commission's jurisdiction to deal with the application. Arguments had been put forward by Sir John Simon and Mr. Tyldesley Jones on the interpretation of the Mines (Working Facilities and Support) Act of 1923, but he was unable to agree with so narrow a construction of the statute. The whole purport and intention of the legislation should

* Reported by W. E. Hurt, Esq., Barrister-at-Law.

be looked at by a consideration of the various sections, and it was quite impossible to say that the power of this Court was restricted as suggested; otherwise, its jurisdiction would practically cease.

He had come to the conclusion that the proper and efficient working of the minerals of the Tilmanstone Colliery had been unduly hampered by the action of the Southern Railway Company. He did not blame them, and it seemed to him that that railway company could not afford to quote a lower rate. In his view the plea to the jurisdiction failed.

Continuing, his Lordship said that the total cost to be found by the colliery company was £93,000, and an undertaking had been given that that amount would be provided. It was apparent from the evidence that coal would be taken over the ropeway at a shilling a ton less than by the railway. If he had thought that the scheme would create a monopoly for ever he would have liked a longer time to consider his judgment. At any rate, they could provide against a monopoly by inserting in the order a clause giving liberty to apply to the Court. In the circumstances and for the reasons which he had given the scheme would be approved, subject to the conditions which would be stated in the minute of the order.

Sir E. Tindal Atkinson, K.C., and Sir Lewis Coward, K.C., concurred.

[Solicitors—Messrs. Freshfields, Leese, and Munns; Messrs. Nicholson, Graham, and Jones; the Solicitor to the G.P.O.; the Solicitor to the Crown Lands Commissioners; Messrs. Milles, Jennings White, and Foster; the Treasury Solicitor; Mr. W. Bishop; Messrs. F. C. Mathews and Co.; Mr. W. P. Webb; Mr. Rutley Mowll; Messrs. Lee, Bolton, and Lee.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. July 15.

REES ROTURBO DEVELOPMENT SYNDICATE, LIMITED v. COMMISSIONERS OF INLAND REVENUE.

SAME v. DUCKER.*

Revenue — Income-tax—Excess profits duty—Profits of trade—Syndicate for development of patented invention—Agreement with foreign company for grant of licence and option of purchase—Exercise of option of purchase for sum in cash—Whether a profit of trade or the realization of a capital asset—Finding of Special Commissioners reversed—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case I.

A syndicate formed to work and develop a group of English and foreign patents carried on business mainly by granting licences to manufacturers at royalties. Certain foreign manufacturers, however, refused to take licences, unless they were also given an option of purchase exercisable within a given period. The syndicate entered into a contract with an American company to grant them a licence to use and work the syndicate's American patents, with an option of purchase thereof. The company exercised its option of purchase and paid to the syndicate the sum of £15,898 for the purchase of the American patents out and out. The syndicate having been assessed to income-tax and excess profits duty upon this sum, the Special Commissioners found that the profits made on the sale of patents were profits of the company's trading, and Rowlatt, J., affirmed their decision.

Held (Scrutton, L.J., dissenting), that the Special Commissioners had misdirected themselves in law, and their finding must be reversed. The sale of the American patent rights was not a profit of circulating capital, but the transmutation of a capital asset into money, and was therefore not assessable to income-tax or excess profits duty.

Collins v. Firth-Brearley Stainless Steel Syndicate (133 L.T., 616) applied.

This was an appeal from a decision of Mr. Justice Rowlatt.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on December 9, 1924, the Rees Roturbo Development Syndicate, Limited, appealed against assessments to income-tax in the sums of £7,500 for the year ending April 5, 1920, £6,161 for the year ending April 5, 1921, and £5,340 for the year ending April 5, 1922, made upon the syndicate by the Additional Commissioners for the Seisdon Division of Staffordshire.

The syndicate was incorporated under the Companies Acts in 1906 with a share capital of £30,000 and with the following objects (*inter alia*): to acquire, protect and renew any patents, patent rights, or licences which might be useful to the syndicate, and to use them or grant licences or privileges in respect of the same, and in particular to acquire from the inventor, Edmund S. G. Rees, and from Thomas Parker, Limited, the benefit of certain inventions in relation to centrifugal turbine and similar pumps, and to enter into and carry out a certain agreement, and to improve, manage, develop, exchange, let on lease or otherwise, mortgage, sell, dispose of, turn to account, grant rights and privileges in respect of, or otherwise deal with, all or any part of the property and rights of the syndicate.

The said Edmund Scott Gustave Rees was the managing director of Thomas Parker, Limited, and he formed the syndicate to take over the existing Roturbo patents and to provide additional working capital for development. The company took over all the foreign patents. In 1908 a new company, the Rees Roturbo Manufacturing Company, Limited, was formed, and took over the business of Thomas Parker and Co., Limited, which included the manufacture of the pumps in the United Kingdom.

The main business of the syndicate had always been the development of the patents by the grant of manufacturing licences to foreign companies and licensees upon payment of lump sums and of royalties. Such receipts were always brought by the syndicate into their income account. Some of the foreign licensees, however, refused to enter into agreements for licences, except upon condition that they were to have an option of purchase of the foreign patent, at any rate after a certain sum had been paid in royalties.

By an agreement dated March 15, 1912, the syndicate and Edmund S. G. Rees agreed to grant to the Manistee Iron Works Company, of Manistee, Michigan, U.S.A., an exclusive licence to manufacture and sell Roturbo pumps and other articles under the American and Canadian patents, for all the unexpired

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

residue of the terms of the patents, in consideration of the payment of £10,000 and royalties at the rate of 10 per cent. on the selling price of all articles made, with guaranteed minimum royalties and an option of purchase.

The Manistee company having failed to pay the minimum royalties, in January, 1917, a supplementary agreement was entered into between the parties, providing for payment of the unpaid royalties and for the surrender of the Canadian patent rights to the licensors, and providing that the Manistee company should continue to hold an option to purchase the American patent rights at any time before January 1, 1918, for the sum of £26,500.

The Manistee company paid the royalties accruing during 1917 and exercised its option of purchase over the American patents for £26,000, of which the share of the syndicate was £15,898. This sum was not included in the syndicate's profit and loss account, but was written off the value of the patents in the balance-sheet.

The sole question for the Court was whether this sum of £15,898 so received by the syndicate was a profit of its business on which it was assessable to income-tax.

It was contended on behalf of the appellant syndicate :—

(*a*) That the patents sold to the Manistee company were capital assets of the appellants.

(*b*) That the syndicate in selling the patents was realizing part of its capital assets.

(*c*) That the syndicate had not made a business of buying and selling patents.

(*d*) That the sum received from the Manistee company was not, as a whole, or in part, a profit of its trade or business in respect of which it was assessable to income-tax and excess profits duty.

It was contended on behalf of the Crown (*inter alia*), (*a*) that the sum of £26,000 so paid by the Manistee company was a receipt of the appellant syndicate's business and so was assessable to income-tax ; and (*b*) that the assessments appealed against were correct and should be confirmed.

The Special Commissioners decided that the profits on the sale of patents arose in the course of the syndicate's business and were assessable to income-tax and excess profits duty.

Upon an appeal by the syndicate Mr. Justice Rowlatt held that he was bound by the Special Commissioners' decision as a finding of fact, and could not disturb it. He followed his own decision in *Collins v. Firth-Brearley Stainless Steel Syndicate* (unreported), afterwards reversed by the Court of Appeal (133 L.T., 616).

The syndicate appealed.

Mr. Latter, K.C., and Mr. J. H. Bowe appeared for the appellants ; the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. Reginald P. Hills for the respondents.

At the conclusion of the arguments the Court took time for consideration.

The Master of the Rolls.—These two appeals are from judgments of Mr. Justice Rowlatt dated May 20, 1927, whereby he confirmed the decisions of the Special Commissioners that the appellant company was liable to pay income-tax and excess profits duty upon a sum of £15,898. The details of the figures are not in dispute and the full facts are stated in the cases and the judgment of Mr. Justice Rowlatt. For the purpose of this judgment it is enough to say that the company contends that the above sum was not subject to income-tax or to excess profits duty, because it represents the company's share of the sale price of the patent rights in the United States of America of the group of patents relating to centrifugal turbine and similar pumps which it was the purpose of the company to acquire and to turn to account by granting licences or by sale. This is the sole question raised in the case, although the dealings by the company in other directions are stated for the purpose of giving full information upon its activities. To avoid any misconception, I say that in my judgment the group of patents which were acquired by the company may be treated as the one patent which the company was formed originally to acquire. The other patents, which have been added to the original one, relate to devices subsidiary to the main one, and are dependent for their purpose and use upon the central invention, the fundamental basis of which was what is called the Roturbo principle.

It is claimed on behalf of the company that what they have disposed of, receiving in return the £15,898, was a capital asset—that the transaction was a realization of a part of their capital assets, and not a profit of their circulating capital. The Revenue authorities contend that it was a receipt and profit made in the course of carrying on the ordinary business of the company, and so chargeable to the tax and duty. Thus the question, which is the same in both cases, is the difficult one of deciding whether a profit realized belongs to the capital or to the profit and loss account.

The cases were heard in December, 1924, but the Special Commissioners delayed their decision until a judgment was delivered by Mr. Justice Rowlatt in the case of *Collins v. Firth-Brearley Stainless Steel Syndicate* (unreported), which involved a similar question. The judgment was delivered by Mr. Justice Rowlatt on March 2, 1925 ; and the Special Commissioners then gave their decision in the present cases on March 18, holding : "That the profits on sale of patents arose in the course of the appellant company's business and were chargeable to income-tax and excess profits duty." They followed the question put and answered affirmatively by Mr. Justice Rowlatt in his judgment in *Collins v. Firth-Brearley Stainless Steel Syndicate* (*supra*)—namely, whether the company benefited by this appreciation in the course of its trade, with the same result as decided by Mr. Justice Rowlatt in the *Firth-Brearley* case (*supra*), that the syndicate was liable to the tax. That question so answered in the *Firth-Brearley* case (*supra*) was held in this Court (133 L.T., 616) on June 25, 1925, not to have concluded the matter. The finding of the Special Commissioners in the present cases was not that the profit was realized as part of its ordinary trading, although the finding was interpreted to bear that meaning by Mr. Justice Rowlatt in his judgment now under appeal.

In the *Firth-Brearley* case (*supra*) in this Court, Lord Justice Atkin pointed out that it was necessary not only to determine that the syndicate carried on a trade, but also what was the scope of the trade : "For that purpose I think in order to examine the facts you must look at what the company purported to do and also at what it did in fact" (133 L.T., at p. 622). Finally, upon an examination of the findings of the General Commissioners, the Court of Appeal held that they had intended to find that upon the sale of the patent there was a transmutation of a capital asset from the form of a patent to a sum of money, and that upon that finding the Firth-Brearley Syndicate was not liable to income-tax.

The present cases therefore come before this Court with a finding by the Special Commissioners which in itself is not sufficient. The scope of the trade, in

the course of which the profits on sale of patents arose, is not examined or stated. Mr. Justice Rowlatt regretfully felt that he could not disturb the finding of the Special Commissioners, which he interpreted as meaning that the profits arose out of the syndicate's trading and in the course of their seeking the objects of their ordinary business. It is unfortunate, as the learned Judge observes, that the question decided in the *Firth-Brearley* case (*supra*) and presented in the one before us involves such a nice examination of the language used, but it is not possible to do justice to the issues raised, and to the decisions given, without it.

Two points arise for this Court to determine : (1) Is the question raised by the appeal one of fact upon which the decision of the Special Commissioners is final, or one of law ? (2) Have the Special Commissioners rightly directed themselves in applying the law to the facts ? It is not necessary to go over again all the cases in which this problem of fact or law has been discussed. They are referred to in the decision of this Court in *Currie v. Inland Revenue Commissioners* (37 *The Times* L.R., 371 ; [1921] 2 K.B., 332), particularly in the judgment of Lord Justice Scrutton, who quotes the observation of Lord Parker in *Farmer v. Cotton's Trustees* (31 *The Times* L.R., 478 ; [1915] A.C., 922, at p. 932) : "The views from time to time expressed in this House have been far from unanimous." It is useful, however, to observe that in *Currie's* case (*supra*) the question for the Court was whether a man was carrying on a profession. That was held to be a question of fact. On the other hand, in *Inland Revenue Commissioners v. Korean Syndicate* (37 *The Times* L.R., 735 ; [1921] 3 K.B., 258)—which was decided in this Court and two members of it were those who had decided *Currie's* case (*supra*)—it was held that the Special Commissioners had misdirected themselves on a matter of law—namely, the true interpretation of an agreement and the memorandum and articles of association of the company. Thus the Court felt able to reverse the decision of the Special Commissioners, which had been upheld by Mr. Justice Rowlatt. I have come to the conclusion that the later decision applies to the present case. The circumstances in which the decision of the Special Commissioners was given confirm me in this view, for not only had they to consider the memorandum and articles of association of the syndicate and the agreements made with the Manistee company, dated March 15, 1912, and January, 1917, but avowedly they waited for the guidance to be derived from the judgment of Mr. Justice Rowlatt in the *Firth-Brearley* case (*supra*), a judgment which was afterwards reversed.

Dealing with the case, therefore, as one open to review in this Court, it appears that the asset of the syndicate, which was incorporated in 1906, was this group of Roturbo patents with the rights which accrued to the syndicate in foreign countries under international conventions. The facts as to the syndicate's business for a succession of years are stated in paragraph 11 of the case. When the option to purchase the American rights was exercised by the Manistee company in 1917, the syndicate marked the distinction between the royalties paid to them for the user of the patent during 1917, and the sum received for the sale of the American rights, by bringing the former into their profit and loss account and deducting the latter from the value of the patents in their balance-sheet in 1918. In 1922 the syndicate reduced its paid up capital under section 40 of the Companies (Consolidation) Act, 1908. The syndicate were not trading in buying and selling patents generally. They had secured these particular patents and patent rights, which formed the totality of their assets. It was proved by evidence which the Special Commissioners accepted (see paragraph 12) that the syndicate had never originated offers to sell the foreign patents.

If the Special Commissioners had had an opportunity of considering the judgment of this Court in the *Firth-Brearley* case (*supra*), in my opinion they would and ought to have come to the conclusion that the sale of these U.S.A. patent rights was the transmutation of a capital asset into money. It was an out-and-out disposal of a right which, up to the date of the sale, enhanced the capital assets, and upon its transfer to the Manistee company deducted a portion from them. It was a substitution of one form of fixed capital assets for another, not a profit of circulating capital.

In *Gloucester Railway Carriage and Wagon Co. v. Inland Revenue Commissioners* (41 *The Times* L.R., 320 ; [1925] A.C., 469) Lord Dunedin held that the selling of the wagons was an incident of buying and selling in the ordinary course of the business of the company, for it was an integral part of the company's business to deal in and sell wagons. The business was of a different nature here.

Holding, as I do, that the decisions of the Special Commissioners are open to review in this Court, I have come to the conclusion which I gather that Mr. Justice Rowlatt would have desired to reach, and these appeals must be allowed and this sum of £15,898 must be treated as a capital asset.

The appeals will be allowed with costs, and the assessments discharged.

Lord Justice Scrutton.—These two appeals by the Rees Roturbo Syndicate, Limited, one in respect of income-tax and one in respect of excess profits duty, raise the same point, whether the syndicate were liable to taxation on the result of certain transactions in respect of their patents. The Special Commissioners held that the results were profits on the sale of patents arising in the course of the syndicate's business, and as such were liable to taxation. Mr. Justice Rowlatt declined to interfere with what he considered to be a finding of fact by the Special Commissioners, and the syndicate appeal.

The case is complicated by the fact that this decision of the Special Commissioners was pronounced after Mr. Justice Rowlatt had reversed a previous decision of theirs in a somewhat similar case, but before the decision of the learned Judge in that previous case had been reversed by the Court of Appeal. Mr. Justice Rowlatt's decision in the present case was, however, given with full knowledge of the decision of the Court of Appeal in the previous case.

I deal with the facts of the present case first. The syndicate had a very large interest in a series of patents relating to centrifugal pumps and condensers both in England and foreign countries. As a company it was formed to acquire these patents, and to "sell, dispose of, turn to account, grant rights and privileges in respect of, or otherwise deal with all or any part of the property and rights of the company." The company desired, if possible, to exploit these patents by granting manufacturing licences in consideration of royalties, and to retain the ownership of the patents. But it was found that some foreign manufacturers would not agree to take a licence on payment of royalties, even an exclusive licence, unless they were also given an option to purchase the patents. In these circumstances, besides a number of royalty licences in various countries, these transactions are mentioned in the case. (1) An exclusive licence to the Manistee company for the

United States and Canada in consideration of a cash payment of £10,000 and royalties of 10 per cent. on the selling price, with a guaranteed minimum, coupled with an option exercisable within fixed dates to purchase the United States and Canadian patents for a lump sum. The Manistee company paid the £10,000 but not the minimum royalties, and ultimately another agreement was made by which the Manistee company was excused royalties up to January 1, 1917; and its option was changed into one to purchase the United States patents only for a sum of £26,500. The Manistee company paid royalties for 1917 and then exercised its option, and £15,898 net was received by the syndicate and written by them off the value of the patents. This appears to be the sum in dispute in this case. I find it difficult to understand how part of this complicated transaction was in the course of business, and part not. (2) In 1918 an agreement was made with a Canadian company, by which an exclusive licence was granted to them to manufacture and sell Roturbo pumps within the Dominion of Canada in consideration of a payment of $5,000, a royalty on selling price with a guaranteed minimum, and a provision that, when the royalties came to $90,000, all royalties should cease and the Canadian patents should be transferred to the Canadian company. (3) By an agreement of 1919 an exclusive licence was granted to a French company to manufacture and sell in France in consideration of 130,000 francs paid down, the royalties to be reduced when they reached a certain amount.

In paragraph 21 of the case it is stated that the syndicate, while not admitting liability in respect of cases 2 and 3, did not object to the sums received under them being included in the assessment. The practical difference between an exclusive licence for a district and an assignment of the patent for that district is very small. The licensor cannot, having granted an exclusive licence, make any money out of the patent in the district of the licence except from the licensee under the licence. He does retain to himself the right to sue for infringements, which would pass to the assignee under an assignment of the patent; but in agreements 2 and 3 he binds himself to sue infringers in the licensed districts at his own expense. It does not appear to be disputed that the royalties would be proper subject-matter of taxation, and it follows in the Canadian case that when, the royalties having reached $90,000, the patents were assigned to the licensee, the consideration for the assignment would all have paid tax. The syndicate have not objected to the lump sums in cases 2 and 3 being included in the taxation, and no question is apparently raised about the royalties or first lump sum in the Manistee case. The syndicate have done sufficiently well in exploiting the patents to return 95 per cent. of their capital out of accumulated profits, which must all have been taxed as profits.

The line between receipts which are not taxable as being the result of the sale of capital assets and receipts which, though receipts of sale, are taxable as profits of trade is stated by Lord Dunedin in the Privy Council in *Commissioner of Taxes v. Melbourne Trust, Limited* (30 *The Times* L.R., 685; [1914] A.C., 1001, at p. 1010) as follows: "Their Lordships think that the principle is correctly stated in the Scottish case quoted, *California Copper Syndicate v. Harris* (5 Tax Cas., 159): 'It is quite a well settled principle in dealing with questions of income-tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income-tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.' In the present case the whole object of the company was to hold and nurse the securities it held, and to sell them at a profit when convenient occasion presented itself. Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit." This case was followed by the Privy Council in *Rex v. Anderson Logging Company, Limited* ([1926] A.C., 140). Illustrations of the two classes of cases as regards sale of land may be found in *Stevens v. Hudson's Bay Company* (25 *The Times* L.R., 709) (price of land not taxable) and *Thew v. South West Africa Company* (9 Tax Cas., 141) (price taxable as proceeds of trade). Cases of taxation on the profits of realization by sale of the one and only asset will be found in *Martin v. Lowry* (43 *The Times* L.R., 116; [1927] A.C., 312) and *Cape Brandy Syndicate v. Inland Revenue Commissioners* (37 *The Times* L.R., 402; [1921] 2 K.B., 403). This being the question to be decided, the Special Commissioners heard arguments on behalf of the syndicate that the sum in dispute was a realization of capital assets, and on behalf of the Crown that it was a receipt of the company's business, and decided that "the profits on sale of patents arose in the course of the syndicate's business." If this is a finding of fact, it is unappealable if there was evidence on which the finding could be made, even if the Court would not have made such a finding. If it includes a finding of law, it is appealable on the law.

In my view it is impossible to reconcile the various statements of high authorities on the division between fact which is unappealable and law which is appealable. One may compare the view of Lord Parker in *Farmer v. Cotton's Trustees* (31 *The Times* L.R., 478; [1915] A.C., 922) and of Lord Wrenbury in *Great Western Railway Company v. Bater* (38 *The Times* L.R., 448; [1922] 2 A.C., 1), which I think would make every finding of fact appealable on the ground that it was a question whether the Commissioners had rightly construed the statute or law which used the words in which they described the "fact," with the views of the House of Lords in *American Thread Company v. Joyce* (29 *The Times* L.R., 266), affirming the judgment of Mr. Justice Hamilton, and in *Usher's Wiltshire Brewery, Limited v. Bruce* (31 *The Times* L.R., 104; [1915] A.C., 433, at p. 465), negativing the view of Sir Samuel Evans that the question was one of law. I have myself twice expressed my views on the subject at some length, first in *Smith v. Incorporated Council of Law Reporting for England and Wales* (30 *The Times* L.R., 588; [1914] 3 K.B., 674), a decision which has several times been cited with approval in this Court and in the House of Lords, and secondly in *Currie v. Inland Revenue Commissioners* (37 *The Times* L.R., 371; [1921] 2 K.B., 332). In my view, the point at which sales of assets resulting in a profit are of such a number and nature as to constitute a trade or business, or the point when a sale of an asset is so connected with a trade carried on that profits received from it

are profits of a trade, is a question of degree and of fact. How many sales of pictures will make a man a picture dealer is a question of degree. I agree with the view of Lord Justice Atkin in *Cooper v. Stubbs* (41 *The Times* L.R., 614; [1925] 2 K.B., 753) that questions of degree are questions of fact, and that whether a trade is being carried on is a question of degree and fact. Looking at this case alone, I think there was evidence on which the Special Commissioners could find that these profits arose in the course of a trade and business. The syndicate were making profits out of their patents largely by granting licences in exchange for royalties. They found difficulties in getting agreements to pay royalties unless they would grant options to purchase, or agreements to assign when royalties reached a certain amount. I find it impossible to say that there was no evidence on which the Special Commissioners could find that these transactions were part of, and incidental to, and arose out of the appellants' trade or business. Indeed, the appellants did not object to cases 2 and 3 and the royalties under case 1 being included in the assessment. So far on the case under appeal. There remains the question how far the present case is affected by the proceedings in the previous case of *Collins v. Firth-Brearley Stainless Steel Syndicate* (133 L.T., 616). In that case the company had patents for the manufacture of stainless steel, and granted licences for their use. Three transactions were stated in the case. (1) An agreement by which the United States patent was sold in consideration of 550 shares in the purchasing company. The selling company there exchanged the patent under which they could receive royalties for shares in a company which itself would pay dividends out of the sums made by exercising, or licensing the use of the patent. This certainly looks like the exchange of one capital asset for another. (2) An agreement for the sale of a Japanese patent for a price payable by ten yearly instalments, and for a fixed royalty per year for the life of the patent. (3) An agreement whereby a French patent was assigned in consideration of a royalty per pound of all stainless steel dealt with under the patent. These last two cases are similar to cases 2 and 3 of the present case, on which the present appellants submitted to be taxed. The General Commissioners for one of the Divisions of Yorkshire heard arguments similar to those in the present case and decided that "the amounts realized were an appreciation of capital and not taxable profits." Mr. Justice Rowlatt reversed their decision. He has explained in his judgment in the present case that he did so under the impression that the General Commissioners had only found an appreciation of capital in the course of trade; and that, if he had understood that they intended to find an appreciation of a capital asset not in the course of trade, he would not have reversed their decision. However that may be, the Court of Appeal reversed Mr. Justice Rowlatt's judgment and restored the decision of the General Commissioners. The ground of their opinion appears to be that it was a finding of fact with evidence justifying the decision, though there was evidence on which an opposite finding might be arrived at. Lord Hanworth at the end of his judgment, Lord Justice Warrington and Lord Justice Atkin at the beginning of their judgments, all treat the finding as one of fact, with evidence to support it, with which the Judge had no right to interfere, he not being the judge of fact. I approach the present case in the same way; in my view there is here a finding of fact, with evidence to support it, and no misdirection in law. It would have been possible in each case to come to a decision the other way; this is always so when the question is one of degree judged of by different bodies of Commissioners. The Special Commissioners are at least as competent to decide questions of fact and appreciate the law as the General Commissioners of a Division of Yorkshire; one might perhaps go farther with safety. In my view Mr. Justice Rowlatt's refusal to interfere with the decision of the Special Commissioners given after reading the decision of this Court in the *Stainless Steel* case (*supra*) was justified, and the appeal must be dismissed.

Lord Justice Sargant.—In the first case—namely, that as to income-tax—I think that Mr. Latter was right in his contention that the decision of the Special Commissioners must be interpreted in the light of the learned Judge's decision in the analogous case of *Collins v. Firth-Brearley Stainless Steel Syndicate* (unreported). The appeal in that case had been decided by the learned Judge on March 2, 1925, while the decision in the present case was given by the Special Commissioners on March 18, 1925, having been held over by them since the argument before them on December 9, 1924. It is fairly clear, therefore, from these dates, and is confirmed by the internal evidence of the decision itself in the present case, that the Special Commissioners have taken for their guide the observations of the learned Judge in his judgment in the *Firth-Brearley* case (*supra*).

Now in that case the General Commissioners had decided that the sums received by the company on the sale of their patents in Japan and the United States of America were an appreciation of capital and not assessable profits. But the learned Judge reversed their decision because (as he says in the present case) he misunderstood their finding, and thought that they did not mean that there had been an appreciation of a capital asset, but that they meant that the appreciation had occurred in the course of "trade which it was the object of the trade to secure." Unfortunately, however, for the decision of the present case, the learned Judge, in the language of his decision in the *Firth-Brearley* case (*supra*), did not make it clear that his judgment was based upon the supposition that the appreciation was in the course of "trade which it was the object of the trade to secure," but used language which was much more general—namely, that any appreciation in the course of the company's trade would have been sufficient to involve liability to income-tax.

With that judgment before them the Special Commissioners here, while stating correctly the contention on behalf of the company that the sale of the patents in the U.S.A. was a sale of part of their capital assets—*i.e.*, of assets representing fixed capital and not circulating capital—state the contention of the Crown in terms which fall short of being the contrary of that contention, but satisfy the less definite language of the judgment of Mr. Justice Rowlatt in the *Firth-Brearley* case (*supra*)—namely, that the sum received on the sale was "a receipt of the appellant company's business and so assessable to income-tax." And in the same way the decision of the Special Commissioners is worded in language equally wanting in the necessary precision—namely, that "the profits on sale of patents arose in the course of the appellants' business and were chargeable to income-tax and excess profits duty."

In this state of things, the first question that arises is: What is the right interpretation to be put upon the finding of the Special Commissioners in the present case? The learned Judge has held that it amounted to a direct negativing of the contention of

the company and to an assertion that the profit arose "in the course of the appellants' business, not because they were getting rid of a capital asset and putting an end to it, but because it was in the course of their business to sell the patents." With all respect to him, I cannot take that view. In my opinion the Special Commissioners carefully abstained from directly negativing the company's contention, and found in favour of the Crown enough, and no more than enough, to involve liability to income-tax on the basis of the incomplete test stated by the learned Judge in his decision in the *Firth-Brearley* case (*supra*).

I arrive at this conclusion on the language used by the Special Commissioners in stating the contention of the Crown and their own finding. But the conclusion is immensely strengthened by a consideration of the specific facts found by the Special Commissioners in the previous paragraphs of the case, and particularly in paragraphs 10, 11, and 12. It appears that the appellant company, so far from making it their business or part of their business to attempt to sell their foreign patents or any of them, always endeavoured to avoid any such sale, and that the sale now in question is the only sale which the company have ever in fact made. The specific facts found point unmistakably to the company's patents having constituted fixed assets or capital, as distinguished from assets or capital circulating in the course of the company's business and so resulting in a profit or loss attributable to income. And it is, in my judgment, inadmissible to attribute to the somewhat ambiguous and indefinite words of the general conclusion in paragraph 24 of the case a meaning which would be directly in the teeth of the facts specifically found in the preceding paragraphs. Indeed, if the conclusion in paragraph 24 has the meaning attributed to it by the learned Judge, there was not, in my judgment, any evidence on which the Special Commissioners were entitled to come to this conclusion.

Further, I do not consider that the decision of the Special Commissioners in paragraph 24 (for that is what they call it) was or was intended by them to be a finding of fact. I think it was a decision as to the law resulting from the facts previously found by them and stated in detail in the preceding paragraphs of the case. In my judgment that decision as to the law was wrong, and should on the specific facts found by the Special Commissioners have been the other way ; and the facts so specifically found and stated are, in my opinion, sufficient to entitle this Court to deal with and answer the question raised by the twenty-first paragraph of the case.

On these facts, which are practically on all fours with those in the *Firth-Brearley* case (*supra*), or so far as they differ are more strongly in favour of the taxpayer, this question should be answered in the negative, since the assets sold were obviously part of the fixed capital of the company and not part of its circulating capital. And I think, therefore, that the decision of the learned Judge to the contrary should be reversed.

I may add that this decision does not, in my view, prejudice such claim, if any, as the Crown may have to income-tax in respect of the years in which the company earned the royalties to the extent of £13,500, which were ultimately included in the purchase price of £26,500. The reversal of the decision as to income-tax, of course, involves a reversal of the corresponding decision as to excess profits duty. It has throughout been agreed that the two claims by the Crown rest on the same foundation.

[Solicitors—Messrs. Sharpe, Pritchard, and Co., for Messrs. Underhill, Neve, and Co., Wolverhampton, for the appellants ; the Solicitor of Inland Revenue for the respondents.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Viscount Sumner, Lord Wrenbury, Lord Darling, and Lord Warrington of Clyffe.)
1927. July 28.

LUSCAR COLLIERIES, LIMITED v. McDONALD AND OTHERS (ATTORNEYS-GENERAL FOR CANADA AND ALBERTA INTERVENANTS).*

Canada — Railway Act, 1919 — Jurisdiction of Railway Commissioners.

In proceedings brought by the appellants it was submitted that, as their line was a provincial railway, the Dominion Railway Acts had no application and the Board of Railway Commissioners no jurisdiction.

Held, affirming the decision of the majority of the Supreme Court of Canada, that as the appellants' railway was, under the circumstances, a railway connecting the Province of Alberta with other Provinces, the railway was one within the legislative authority of the Dominion Parliament under s. 92 (10) (*a*) of the British North America Act, 1867, and the Board of Railway Commissioners had jurisdiction.

This was an appeal from a judgment of the Supreme Court of Canada supporting a decision of the Board of Railway Commissioners.

Mr. A. M. MacRobert, K.C., and Mr. S. B. Woods, K.C. (both of the Canadian Bar), appeared for the appellants ; the Hon. Geoffrey Lawrence, K.C., for the Attorney-General for Alberta ; Mr. O. M. Biggar, K.C. (of the Canadian Bar), for the Attorney-General for Canada.

Lord Warrington of Clyffe, delivering their Lordships' judgment, said :—The appellants, the Luscar Collieries, Limited, are the owners of a short branch line of railway in the Province of Alberta, constructed by them but operated by the Canadian National Railway Company under certain agreements to be mentioned presently. The question in this appeal is whether the appellants' railway is a railway "within the legislative authority of the Parliament of Canada," and therefore a railway to which the Railway Act, 1919, of Canada applies (Railway Act, 1919, section 5).

The facts giving rise to these questions are as follows :—

In the year 1911 the Grand Trunk Pacific Branch Lines Company, under the authority of an Act of 1909 of the Parliament of Canada, constructed a Coal Branch in the Province from a station on the main line of the Grand Trunk Railway to a point at or near Coalspur. This Branch line is now part of the Canadian National Railways.

In the year 1911, by an Act of that year, the Branch Lines Company were authorized by the Parliament of Canada to construct another branch

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

from the branch last mentioned to the Mountain Park Coal Company's collieries.

In the year 1912 the Mountain Park Coal Company, Limited, obtained authority from the Parliament of Alberta to construct, maintain, and operate a railway which is either identical with or takes the place of the branch described in the Canadian Act of 1911, and by the same Act of the Parliament of Alberta an agreement set forth in the Schedule to the Act between the Branch Lines Company, the Grand Trunk Company, and the Coal Company was ratified and confirmed, and it was provided that the railway thereby authorized should be operated pursuant to the agreement.

By the said agreement, which is dated January 23, 1912, it was provided in effect that the last-mentioned railway should be constructed by and at the expense of the Coal Company, who were to be reimbursed by certain rebates on freight, and that so soon as they had been so reimbursed the Branch Lines Company were to be the absolute owners of the railway. Provision was also made for the operation of the railway by the Grand Trunk Company.

In the year 1921 the appellant company, by an Act of the Parliament of Alberta, were authorized to construct the railway in question to connect with the Mountain Park Company's railway and to enter into an agreement for the operation of the railway by the Canadian National Railways which then comprised both the Branch Lines Company and the Grand Trunk Company, and for the ultimate transfer to or acquisition by the Canadian National Railways of the railway.

By an agreement dated May 10, 1921, made between the Branch Lines Company and the Grand Trunk Company, and the Mountain Park Coal Company, supplemental to the agreement of January 23, 1912, provision was made for the application of the agreement to the railway in question, therein referred to as the Luscar Branch Line, with certain modifications as to the terms of reimbursement, and it was thereby provided that on failure of the Coal Company to ship over the Luscar Branch Line when constructed the annual quantity of coal therein mentioned, neither the Branch Lines Company nor the Grand Trunk Company should be under any obligation to the Coal Company to continue the operation of such branch line.

Ultimately, by an agreement dated April 2, 1923, and made between the Mountain Park Company of the first part, the appellant company of the second part, the Branch Lines Company of the third part, and the Grand Trunk Company of the fourth part, the appellant company agreed to submit the Luscar Branch to the operation of the agreements of January 23, 1912, and May 10, 1921, and agreed that the Branch Lines Company and the Grand Trunk Company should have as regards the Luscar Branch all the rights given to them by the Mountain Park Company under the said agreements with regard to the Mountain Park Branch.

Since the construction of the Luscar Branch Line it has been operated under the agreements aforesaid by the Canadian National Railways, and traffic over it can pass without interruption to such parts of the Dominion as are served by the Canadian National Railways.

Under these circumstances the respondent, N. S. McDonald, the owner of a coal lease in the vicinity of the appellants' colliery, made an application to the Board of Railway Commissioners constituted under the Railway Act of 1919 for an order granting him running rights over the Luscar Branch, and for an order requiring the Canadian National Railway Company to grant him permission to construct a short track to serve his coal lease.

The appellant company objected to this application on the ground that the Board of Railway Commissioners for Canada had no jurisdiction, asserting that their line was a provincial railway, to which the Dominion Railway Acts had no application.

The Board of Railway Commissioners overruled the appellants' objection, and on August 14, 1924, made a formal order declaring that in pursuance of the powers conferred by section 6 (*c*) of the Railway Act, 1919, the Board had power to make the order applied for.

In view of the then pending appeal to the Supreme Court of Canada, the Board made no operative order, leaving this to be dealt with after the question of jurisdiction should have been settled.

The Attorney-General for Canada intervened in the appeal to support the jurisdiction of the Board, and by an order dated May 18, 1925, the Supreme Court affirmed the order of the Board and dismissed the appeal.

The appellant company thereupon obtained special leave to appeal to his Majesty in Council. The Attorney-General for Canada and the Attorney-General for Alberta intervened to oppose and support the appeal respectively. The respondent McDonald does not appear.

The material statutory provisions are the following :—

By section 91 of the British North America Act, 1867, it was provided that the exclusive legislative authority of the Parliament of Canada extends to (amongst other subjects thereby enumerated) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

Section 92, so far as it is material, is as follows :—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :—

"10. Local works and undertakings other than such as are of the following classes :—

"(*a*) Lines of steam or other ships railways canals telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province.

"(*c*) Such works as although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

The Railway Act, 1919 (Canada), contains the following material provisions :—

"Section 2 (4). 'Company' . . . where not otherwise stated or implied means 'railway company' unless immediately preceded by 'any' 'every' or 'all' in which case it means every kind of company which the context will permit of.

"Section 5. This Act shall, subject as herein provided, apply to all . . . railways . . . within the legislative authority of the Parliament of Canada. . . .

"Section 6. The provisions of this Act shall without limiting the effect of the last preceding section extend and apply to :—

"(*c*) Every railway or portion thereof, whether constructed under the authority of the Parliament of

Canada or not, now or hereafter owned controlled leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada . . . whether such ownership control or . . . operation is acquired or exercised by lease agreement or other means whatsoever and whether acquired or exercised under authority of the Parliament of Canada or of the Legislature of any Province or otherwise howsoever; and every railway or portion thereof now or hereafter so owned controlled leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada."

On this section it is clear that having regard to the definition in section 2 (4), the word "company" means railway company, and does not include a bank or financial company controlling a railway.

The Attorney-General for Canada, in support of the jurisdiction of the Board of Railway Commissioners, relies on two alternative grounds:—

(1) That the appellants' railway is, under the circumstances, a railway connecting the Province of Alberta with other Provinces (section 92 (10) (*a*) of the British North America Act, 1867).

(2) That, if this ground fails, then it is a 'work' within section 92 (10) (*c*) of the Act of 1867 by virtue of section 6 (*c*) of the Railway Act, 1919, and the declaration therein contained.

Of the Judges of the Supreme Court of Canada three—namely, the Chief Justice and Mr. Justice Duff and Mr. Justice Rinfret—decided in favour of the jurisdiction on the first ground, but in reference to the second were of opinion that such a general declaration as that contained in section 6 (*c*) was not a declaration within section 92 (10) (*c*) of the British North America Act, 1867; two—namely, Mr. Justice Mignault and Mr. Justice Newcombe—accepted the second ground and expressed no opinion on the first. Mr. Justice Idington was for allowing the appeal.

Their Lordships agree with the opinion of Mr. Justice Duff that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connexion, and would properly be said to connect the Province in which it is situated with other Provinces.

In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with other Provinces, and therefore falls within section 92 (10) (*a*) of the Act of 1867. There is a continuous connexion by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within section 92 (10) (*a*) may have to be determined, but that question does not now arise.

Their Lordships having thus come to a conclusion against the appeal on the first of the two grounds mentioned above, it is unnecessary for them to express any opinion on the second, and in accordance with their usual practice they think it not desirable to do so. But they wish it distinctly to be understood that so far as they are concerned the question as to the validity of section 6 (*c*) of the Act of 1919 is to be treated as absolutely open.

Counsel for the appellant company raised a question as to the power of the Board of Railway Commissioners to grant the application in the form in which it was framed. This is not a matter going to the jurisdiction of the Board—a Dominion authority as distinct from a Provincial one—and is one which can and ought to be considered by the Board when—its general jurisdiction having been established—it is asked to exercise it in the particular case.

Their Lordships are of opinion that the appeal fails and must be dismissed, but without costs. The respondent McDonald does not appear to ask for costs, and the interveners are not entitled to them. Their Lordships will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Blake and Redden; Messrs. Charles Russell and Co.]

Court of Appeal. (Bankes, Atkin, and Lawrence, L.JJ.) 1927. July 1.

FAREY v. COOPER AND OTHERS.*

Assignment—Assignment to trustee for benefit of creditors — Business and goodwill — Covenant by assignors to assist trustee in realizing the estate and in distribution of assets—Whether broken by solicitation of customers by assignors on behalf of rival business.

By a deed of assignment, the debtors, who were three brothers who had been carrying on a bakery business in partnership, assigned the business and goodwill thereof to the plaintiff as trustee. The debtors covenanted, *inter alia*, that they would "do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among the creditors as may be reasonably required by the trustee, and will aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof among the creditors." In an action by the plaintiff as trustee under the deed of assignment claiming an injunction to restrain the debtors from soliciting the customers of the business for orders for and on behalf of themselves and the defendant Cooper, who carried on business as a baker, and to restrain the defendant Cooper from instigating the debtors so to do,

Held, that the action would not lie against the defendant Cooper, as the acts which it was alleged that he instigated were not wrongful. As the debtors themselves were justified in law in soliciting the customers of the business, and were not precluded from so doing by their covenant, the defendant Cooper could not be restrained from instigating them so to do.

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

Green v. Morris (30 *The Times* L.R., 301 ; [1914] 1 Ch., 562) approved and applied.

This was an appeal by the defendant Cooper from a decision of Mr. Justice Finlay in an action tried with a jury.

The plaintiff claimed an injunction to restrain the defendants, the brothers Hill, from soliciting the customers of a bakery business which they had assigned to the plaintiff as trustee for the benefit of creditors. The plaintiff also claimed an injunction against the defendant Cooper to restrain him from instigating the other defendants to solicit the customers of the business.

The plaintiff was trustee under a deed of assignment dated November 11, 1925, executed by three of the defendants, the brothers Hill (the debtors), who had carried on business as bakers at Harrow, under the name of Hill Brothers. By the deed the debtors assigned the business and the goodwill thereof to the plaintiff, with power to carry on the business so far as might be necessary to wind up the estate. The debtors covenanted, for the purpose of assisting the trustee in realizing the property to the best advantage, *inter alia*, that they would attend at any time as the trustee required, and generally do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among the creditors as might be reasonably required by the trustee, and would aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof among the creditors.

The plaintiff alleged that the defendant, Mr. Wright Cooper, who carried on business at Harrow as a baker, had instigated and allowed one of his co-defendants, Mr. Charles Thomas Hill, to solicit customers of the business formerly carried on by the three assignors (the debtors) as bakers in Harrow, and the plaintiff claimed an injunction to restrain the debtors from soliciting the customers for orders and to restrain the defendant Cooper from instigating the debtors so to do.

The jury found that two of the debtors, Messrs. G. A. Hill and Mr. C. T. Hill, had solicited old and new customers of the business ; and that the defendant Cooper had instigated C. T. Hill to solicit the customers of the business. The jury awarded damages against the defendants, and Mr. Justice Finlay directed judgment to be entered for the damages awarded and granted injunctions against the debtors, G. A. Hill and C. T. Hill, and against the defendant Cooper.

The defendant Cooper appealed.

Serjeant Sullivan, K.C., and Mr. A. W. Elkin appeared for the appellant ; Mr. Pritt, K.C., and Mr. A. W. Roskill (Mr. Comyns Carr, K.C., with them) for the respondent.

Lord Justice Bankes.—This is an appeal from the verdict and judgment in an action tried before Mr. Justice Finlay, and a number of points have been raised in support of the appeal. The action was brought by the trustee under a deed of assignment against the three assignors, and the present appellant, Mr. Wright Cooper. Mr. Wright Cooper is the only appellant, and the case made against him was that, being a baker at Harrow, he had instigated and allowed one of his co-defendants, Mr. Charles Thomas Hill, to commit a wrong ; whether it is described as a breach of his duty, or a derogation from his grant or breach of contract, does not very much matter. The wrong consisted in soliciting customers of the business formerly carried on by the three assignors as bakers and confectioners in Harrow. The action was tried by Mr. Justice Finlay and a common jury, and among other questions the learned Judge asked the jury whether the appellant, Wright Cooper, did instigate or conspire with the other defendants, or any and which of them, to canvass and obtain either (*a*) the old customers or (*b*) other customers of the trustee, and the jury answered that question in the affirmative. Upon that, after discussion, the learned Judge entered judgment for the plaintiff and granted an injunction to restrain the appellant, Cooper from instigating or allowing Charles Thomas Hill, his servants or agents, to endeavour to induce the customers of Hill Brothers, bakers and confectioners, to deal with the appellant, Cooper. From that judgment and verdict this appeal is brought, and a number of grounds have been urged, grounds of law and grounds of fact.

With regard to the law, it was said that there is no evidence to support the jury's finding. We have heard Serjeant Sullivan upon that, and I do not propose to express any opinion upon that point, as we have not heard the other side, except to say that there is certainly something to be said in support of the argument. Then it was said that, even if there was some evidence to go to the jury, the verdict and judgment ought to be set aside on the ground of misdirection and non-direction, and that the verdict was against the weight of evidence. There is obviously a good deal to be said in support of that contention, but we have not heard the other side, and I express no opinion about that. The other question of law was one which at first I did not consider substantial, but on further consideration I think it is conclusive. The point is this : That this action will not lie against the appellant, for the simple reason that the acts which he is said to have instigated or allowed were not wrongful acts at all, but they were acts which the particular brother, Charles Thomas Hill, was, in the circumstances, perfectly justified in doing ; and, if he was perfectly justified in doing them, it cannot be complained of the appellant that he instigated or assisted him. I quite understand that the appellant emphatically denies that he had anything to do with it, but that question remains undecided, because I propose to deal with this appeal on the underlying principle of law. There are authorities which have been referred to in order to show what the state of the law was at the time when this deed of assignment was made. The deed of assignment was made on November 11, 1925, and it is in common form to a large extent. Among other things, it contains in the form of a covenant what really are extracts from the provisions of the Bankruptcy Act, 1914, relating to bankruptcy, and the particular clause in the covenant which is relied upon, and the one upon which the learned Judge seems to have decided the matter, is in a covenant imposing a number of obligations upon the debtors for the purpose of assisting the trustee in realizing their property to the best advantage, and among other provisions there is this, that they will attend at any time as the trustee may require, and generally do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among the creditors as may be reasonably required by the trustee, and will aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof among the creditors. On the face of it, that is an affirmative covenant : it defines what the debtors are to do by way of assisting the trustee in the realization of their property. But it is said that upon the true construction of this covenant there is implied a negative cove-

nant, an obligation not to do anything which will depreciate the value of the property, and it is said that one of the negative acts which must be implied is the refraining from soliciting the old customers of the former business of the brothers, which has been assigned to the trustee. The learned Judge decided this case, as I understand, upon the view that there was such a negative covenant implied.

I wish to say in the first instance that I think that this covenant must be construed having regard to what was at the time of the covenant the existing law in reference to this particular matter, and for two reasons: one is for the purpose of seeing whether the brother was, or was not, doing something that he was entitled to do, and, secondly, for the purpose of seeing whether the knowledge that the brothers Hill had assigned all their property, including the goodwill of their business, to the trustee—whether a mere knowledge of that fact, without any knowledge that the deed contained this particular covenant, upon which everything apparently turns, was sufficient to create a cause of action against the appellant himself. I think that is a very material consideration. With regard to the law, I wish to refer to three or four cases quite shortly which have been mentioned in order of date, the date when they were, in fact, decided, and the ground upon which, in my opinion, they appear to have been decided.

The first is *Walker v. Mottram* (19 Ch.D., 355), which was decided in 1881 by a Court of Appeal. That case has stood as an authority ever since, and is now completely established as a binding authority. The question which was raised in that case was whether, in a case of bankruptcy, a bankrupt whose property and goodwill of the business had passed to a trustee in bankruptcy was under any obligation, as against a purchaser from the trustee, not to solicit the customers of the old business, and it was held that he was not. The ground, as I understand it, upon which it was held that he was not was that the passing of the property by the act of bankruptcy from the bankrupt to the trustee created no obligation as between the bankrupt and the trustee not to derogate from the grant within the meaning of the rule, and that there was no contract and no privity of contract between the bankrupt and the trustee from which any such obligation as not to solicit the customers of the old business could arise; and it was for that reason that the Court decided, as they did, that in such a case as that, where the property and goodwill of a man's business had passed under the bankruptcy laws from him to a trustee, the bankrupt was under no obligation to refrain from soliciting the customers of the old business. I will read one or two lines from the head note: "The rule of *Labouchere v. Dawson* (L.R. 13 Eq. 322), by which, in the case of a voluntary sale, the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation," and then the reason is: "The obligation enforced by the rule is purely personal, and not a mere incident to the transfer of property. Therefore the purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation has no right to restrain the bankrupt or liquidating debtor from setting up *bona fide* a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser."

I should like to refer to a case which was decided in 1882, and which was cited. It is only interesting as an instance in which the then Master of the Rolls, Sir George Jessel, applied this doctrine of *Walker v. Mottram* (*supra*) and for the way in which he expressed himself with reference to that decision. It was a case of partners where one partner had been expelled and his interest had been purchased by his former partners. The expelled partner then set about soliciting the customers of the former partnership, and an application was made to restrain him, and the Master of the Rolls refused to make any order, and he said this (*Dawson v. Beeson*, 22 Ch.D., at p. 509): "The plaintiffs say that they had a right under the articles to expel their partner. Well, they did exercise that right and expelled the defendant, and then they bought the defendant's interest in the property from the sheriff. That is not equivalent to a voluntary alienation by a vendor; it is like the case of the alienation of a debtor's property by bankruptcy. The defendant loses the right to the business, but he does so involuntarily. He is turned out against his will, and is only entitled to receive the value of his share as if dead. He is not in the same position as a partner resigning voluntarily. Looking at *Walker v. Mottram* (*supra*), I think that he ought not to be restrained from carrying on the business in his own name and soliciting customers." Then in 1895 came the case of *Trego v. Hunt* (12 *The Times* L.R.,80; [1896] A.C., 7), in which the House of Lords established the principle that where a person voluntarily disposes of the goodwill of his business he cannot afterwards canvass the customers of the old firm; there is one passage to which I should like to refer in the judgment of Lord Herschell in which he describes the principle. Lord Herschell says this at page 21: "It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity." That was the position when *Green v. Morris* (30 *The Times* L.R., 301; [1914] 1 Ch., 562) was decided. But I want to go back for a moment to *Walker v. Mottram* (*supra*) to pick up another point which I think is important in reference to this particular case which is now being discussed. It is said by the appellant here that in considering the construction of the particular words in question in this deed of assignment it must be borne in mind that they are a reproduction only of provisions in the Bankruptcy Act, 1914, and provisions in the Bankruptcy Act which were in force at the time when *Walker v. Mottram* (*supra*) was decided, and that if there was any foundation for the respondent's contention as to the true construction of the words in question, *Walker v. Mottram* (*supra*) must have been decided the other way, because there were the identical words in the Bankruptcy Act staring the Court of Appeal in the face, and, in spite of that, they decided that there was no such obligation arising from these statutory words as is now contended exists from the contractual words in question in this assignment. It is quite true that the point was not put in exactly the same way in which it has been put to-day, but, in my opinion, it is impossible to come to any other conclusion than that the Court had in mind the provision, and the identical provision, of the Bankruptcy Act when they came to the decision at which they arrived. The way in which this particular part of the case in *Walker v. Mottram* (*supra*) was put was this: It was said that under the present bankruptcy

laws goodwill is expressly mentioned, and is specially mentioned, as a thing which passes to the trustee, and that there is a special provision in the statute which protects the value of the goodwill in the hands of the trustee. That provision in the statute is the one which is reproduced in this assignment in the form of an obligation on the debtors to do everything that is reasonably required, and to the utmost of their power aid in the realization of the debtors' property. I find that point put more than once in the argument of Mr. Higgins and Mr. Cooper Willis, and I find the Lord Justice referring in terms to the Bankruptcy Act. In these circumstances it seems to me that this case must be treated as a decision that the Court of Appeal did not consider that the soliciting of the old customers was a breach of the statutory obligation that the bankrupt owed to the trustee to aid to the utmost of his power in the realization of his property. I think that that is a very important consideration when we come to consider the case of *Green v. Morris* (*supra*) and the construction that ought to be put upon this deed. *Green v. Morris* (*supra*), as I read the decision, is an express decision that for all practical purposes an assignment under a deed of assignment for the benefit of creditors, although in one sense it may be said to be voluntary, yet in the eye of the law, and for this particular purpose, must be treated as involuntary and in the same position exactly as a transfer which takes place by operation of the bankruptcy law from the bankrupt to the trustee. I think that is necessarily so when you follow the argument that was addressed to the learned Judge, Mr. Justice Warrington, and his decision. Mr. Simonds, who argued the case for the defendant there, said: "It is submitted that there is no obligation on the former owner of a business not to solicit where the goodwill is not sold by him but by his trustee under a deed of assignment for the benefit of creditors. A bankrupt although he files his own petition will not be restrained from soliciting: *Walker v. Mottram* (*supra*). In that case it was held that a bankrupt whose business had been sold by his trustee in liquidation could not be restrained from soliciting his former customers, and that it was immaterial whether he had or had not joined in the conveyance to the purchaser. That decision proceeded on the principle that a debtor ought not to be prevented after the liquidation of his affairs from gaining his livelihood. The same principle, it is submitted, applies in the case where a debtor has assigned all his property for the benefit of his creditors." Then he goes on: "There is no privity of contract between the assignor and the ultimate purchaser of the business. In such a case there is no implied contract by the assignor that he will not solicit the customers of his old business." What is meant by saying "There is no privity of contract between the assignor and the ultimate purchaser of the business"? Putting the two sentences together, it must mean that there is no contractual obligation as between the assignor and the trustee, and, there being no such obligation as between the assignor and the trustee, there is nothing which the trustee can pass on to the ultimate purchaser of the business. That must be what is meant when counsel is contending that there is no privity of contract between the assignor and the assignee. There is, in other words, nothing which the trustee can pass on. Then he goes on to say: "The assignment in this case, although for the benefit of creditors, is a voluntary one, and therefore differs from the case of a bankruptcy where the property vests by operation of law. The trustee in this case is in the position of an attorney of the debtor to sell the property." Then the learned Judge, referring to *Walker v. Mottram* (*supra*), says this at page 567: "The liquidating debtor is a person who is compelled by circumstances to take certain steps in order that his property may be distributed among his creditors in exactly the same way as a bankrupt who presents a petition under the present Bankruptcy Act. I can see no rational distinction between *Walker v. Mottram* (*supra*) and the present case. In one sense what the debtor does is voluntary, in another sense it is not voluntary at all, as he may have taken the steps he did take in order to avoid other proceedings being taken by the creditors. A man by divesting himself of his property under such circumstances as those in this case does not thereby constitute the relation of vendor and purchaser between himself and the ultimate purchaser of the property." I think in using that language he is referring to the argument addressed to him. Now I quite agree that it is a contentious point whether a man who executes an assignment such as this is for all purposes in the same position as a man who quite involuntarily comes within the provisions of the bankruptcy law. But I am quite satisfied that that is what the learned Judge decided as long ago as 1914 and has been quite recently approved by Mr. Justice Tomlin (*Boorne v. Wicker*, [1927] 1 Ch. 667, at p. 674). I certainly am not prepared to dissent from it. I think myself that it is the right view, and it seems to me impossible to decide this case in the way Mr. Pritt asked us to do without overruling *Green v. Morris* (*supra*), and I am not prepared to do that. I think that when this deed was in fact executed the law was that a person who executed such a deed as this was under no obligation to refrain from soliciting the customers of the old business, and that from and after the decision of *Green v. Morris* (*supra*) it was no longer sufficient to draft a deed of assignment in this form, but if it was desired to go farther, and to obtain a greater protection than the law as it existed afforded, some clear and precise words must be inserted in the covenant placing the assignor under whatever obligation was desired so long as it did not infringe any other provision of the law.

In the absence of any such express covenant, in my opinion, in this case two consequences follow. First of all, it cannot be said that the brother, Hill, was doing anything other than what he was entitled to do, in which case it cannot possibly be said that he committed any wrong which entitled the trustee to bring an action against him; and I also think that the trustee would fail, even assuming that a different view were taken of Mr. Justice Warrington's decision. It seems to me that this appellant was entitled to act under the belief that Mr. Justice Warrington's decision was the law, and all that he knew was that there had been an assignment for the benefit of creditors, and he had no reason to know, or to suppose, that there was in that deed anything which took the case out of that rule. Therefore it seems to me that whether you treat the covenant as one which does not contain a precise negative obligation, which is now contended for, or whether you accept it as containing such an obligation, but at the same time accept Mr. Justice Warrington's decision, the appellant in this case could say in the one case: "I have done no wrong, and it is impossible to suggest that I have," and in the other case he could say: "Well, whether I did or not, I did not know it, and you must bring home to me knowledge before you can bring an action against me for instigating a man to do something which I knew was wrong."

For these reasons I think this appeal succeeds, and must be allowed with costs, and the judgment against the appellant set aside and entered for him with costs here and below.

LORD JUSTICE ATKIN.—I agree. This is a case of a deed of assignment by certain debtors who were carrying on a baker's business in Harrow, and the plaintiff is the trustee of the deed of assignment. The defendant Cooper has been carrying on an old-established business in Harrow for a great number of years. The case that is made against the defendant Cooper, who is the appellant, is for damages for procuring the breach of certain obligations, by covenant express or implied, not to solicit customers of the business, and not to solicit these customers whether they were customers of the business at the time of the assignment by the debtors, or whether they are new customers acquired by the trustee in the course of his conduct of the business under the deed of assignment. Now in order to establish a case of procuring a breach of covenant it is, of course, necessary to establish that there was such a covenant, and that the person procuring was, in fact, under an obligation to refrain from procuring a breach of it. That has given rise to a very interesting question of law. As far as appears from the summing-up, the learned Judge adopted a simple method of solving the question whether or not there was such an obligation by leaving it to the jury, and one must assume that the jury found that such an obligation existed. But we are told that although he in terms left it to the jury, he had, in fact, ruled upon it before and indicated his view that there was an obligation subsisting. We have now to address ourselves to the proposition. The suggestion is that the debtors, who had assigned all their property to the trustee, had included in that property the goodwill of the business, and that by that assignment by express covenant, or by implied covenant, they were under an obligation to abstain from soliciting the customers of that business, whether they were customers at the date of the assignment or whether they had since been acquired by the trustee.

I think a simple way of approaching this case is by inquiring in the first place what would have been the position if, instead of its being a deed of assignment, there had been a bankruptcy petition upon which the debtors had been adjudicated, and the plaintiff was trustee in bankruptcy, and the property of the debtors, including the goodwill of the business, was vested in the trustee. It appears to me that in such a case the bankrupt is not under an obligation to the trustee to abstain from soliciting the old customers of the business, and, *a fortiori*, from soliciting the new customers of the business acquired after his connexion with the business had come to an end. That seems to explain the decision in *Walker v. Mottram* (19 Ch.D., 355). It is unnecessary, I think, to consider the grounds for it. No doubt it is founded upon the fact that in a case of bankruptcy there is no voluntary disposition by the debtor of his business, and therefore no opportunity of implying a contract between the bankrupt and the trustee. I think what also influenced the Court to come to their conclusion was the view that, whereas in the case of a voluntary disposition a man is doing something that might be said to be a breach of faith in diminishing that which he has sold (a derogation from his grant it has been called) by soliciting the old customers, in a case of bankruptcy not only does that consideration not apply, but there is a contrary view indicated—namely, that the policy of the Bankruptcy Act enables a bankrupt to resume his position in the world as much as possible, and to carry on his business—there is nothing to restrain him from carrying on his business; and inasmuch as he, being then a bankrupt, would have very few persons to deal with except those whom he had known beforehand, there is nothing to prevent him from asking for the assistance of his former customers in order to enable him to rehabilitate himself in the commercial world. I think that entered into consideration. Therefore, if it were a bankruptcy pure and simple, it seems to me plain that the debtors would be under no obligation to abstain from soliciting the customers of the old business. But it is said that this is a case of a deed of assignment, and therefore the position is the same, first of all, as in an ordinary case of a sale to a trustee, and one answer that has been made to that, and indeed it is admitted by Mr. Pritt to be a forcible answer, is that that is not enough to carry him home and to justify the verdict which has been obtained and the injunction which has been granted, because it is quite plain that an implied obligation in a purchase and sale of a goodwill with nothing more is merely an obligation—enforced in the House of Lords in *Trego v. Hunt* (12 *The Times* L.R. 80; [1896] A.C. 7)—to abstain from soliciting those who were customers of the business at the time of the sale, and would not apply to new customers who were obtained after the sale. Inasmuch as the damages here have been assessed on the footing of soliciting new customers, and inasmuch as the injunction is also addressed to restrain the defendant Cooper from procuring the solicitation of the new customers, the verdict would have to be set aside and the injunction discharged and a new trial would have to be ordered on that ground alone. Therefore Mr. Pritt put the case on a wider footing, and contended that in this case there was an express covenant which the trustee was entitled to enforce as against the debtors, and that a breach of it had been procured by the appellant. The covenant is a covenant that is to be found in the printed deed of assignment, "That the debtors will aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof among the creditors," and it is said that that obligation imported a negative obligation not to solicit the customers of the business, either new or old. One has to consider that covenant as a whole in conjunction with the other covenants and the other stipulations, and it is to my mind very relevant to bear in mind, as was pointed out to us by Serjeant Sullivan, that that covenant is nothing but a repetition in the deed of the words of the Bankruptcy Act—the present Act and the former Bankruptcy Act—governing the duties of a bankrupt towards a trustee in bankruptcy. The words are to be found in section 22, sub-section (3), of the Act of 1914, and they appear, as was pointed out to us, in section 19 of the Bankruptcy Act, 1869. Not only do these words appear, but the previous covenant in the same deed that the debtors will give such further inventory of the property and particulars of their creditors and debtors, and attend examinations, and attend meetings, and do all such acts as may be reasonably required by the trustees, is expressed in words which are almost verbatim taken from the provisions of section 22, sub-section (2), of the Act of 1914, and is in itself merely a restatement by way of contract of the obligations imposed by the statute. To my mind it follows that in considering such a contract in a matter *in pari materia* with the Bankruptcy Act it would be right to give to the words in the contract the same construction as had been given to the words in the statute, and I think it is made more obvious that that would be the right construction when one remembers that by one of the clauses of this deed it is expressly agreed and declared that in the administration of the joint and separate estates of the debtors so far as circumstances admit the rules which govern or prevail in the administration in bankruptcy of the joint and separate estates of joint debtors shall apply.

Therefore I think there is no doubt that one ought to put upon these words in the contract the construction that is put upon the same words in the Bankruptcy Act. It is quite plain to my mind from *Walker v. Mottram* (*supra*) that these words in the Bankruptcy Act would not be construed to impose an obligation upon a bankrupt restraining him from soliciting the customers of the business, whether new or old, because if they ought to be so construed in bankruptcy it appears to me impossible that the case of *Walker v. Mottram* (*supra*) would have been decided as it was. I think, therefore, these words do not bear the meaning contended for. I should also come to the conclusion that, inasmuch as the duties of the debtors to the trustee in respect of the business are carefully defined in this express covenant, that covenant would probably exclude the existence of an implied covenant different from the express covenant, though dealing with the same subject-matter. Therefore, if it rested on contract alone, I think the position would be as I have stated, apart from other decisions, but it was decided by Mr. Justice Warrington, as he then was, in *Green v. Morris* (30 *The Times* L.R., 301; [1914] 1 Ch. 562) that the same position exists in respect to an obligation not to solicit in the case of an assignment for the benefit of creditors as exists in bankruptcy, and that the principle of *Walker v. Mottram* (*supra*) ought to be applied to a sale under a deed of assignment such as is applied, and was applied, in the case of a sale by a trustee in bankruptcy. The reason adduced by the learned Judge was that for practical purposes the position must be treated as the same and the assignment must be treated as being more or less involuntary. I think it sufficient to say that I am not prepared to dissent from the statement of the law which has existed for a considerable time and has been dealt with over and over again under deeds of assignment on the footing that that is the law. I am not prepared to dissent from it. Therefore I think that we are left in this position, that the principles of bankruptcy apply in this case.

It was said by Mr. Pritt that he could distinguish both *Walker v. Mottram* (*supra*) and *Green v. Morris* (*supra*) on the ground that in both these cases what was in question was a sale by the trustee, and that the purchaser from the trustee had not the same rights against the debtor as the trustee himself would have. To my mind that is quite an impossible contention. I apprehend that the decision in *Walker v. Mottram* (*supra*) is based upon the consideration that a trustee in bankruptcy himself had not got a right as against a debtor to restrain the debtor from soliciting the old customers of the business, because if he had such a right it seems to me conceivable that he would be capable of passing it on. It does not matter whether his right would be derived from contract, or from an obligation under the statute, or would be derived from the vesting of the property and the obligation imposed by section 22. It is obvious to my mind that if the trustee had such a right he would have been able to use it for the benefit of the estate, and to pass it on to a purchaser, thereby getting the greatest value for the estate that he could; and I think that the reasoning in *Walker v. Mottram* (*supra*) is upon the footing that there was no such obligation as between the debtor and the trustee, and therefore it could not be passed on to a purchaser from the trustee. I think that is the view taken by Mr. Justice Warrington in *Green v. Morris* (*supra*).

The result of that seems to me to be this: That inasmuch as the debtors were under no obligation to the trustee to refrain from doing the acts complained of, this defendant, Mr. Wright Cooper, could not possibly be made liable either for damages or to an injunction to restrain him from procuring acts which themselves were lawful in the debtors. The result of that seems to me to be that it follows that the verdict and judgment given against the defendant Cooper, who alone is the appellant, must be set aside and the verdict and judgment entered for the defendant Cooper. That in itself would carry costs, and this appeal must be allowed with costs. It also follows, I think, from what I have said, that the verdict and judgment against the other defendants were irregularly obtained, but they are not appellants in this case, and nothing more need be said about them.

Lord Justice Lawrence.—I agree. The case made against the defendant Cooper is that he instigated the defendant C. T. Hill to commit a breach of contract. The breach alleged to have been instigated is the breach of an implied covenant on the part of the defendants, the brothers Hill, with the plaintiff not to canvass either the old customers or the new customers of the brothers Hill.

The first and vital question which arises is whether there was, in fact, any such implied covenant. As regards new customers—that is to say, customers who became customers after the execution of the deed of assignment—the rule in *Trego v. Hunt* (12 *The Times* L.R. 80; [1896] A.C. 7) does not apply, but it is said that a covenant not to canvass these customers would be implied by reason of the covenant, contained in the assignment, to aid in the realization of the assignors' property. That is a question with which I shall deal in a moment. As regards the old customers, the rule in *Trego v. Hunt* (*supra*) *prima facie* applies. But there is a decision to which we have been referred in *Green v. Morris* (30 *The Times* L.R. 301; [1914] 1 Ch. 562) which determines that that rule is not to be imported in a case of an assignment for the benefit of creditors, and the question arises whether that decision was rightly arrived at. The same argument as regards the old customers is adduced—namely, that there is an implied covenant by reason of the covenant to aid in the realization. The first question that ought to be dealt with, in my judgment, is whether *Green v. Morris* (*supra*) was rightly decided, and, if so, whether it covers the present case. I agree with a remark made by my Lord as regards *Green v. Morris* (*supra*) being good law, as it has stood for so long undisturbed and has never been doubted or questioned, and I adopt what my colleagues have said as to the inadvisability of overruling that case at the present time. Mr. Pritt has contended that even if *Green v. Morris* (*supra*) stands it is distinguishable on two grounds: first, that it was a case not between the trustee and the debtor, but between a purchaser from the trustee and the debtor. In my judgment that is not a sound distinction. The foundation of the cases of *Walker v. Mottram* (19 Ch.D. 355) and *Green v. Morris* (*supra*) is that there is no implied contract by a debtor with a trustee the benefit of which the trustee can pass on to a purchaser. It is upon that foundation that the whole of both these judgments rests, and therefore they involve this, that according to *Walker v. Mottram* (*supra*) in the case of bankruptcy, and according to *Green v. Morris* (*supra*) in the case of an assignment for the benefit of creditors, the bankrupt himself can solicit the old customers and the new customers. The second ground upon which Mr. Pritt sought to distinguish *Green v. Morris* (*supra*) was that in that case there was no such covenant as we have here that the debtors will aid the trustee in the realization

of the property. That brings me to the final point as to whether a covenant ought to be implied on the part of the debtors in the present case not to canvass either old or new customers from the fact of there being a covenant by them to aid the trustee in the realization of the property. I fully concur in the remarks made by my Lord on the point that that covenant is a mere repetition of the statutory obligation imposed by the Bankruptcy Act, 1914, upon debtors, and I think it is obvious in construing that covenant that the same rule must be applied to the meaning of such a covenant in this deed as was applied in the case of *Walker v. Mottram* (*supra*) as regards the statutory equivalent—namely, section 19 of the Act of 1869. But, quite apart from that, what is the property in the present case which the debtors have covenanted to help the trustee to realize? The assignment includes the goodwill of the business which they were carrying on, but having regard to the decision that goodwill consists only of the probability of the old customers resorting to the old place of business—in other words, the property assigned does not include the benefit of a covenant not to solicit either the old or the new customers—such a covenant as this cannot, in my opinion, enlarge the parcels of the deed, or enhance the value of the property which is thereby assigned, nor can it in my judgment imply a negative covenant not to do something which the law allows the assignors to do—namely, to solicit old and new customers.

For these reasons I think the appeal ought to be allowed with costs.

[Solicitors—Mr. Geo. H. Exeter; Messrs. Biddle, Thorne, Welsford, and Gait.]

Court of Appeal. (Bankes, Atkin, and Lawrence, L.JJ.) 1927. July 15.

MARBÉ v. GEORGE EDWARDES (DALY'S THEATRE), LIMITED.*

Contract — Theatrical engagement—Agreement to advertise the performer—Refusal by employers to allow performer to play the part—Payment of full salary—Action for breach—Obligation to allow performer to act—Damages for loss of reputation.

The plaintiff, an actress, was engaged by the defendants to play a certain part in a play for the period of rehearsal and for the run of the play, and there was a collateral agreement that the defendants would advertise her in a prominent position. The defendants refused to allow the plaintiff to play the part, but they paid her the whole of her salary down to the end of the run of the play. In an action for breach of contract the jury awarded to the plaintiff, over and above her salary already paid, damages for loss of reputation through her not being employed to play the part. The defendants contended that under the written contract they were under no obligation to give the plaintiff an opportunity of acting, and that the plaintiff was not entitled to damages for loss of reputation.

Held, that there was an obligation to give the plaintiff an opportunity of acting, and the plaintiff was entitled, in addition to her salary already paid, to the damages awarded by the jury for loss of reputation.

Decision of Horridge, J. (43 *The Times* L.R., 460), affirmed.

This was an application by the defendants for judgment or a new trial in an action tried before Mr. Justice Horridge and a special jury (43 *The Times* L.R., 460).

In the action Miss Fay Marbé, the plaintiff, an American actress, claimed against George Edwardes (Daly's Theatre), Limited, £5,000 damages for loss of publicity and injury to reputation, and loss of salary at £100 per week during the run of *Yvonne* at Daly's Theatre, in which play she was engaged to play the part of Lolotte. Her case was that she had never been given an opportunity to play the part. She also claimed damages for alleged libel contained in a letter written on behalf of the defendant company on July 29, 1926.

The special jury returned a verdict for the plaintiff, awarding her £3,000 damages for loss of reputation and £100 damages for libel over and above the £3,257 already paid by the defendants in respect of salary at £100 per week.

In the course of the trial the late Mr. James White, who was managing director of the company, and who had been joined as a defendant, had been dismissed from the suit.

Mr. Neilson, K.C., and Mr. Croom-Johnson, K.C., appeared for the appellants; Sir Patrick Hastings, K.C., and Mr. Richard O'Sullivan for the respondents.

Mr. NEILSON, in opening the application, said that there were two causes of action—namely (1) breach of contract; and (2) libel. As to the first, Miss Marbé had entered into a contract with the defendants under which they retained her to play the part of Lolotte in *Yvonne* when they thought proper, and to pay her £100 a week. What happened was that, in the view of the authorities of Daly's Theatre, after the dress rehearsal, Miss Marbé was found not to be suitable for that particular part. But it was agreed that she should be paid for the run of the play at the contract price, and, in the result, £3,257 was paid to her for the run of 32 weeks. Not satisfied with that, the plaintiff claimed damages for loss of publicity. The appeal was based on the grounds:—(1) That in law there could be no claim for damages beyond the actual remuneration agreed to between the parties; and (2) that the damages awarded were excessive.

Miss Marbé, who was an actress of some position in America, wanted a part in a play in this country, and for that purpose obtained an introduction to the management of Daly's Theatre, where the play *Yvonne* was running. The play was not very successful, and, with a view to reshaping it and making it more successful, the management gave the plaintiff an audition, but she declined to rehearse unless she had a contract signed.

As to the second cause of action—namely, the alleged libel, the matter stood thus. After the plaintiff had signed the contract she proceeded to rehearse, and after the rehearsal she was told by the defendants that they were not going to play her, but that they would pay her. They intimated to her that she ought to look out for something else in order to reduce their liability to pay. Several letters were written to that effect, the defendants' view being

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqrs., Barristers-at-Law.

that the plaintiff was not taking any very active steps to find other work. Finally, before the letter complained of was written, Miss Marbé wrote asking permission to play in certain charity performances, by means of which, although she would not receive any pay, she hoped that she would ultimately get something to do.

The letter complained of was sent to the plaintiff by Mr. Paget, the defendants' general manager, having been handed to his typist to be copied. It contained certain phrases which the Judge below had found to be capable of a defamatory meaning, but he held that it was a privileged document. The question whether there was malice was left to the jury, who, in the result, awarded damages to the plaintiff. Upon the question of libel, he (counsel) submitted that there was no evidence of publication, except to the typist who had copied the letter complained of, and, further, that there was no evidence of malice fit to be left to the jury.

On the question as to the alleged loss of publicity, the jury had found that there was an oral collateral agreement that Miss Marbé should be advertised in a prominent position. He submitted that there had been a misdirection on that point. There was in the written contract nothing which imported an obligation on the part of the defendants to give the plaintiff an opportunity of acting. There was nothing more than an obligation on their part to pay the £100 a week. The added term, namely, to "bill" her in a prominent position when she played, made no difference.

As to the damages awarded for the injury to the plaintiff's reputation, he submitted that they were punitive in their nature. The only damages to which she was entitled were for the loss which she had sustained by not being advertised.

In conclusion, on the question of breach of contract, he desired to sum up his points by saying:—(1) That there was no express obligation upon the defendants to permit the plaintiff to play; (2) that there was no room for implying such an obligation, and that in the absence of such an obligation there could be no right to recover damages for loss of publicity, and (3) that the alleged collateral agreement added nothing to the written contract by way of imposing any obligation upon the defendants, because it was consistent with that contract that it was only when the plaintiff played that they were to advertise her in a prominent position.

Lord Justice Bankes.—This is an appeal from a verdict and judgment in an action tried by Mr. Justice Horridge and a special jury. The action was brought by the plaintiff claiming damages under two heads; one was for libel, and the other was for breach of a contract of employment; and the jury were asked certain questions. They found in the lady's favour on all points, and they awarded her £100 damages in respect of her claim for libel, and £3,000 as damages for the breach of the engagement of which she complained.

A number of points have been taken in this appeal. It is said, first of all, in reference to the claim for damages for libel, that there was no evidence of publication; secondly, that the learned Judge was wrong in refusing to rule at the close of the plaintiff's case that there was no evidence of malice. With regard to the breach of the engagement, it was said that the learned Judge was wrong in law in the construction which he put on the contract, that there was no evidence of the alleged collateral agreement; that there was misdirection on the part of the learned Judge on several points; and that the damages were excessive. I think that that exhausts the points that have been taken.

I must deal with each of those points separately, but it is necessary to introduce what I have to say by referring quite shortly to what the lady's case was. Her case was that she was a lady with an established reputation in America, and that in order to increase her reputation she was anxious to come over to Europe and, if possible, obtain an engagement in one of the leading London theatres, because if an American actor or actress can do that and play a part with success, it has a great influence on his or her success in America. She came over therefore with the object of obtaining an engagement for that purpose, and her case was that she was introduced to those who were responsible for the management of Daly's Theatre, which was a theatre specially suitable to her intentions and desires, and that she did obtain a definite engagement at that theatre to play a definite part in a specified play, and that she had made two stipulations before she would enter into that agreement. The salary offered her was £100 a week, a very substantial salary, but less than she had been obtaining in America. She made two stipulations according to her case; one was that the agreement with her must be completed and signed before there was any rehearsal—that she must have a definite engagement before there was even any attempt at a rehearsal; and the second was that she would secure for herself the certainty of the fullest possible publicity in connexion with her engagement by making a special arrangement in reference to the advertising of her name in connexion with the part; and her case was that she made both those stipulations quite definitely as a condition of being willing to enter into this engagement. That was her case as put to the jury. She went on to say that those matters had been agreed to. The formal agreement was signed, and the collateral agreement in reference to the advertisement was carried out to this extent, that there was a preliminary advertisement of the play advertising her name. The rehearsals commenced, she rehearsed, and she gave full satisfaction, and nothing untoward happened until the day of the dress rehearsal, and on the day of the dress rehearsal she was told that she would not be allowed to play the part, and it was suggested that if she was allowed to carry out her engagement and take the part she would be overshadowing the position of another lady and the other lady was not going to allow it. This reason was definitely given to the lady, and regret was expressed by Mr. Paget, who had to convey that message to her. That was the lady's case as presented to the jury. She was not allowed to act.

Then letters were written by her and by the solicitors representing the defendants. It was suggested, first of all, that in the circumstances, the lady was under some duty to the defendants to try to find an engagement elsewhere. That was a misconception. Then when she did not find an engagement elsewhere the defendants said that she was not endeavouring to find any engagement, that she was amusing herself, and not trying to find an engagement. Then the next thing was what gave rise to the claim for libel. When she wrote to say that it was quite a mistake, and that she was doing her best to get an engagement, an answer came, in substance saying: "Well, the reason of your not getting an engagement is because you have not got the reputation that you profess to have and under which you obtained the engagement from us." In substance, that was a letter which

conveyed the imputation that the lady had obtained her engagement by misrepresentation. That letter was the foundation of the claim for libel.

The matter went on, and the lady did not obtain an engagement. The run of the play commenced in June, 1926, and she commenced her action in August. In the defence to that action the defendants contended that on the construction of the agreement they were not bound to give her any actual employment in the sense that they were not bound to allow her to play this part or any part, and they suggested that the reason why she was not allowed to play the part was that she was not qualified for it, and they defended the action up to quite a late stage on all these grounds. At a late stage they paid into Court the whole of the amount of the lady's salary at the rate agreed for the full run of the play, so that when the action came to be tried the matter stood in this way, that the defendants were not contending that they were not bound to pay the lady's salary for the full run of the play, but they were contending that there had been no libel, and that she was not entitled to any damages for libel, and that she was not entitled to any damages for what is called, putting it shortly, loss of reputation, or, more properly expressed, and more fully expressed, the loss which followed from not obtaining the publicity that she would have obtained if she had been allowed to act.

I think that is a full summary of the lady's case. Of course the defendants' case on the other side was that so far as the promise which was alleged to be a collateral agreement was concerned, the promise had never been made, and that there was nothing in the nature of a contract.

Then the matter came on for trial. I will deal first of all with the question of this libel. It was said in regard to the libel that there was no publication. I need not go into that because on the authorities, I think Mr. Neilson agreed that, at any rate so far as this Court is concerned, this Court would be bound to hold that there was sufficient publication of the libel to found an action for damages for a libel. But he made a strong point that there was no evidence of malice, which was a necessary part of the plaintiff's case, the occasion being privileged. It was said that at the end of the plaintiff's case, the issue of malice being on the plaintiff, there was no evidence of malice. The learned Judge was at that stage asked to rule upon that point, and the defendants say that he ought to have ruled, and that if he had ruled at that stage of the case the plaintiff would have failed on that part of the case, and there would have been an end of it. That particular matter has been before the Court on several occasions, and it has been contended on several occasions that the Judge, when he is asked at the end of the plaintiff's case to rule that there is no evidence in support of that case, is bound to rule at that stage. The answer has been, and I desire to repeat it now, that under the present practice, the Judge has a discretion in the matter; he may rule at that stage or he may not do so. What is often done now is that he says: "I shall not rule until the whole of the evidence has been called." The defendant then has to elect whether he will refrain from calling evidence and stand on his point that there is no sufficient case proved by the plaintiff, or call evidence, and if he does the latter he runs a risk of supplementing the plaintiff's evidence, and giving some evidence which the jury may accept.

Now, Mr. Neilson has truly said that in this case that particular course placed the defendants in a great difficulty as there were two causes of action before the Court, one for libel and the other for breach of contract, because although, if the case were merely confined to the libel, he would have elected to call no evidence, he was obliged to call evidence in order to meet the alleged case of breach of contract. That may be a matter for the Judge to take into consideration when he exercises his discretion, but, in my opinion, it is no ground on which we can say that, in what the learned Judge has done, he has done something that he had no right to do. I think, however, that there was on the plaintiff's own evidence sufficient evidence for a jury to find that in this particular case the letter was written maliciously, and for this reason. The letter suggests that the lady obtained this engagement by misrepresentation, and according to the lady's evidence, Mr. Paget, who signed the letter, told her when she was informed that she could not perform the part that he was extremely sorry that she could not be engaged, and he gave her a reason which was perfectly inconsistent with the suggestion that she had misrepresented what her reputation was. On that ground, therefore, I think on the plaintiff's own evidence, if it were necessary to decide the case on that footing, the case was one which the learned Judge ought to have left to the jury, even if he had ruled at the stage at which he was asked to rule. That disposes of the case in regard to libel.

Now with regard to the other part of the case, so much has been said about these theatrical contracts and implied terms, and the circumstances under which the Court will imply certain terms, that I should like to emphasize what seems to me to be a very clear distinction between two classes of employment. Whether you use the word "engage," or whether you use the word "employ," seems to me to be quite immaterial. There is one class of case in which you may engage or employ a person in a certain well known capacity, if I may use that expression, and in that class of case there may be no implication that although you engage or employ a person in that capacity you will actually give him work to do. Take the ordinary case of domestic service. It is ridiculous to suggest that if you employ a domestic servant, a butler, a cook, or a housemaid, or anybody else, there is an implication that you will give him or her work to do, and what some of the jury may consider sufficient work, and that the domestic may have a cause of action against his or her employer because the employer does not provide enough work to do. That seems ridiculous on the face of it. In the same way with regard to a doctor or a solicitor, you may engage them not for a particular illness, or a particular piece of work, but you may engage or employ them for a certain period. Again it is ridiculous to suggest that if you engage a doctor for a year you are bound to be ill, or that if you are ill you are bound to remain ill in order to give him something to do. The thing is absurd on the face of it, and you can multiply instances of that class of engagement or employment. It is the engagement or employment of a person in a particular capacity. One may give another instance which is conveniently referred to under the well-known expression "retainer." You may retain a person, that is to say, you may have a call on his services, which does not necessarily mean that you will call upon them, but it gives you a right to his services if you desire to utilize them. That is one class of case, and you may multiply instances innumerable in which there can be no implication that you will provide employment for the person.

But there is quite a different class of case altogether, and that is the class of case where there is an implication. You employ a person to do a particular thing—it may be manual work. During the argument I gave the instance of employing a man to clean windows. In my opinion, if I employ a man to clean windows for good consideration and when he comes to my house I say "I will not allow you to do it," I may commit a breach of my contract with him, but the measure of damages in such a case is confined merely to the amount which I should have had to pay him if he had done the work. That particular set of circumstances gives rise to the question what is the proper measure of damages. A definite engagement to do a particular piece of work applies just as much to the engagement of an actor or actress to play a particular part as it does to an engagement or employment of a man to do a particular piece of work. It seems to me that no question of implication arises on the face of the employment. It is expressly to do a particular thing, and if you choose to allow the person to do the particular thing you are not committing a breach of your agreement.

Now, in this case, this lady was in this position The manager engaged her as an artiste to play the part of Lolotte in the play called *Yvonne* from the date June 1, 1926. Nothing can be more express, and nothing can be more definite, and, in my opinion, in the absence of some custom which could be read into this agreement as explaining the language used, the Court has nothing to do except to put the obvious meaning upon very plain language. There is no question of implication that arises; the matter, in my opinion, begins and ends there, and in the events which have happened there was a breach of that agreement. It is said that the lady was told that she was not to play because she was not suited to the part. That may have raised a question which does not arise here, because on the verdict of the jury we must assume that they accepted her statement of the reason why she was not allowed to play, and that it had nothing at all to do with her capacity. Then it is said that the engagement was an engagement to play at such times and at such theatres in the West-End of London as the manager from time to time should direct. It is quite true that the management had a discretion in that matter, and that it was open to them to say what the theatre should be, or what the time should be, but that is not what happened. What happened was that they said to her: "You are not to play at any theatre, or at any time," and there was, therefore, a distinct refusal to carry out the obvious and plain terms of the arrangement to rehearse and play this particular part in this particular play.

The question arises, What would be the measure of damages for the breach of that contract? With that we have not to deal in this particular case. It may be that if there were nothing else in the case but the express terms of this written contract, it may be—I express no opinion about it as it is not necessary—that the measure of damages would be the amount of the salary which she would have earned if she had been allowed to play. But the lady's case is: "You must not only consider the written agreement, but you must consider the circumstances under which it was made," and you must consider what was the collateral agreement which is of importance in reference to this question. On that I should just like to refer to a case to which our attention has not been called, but which is referred to in Mr. Justice McCardie's judgment in *Turpin v. Victoria Palace, Limited* (34 *The Times* L.R., 548; [1918] 2 K.B., 539), in which there was a question not only of collateral agreement, but of theatrical usage, and the possibility of the introduction of custom or usage in the construction of a contract. That is the case of *Newman v. A. and S. Gatti* (24 *The Times* L.R., 18). That was a case where there was an engagement of a lady to play the part of an understudy to a particular named actress, and during the run of the piece the principal lady was unable to play and the understudy then claimed the right under her engagement to play the part. The management refused to allow it. In that case the head-note is: "By a written contract the defendants, who were the managers of a theatre, engaged the plaintiff, who was an actress, for the run of a certain play at the theatre to understudy the principal actress at a certain salary, and the plaintiff agreed not to appear at any place of public entertainment elsewhere during her engagement without the defendants' consent. During the run of the piece the principal actress left the theatre, and the plaintiff claimed the right to play the part, which the defendants refused. In an action to recover damages for breach of the contract, evidence was given on behalf of the defendants that an understudy was not entitled as of right to play the principal's part if the latter was absent. *Held,* upon this evidence and upon the true construction of the contract, that no right was conferred on the plaintiff to play the part, the contract merely imposing on the plaintiff the obligation of playing the part if called upon by the managers to do so."

In that case there was evidence of the theatrical usage or custom in the matter. In giving judgment, Lord Justice Vaughan Williams said (24 *The Times* L.R., at p. 20) that "in his opinion judgment must be entered for the defendants. It was said that there was a collateral contract, and that the question whether there was or was not such a contract was a question for the jury." The collateral contract was that they had promised the lady that she should play the part if the principal lady was not able to do so. "He entirely agreed that that would be so, if there was any evidence of such a contract. In his opinion there was no evidence of any such contract. Sometimes one had a collateral contract, the consideration for which was the entering into the principal contract, as, for instance, when one party said that he would not enter into the contract unless the other party made a collateral contract with him. Another case was where, after the contract had been drawn up, it was seen by one of the parties that the contract did not deal with a particular case which might arise, and the parties agreed to provide for that event. No principle of law would prevent the parties from making such a collateral contract, unless the written contract as drawn up was intended to bind the parties to a complete contract embracing all the terms agreed upon. One had first to see if the contract as entered into was intended to be a complete record of the bargain between the parties. Sometimes, indeed, a statute required a contract to be in writing, and in such a case the whole contract must be in writing. In the case of *Lindley v. Lacey* (17 C.B.N.S., 578), Chief Justice Erle dealt with the first of the instances which he (the Lord Justice) had given above, and Mr. Justice Byles dealt with the second. In the present case, in his opinion, there was no evidence whatever of any collateral contract either of the first or of the second kind. That being so, they had to construe the written contract. They had to see what the word 'understudy' meant. Upon the face of it

it was a term which was used in the theatrical profession, and required explanation. Explanation was given in the evidence at the trial, and all the evidence was one way. It was a word which in the ordinary usage of the stage did not cover the right of the understudy to play the part of the principal actor or actress, his or her obligation and right being simply to be ready to do so if called upon by the management, and there was no right conferred upon the understudy to play the part of the principal in cases where the latter happened to be absent. The plaintiff was under the obligation to play the part if called upon, but she had no right to do so. It was the duty of the learned Judge to construe the contract. It was said that the contract, when properly construed, meant that the plaintiff had a right as understudy to play the part in the absence of Miss May, and in the event of Miss May's going away and it being necessary for another actress to play the part. He (the Lord Justice) did not agree. In his opinion the contract meant that the plaintiff should understudy the part which Miss May was to play. The only reason why he was inclined to think the parties used the words they did, and did not specify the particular part, was because the part which Miss May was going to play was not definitely known. That being so, he did not think that the learned Judge ought to have put to the jury either the question as to the construction of the contract—namely, whether the engagement gave the plaintiff the right to claim the part—or the question whether the defendants undertook that it should." Then he says: "Once the meaning of the word 'understudy' was made clear the construction of the contract was for the Court; and when they construed it it became plain that the right which the plaintiff claimed in the action—namely, to play the part if Miss May was absent, was in no way referred to or contained in the contract. He felt sorry for the plaintiff in this sense that probably she anticipated that, during the run of the piece, she would be allowed to play the part when Miss May was away. Such a clause as that was not introduced into the contract, and the plaintiff could only have succeeded here if she had been able to establish a collateral contract." So upon the evidence, and in view of the language of the contract in that case, it was said that the lady had not the right which she claimed.

Now in this case the lady made it quite plain to the jury, and they accepted her evidence, that she only entered into this contract on the condition that the defendants would comply with her request with regard to publicity, and the jury were asked the question: "Did the defendants agree, in consideration of the plaintiff entering into this agreement, to advertise her in a prominent position?" The answer was "Yes."

So it must be taken that the jury found in the lady's favour that there was this collateral contract, and in my opinion it was the kind of contract which, if established, was admissible in evidence upon the ground upon which collateral and parol contracts are admissible in evidence where the principal contract is admissible. Then with regard to this contract, it is said first of all that it was not an agreement, and the point was made that the learned Judge misdirected the jury on the question whether it was something short of an agreement. As I have pointed out, I do not think that that was an argument which sounded very well on the part of the defendants, but, be that as it may, I am quite satisfied that there was no misdirection on this point by the learned Judge. I do not think there was any misdirection by the learned Judge at all, and I think on several points he put the case more favourably for the defendants than certainly I should feel inclined to do.

But now, to come back to this collateral contract, how far does that affect the question of damages? In my opinion, having regard to the authorities—I do not propose to go through them—it is now, at any rate, sufficiently established that in a case of an employment such as this, of an actor or actress, whose reputation depends on the successful exhibition of their art to the public, where, at any rate, the engagement is accompanied by loss, as is here proved, of publicity, the measure of damages, in such circumstances, includes a right to such damages as the jury may award for what has been called the loss of publicity, or the loss of reputation. I do not propose to go through the authorities, as they have been referred to at length. I think they do establish the proposition that in this class of employment where there is proved, in addition to the mere engagement to play a particular part, some contract which would insure a widespread publicity, and a full opportunity of obtaining the advantages which would follow from a successful performance, the law does recognize as the proper measure of damages whatever a jury may award for this loss of publicity.

That brings me to consider the only point about which I have been troubled, and that is the amount which the lady was awarded—namely, £3,000. It is a very large sum, and, in substance, it is doubling her salary. As I say, it is a very large sum, and what has troubled me principally is to satisfy myself that these damages do not represent, from the jury's point of view, punitive damages, damages which they awarded to punish the defendants because they thought the defendants had not behaved well to the lady. Now, of course, if I were satisfied of that, it would be my duty to say that this verdict could not stand because it is part of the duty of this Court, not to interfere with the jury's function in reference to the amount of damages, but to interfere if the Court thinks that the jury, in fixing the amount, have taken into consideration matters which were not proper matters for their consideration, having regard to the issue which they had to deal with. It is quite plain in this case that, although the jury might have awarded punitive damages in respect of the libel, which they did not do, they had no right to award punitive damages in respect to this loss of reputation, or loss of publicity, which is a mere question of assessing the amount of damages, the money loss which the jury might properly think this lady had sustained by reason of this loss of publicity. The question resolves itself into this: Was there before the jury material on which they could properly arrive at so large a sum based merely on this ground of loss of money by reason of the loss of publicity? What is said is this: that eliminating all other matters, eliminating all matters of prejudice, all matters on which the jury may have felt incensed by the conduct of the defendants, what is left is this, that this lady with an established reputation behind her had been, up to the date of the trial, which was in March of this year, that is to say, for, at any rate, three months after the expiration of her contract, and for the whole time of the run of the play, unable to find any suitable engagement in this country. That, according to her evidence, was the test, and that is also an admission by those representing the defendants that the events which happened would undoubtedly prejudice the lady seriously in obtaining suitable engagements. If one is once satisfied that those were materials properly

before the jury it is impossible to say that they were not entitled to estimate for themselves the length of time for which this disability in their view might last, and this disability might be total, or it might be partial, in the sense that although she might obtain an engagement it would not be at the same salary. Having regard to the large salary which the lady commanded, although the figures are undoubtedly large, it does not seem to me possible to say that they are so large that the jury must necessarily have taken into account matters which were not proper for their consideration on this particular issue.

On these grounds—and I have to deal with the matter fully, as the case has been so fully argued before us, and no doubt it is a matter of importance—I think that this appeal fails, and that no objection at all can be raised to the summing up of the learned Judge. The only point on which I need comment is that in dealing with the contract he might have put the case higher, and dealt with it, not as a case where any implication was necessary, but as a case in which the contract spoke for itself as an express contract.

I think on all grounds the appeal fails and must be dismissed with costs.

Lord Justice Atkin.—I agree. On the question of the libel, as to the objection raised by the defendants, that there was no evidence of malice, the manager of the theatre who wrote the letter said this. I am reading a passage from the evidence merely to point out what the witness said. It is quite clear that the letter means that the representations which the plaintiff had made were not true. He says: "(Q.) You told me: 'Quite sure plaintiff had made no false representations'?—(A.) As far as I know: 'I had no means of proving it': I had no means at all of proving it. (Q.) You had no reason for supposing that she had?—(A.) No. (Q.) If, as you have told me, that letter means that she had made representations which were not true, then the statement was not true, was it, that she had made them?—(A.) No. (Mr. Justice Horridge).—'The statement that she had made representations would, so far as I know, be untrue.'"

It appears to me that there was ample evidence to go to the jury that the defendants' servant who published the letter in fact published the letter, though on a privileged occasion, without an honest belief that the statements made in it were true, and if that is so that appears to me to afford ample evidence of malice, and in this respect I am inclined to think the learned Judge's direction on the question of malice was not sufficiently favourable to the plaintiff. There being ample evidence of malice, and there being no misdirection of which the defendants can complain in that respect the verdict as to libel plainly stands.

The other question is a question which is, no doubt, of great importance to persons who enter into contracts in the theatrical profession, and it is the question whether or not an artiste who is employed to play a part in a particular play is entitled to recover damages beyond the mere loss of the salary to which he or she is entitled under the contract. That has been the subject of discussion now for a period of a good many years, and it appears to me that it is quite plain that there is a distinction to be drawn between different contracts of employment. In the case of *Turner v. Sawdon and Co.* (17 *The Times* L.R., 645; [1901] 2 K.B., 653) the contract was a contract by which certain employers engaged and employed the plaintiff as a representative salesman in their business, and he complained that he had suffered damage because he was not allowed to act as representative salesman, and he claimed damages beyond the salary to which he was entitled, having been wrongfully dismissed. The Court held in that case that in such a contract as that there was no promise by the employer to give the servant the particular class of work mentioned in the contract, or any work, and that all that the employer did was to engage the person to join his staff as a servant, without any obligation to give him work. Such a case was analogous to the ordinary case where a domestic servant is employed, in which case it obviously would be contrary to the intention of the parties that a master should be deemed to be under a promise that the servant should continually be kept on that class of work to which the engagement relates. That is a well-defined class of contract of employment. In that case Lord Justice Stirling pointed out quite plainly that there was another class of contract of employment under which a person might properly give a servant a particular class of work and for breach of which damages beyond the salary might, in the proper circumstances, be recovered. Now there is a series of cases dealing with theatrical engagements, and I think, for myself, that time will not be wasted in going through the cases by way of indicating that the position has, to my mind, been made quite clear that, if you can find a promise to give work in the theatrical profession, then damages may be recovered beyond the ordinary measure of damages. The first case is *Fechter v. Montgomery* (33 Beav., 22), a well known case which did, in fact, raise the question of damages. In that case, the plaintiff, the manager of a London theatre, engaged the defendant, a provincial actor desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject, the Court inferred an engagement on the part of the plaintiff to employ the defendant not to perform elsewhere. The plaintiff having (in the circumstances) delayed the defendant's appearance for five months, the defendant broke his engagement, and went to another theatre. It was held that he had a right so to do, and that the plaintiff was not entitled to an interlocutory injunction to prevent his performing there. In that case, the defendant having expressed a wish that the engagement should be in writing, Mr. Barnett, the plaintiff's stage-manager, wrote to the defendant as follows: "July 28, 1862. Dear Montgomery,—I am directed by Mr. Fechter to offer you an engagement at the Lyceum Theatre for two years, commencing January 1, 1863, at a salary of £7 per week for the first and £10 per week for the second year; it being thoroughly understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter." The learned Judge held that, by reason of the correspondence and conversation that had taken place before the contract was entered into, the contract went further than the written contract itself, and he said that in his opinion it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery during a reasonable time to act at the theatre, and that there was an agreement on the other side that Mr. Montgomery should not perform elsewhere. What happened in that case was that some months went by, Mr. Montgomery was not given a part, and he thereupon engaged himself to play at another theatre. Mr. Fechter, the plaintiff in the case, sought an injunction (against Mr. Montgomery) to restrain him from playing at the other theatre. The defence was: No, you have broken your con-

tract in a material respect, and, therefore, you cannot get an injunction. Sir John Romilly held that that was so, and that there was a breach of contract to give Mr. Montgomery a part, and that, therefore, as there was that breach he was entitled to withdraw from the contract in regard to acting elsewhere.

The next case in this respect is *Grimston v. Cuningham* (10 *The Times* L.R., 81; [1894] 1 Q.B., 125). That is a case which appears to me to be of some value in this connexion. It is a case in which the late Mr. Kendal Grimston (professionally known as Kendal) was proceeding on an American tour, and made an arrangement with the defendant, Mr. Cuningham, the actor. The terms of the agreement were: "I hereby agree to engage with Mr. W. H. Kendal to act as a member of his company on tour in the provinces of Great Britain and Ireland for a period of two weeks, or longer if required, prior to American tour commencing on or about September 4, 1893, at a weekly salary of £6, and to receive full salary for all matinées and usual railway fares. A fortnight's rehearsal to be given prior to commencement of tour. And furthermore, I agree to engage with Mr. W. H. Kendal to act and to understudy as a member of his company, on tour in the United States of America and Canada, for a period of twenty-five weeks, or longer if required, but not to exceed forty weeks, commencing on or about October 9, 1893, at a weekly salary of £10."

The parties proceeded to America, and Mr. Kendal proceeded to produce the play *The Second Mrs. Tanqueray*. The defendant, Mr. Cuningham, was not given a part in it—he was only understudying one of the parts, and he made up his mind that he was not going to get any part at all, and thereupon he threw up his engagement, returned to London, and engaged himself at some other theatre. Mr. Kendal Grimston sought an injunction against him, and obtained it, and the reason why he obtained it was not that there was no obligation to give Mr. Cuningham a part, but that it was within the discretion of the managers to give him a part within a reasonable time, and that a reasonable time had not elapsed. Mr. Justice Wills, in giving the judgment of the Court, said this (at page 131): "In that case (*Fechter v. Montgomery, supra*) the plaintiff was bound to give the defendant a reasonable opportunity of acting, and failed to do so. But a manager cannot be expected to give every actor whom he engages a part in every play which may be produced, and generally to attempt to do so would not be for the benefit of the actor. All that the defendant can be entitled to is to have a reasonable opportunity of acting and understudying, having regard to all the circumstances of the case."

I should like to point out that those are two cases where there had been a general engagement of an actor to appear at a theatre without giving him any particular part, and where the Court held that, nevertheless, there was an obligation on the part of the management to give the actor a reasonable opportunity of acting, though it was not a general engagement, the time and circumstances being at the manager's reasonable discretion.

The next case to which I wish to refer is *Bunning v. Lyric Theatre, Limited* (10 *The Times* L.R., 583). That was a case where the terms of the contract were very general. It was an agreement between the Lyric Theatre of the one part, and Herbert Bunning, musical director, of the other part, by which it was agreed: "The said Herbert Bunning agrees to act as musical director of the orchestra for London, Brighton, or Crystal Palace, in consideration of the management paying him a weekly salary of £8 commencing on October 1, 1892, this salary to be increased by the management to £10 per week on and after April 1, 1893, and to £12 per week on and after October 1, 1894, and to be continued at that rate until October 1, 1895, thus making the total engagement for three years. . . . The above payments are to be on the usual playhouse rules—namely, that salary is paid only for performances which have actually taken place, and that no salary shall be paid for any part of the time of this agreement during which the theatre is closed, the management having the right to close the theatre at any time they think fit. . . . The said Herbert Bunning undertakes faithfully to perform all duties which fall to the lot of the musical director, such as adapting music, composing small additions, &c., all of which duties are included in the above salary. The said Herbert Bunning having had no experience in conducting a theatre orchestra in England, it is agreed that he shall give his services up to October 1 free of charge in order to enable the management to judge as to his capabilities as a musical director. . . . Name to be announced in *Standard* and *Telegraph*, and on bills and programmes."

There had been a complaint because Bunning was not employed as musical director, though his salary had been paid. In giving judgment Mr. Justice Stirling said (10 *The Times* L.R., at p. 584): "It was expressly stipulated that the plaintiff's name should appear as musical director, and what was intended was that such a state of things should exist that the defendants should be in the position truly to make such an announcement, or, in other words, that they should employ him in that capacity." In that case, as they had not employed him in that capacity, the learned Judge granted an injunction, though the salary was in fact paid. In those circumstances it appears to me plain that there is a current of legal authority to the effect that, where the management has, in fact, engaged themselves that a person shall play a part, that is a substantial part of the contract and a term which has to be fulfilled. Lastly, it has been decided that for breach of such engagement you may recover damages in addition to the salary.

Now the only interruption in the general authority, so far as I see, on this point, is the judgment of Mr. Justice McCardie in the case of *Turpin v. Victoria Palace, Limited* (34 *The Times* L.R., 548; [1918] 2 K.B., 539). There the lady, Mrs. Turpin, had entered into a contract in the form of the standard contract at the time, which I think has since been altered, but in what respects I do not know. It is somewhat unfortunate that the report of the case, both in the Law Reports and in *The Times* Law Reports does not set out the material words of the engagement, but it would appear that the plaintiff was engaged to perform at the Victoria Palace at two performances every evening for the period stated in the agreement, and there was in the contract a provision by which the plaintiff was required to send to the defendants particulars of all matters for programmes, billing, and advertisements, and the words of all songs to be used during the engagement, and that there was power given to the management to prohibit any part of the performance which they considered unsuitable or displeasing to the audience, and to require a copy of songs to be forwarded for approval two weeks before being sung. The learned Judge, in a long judgment in which he considered that case, says (at p. 547): "It is essential to inquire whether the

present contract imposes on the defendants any obligation to allow the plaintiff to appear at their music-hall on the dates fixed by the agreement"; and he came to the conclusion that it did not, and I am bound to say that unless there is some special provision in the contract which does not appear in the report, as at present advised, I should not be disposed to agree with that decision, because I should have thought that if a person is engaged to appear in a company at a theatre, without naming any part, or any particular time, he is entitled to have a reasonable opportunity to perform, and I should have thought that it was an *a fortiori* case where he was a person who was engaged to perform at a music-hall for a definite fortnight, and at no other time. My own view would be that such a contract would have no meaning to the artiste unless that artiste had the right to perform subject to the performance being in other respects in conformity with the contract.

My Lord has referred to the interesting case of *Newman v. A. and S. Gatti* (24 *The Times* L.R., 18), where the engagement was of a lady to act as understudy to a named lady in a new play. In that case there was no doubt that the contract had been performed by allowing the lady to understudy. She had understudied the named lady, and the only question was as to the meaning of the contract—whether an engagement to understudy gave the understudy the right to play the part when the principal was not present at the theatre—that was held to be a matter for explanation by theatrical usage, and the Court came to the conclusion that upon the evidence, which they said was all one way, there was no such right in the understudy.

Therefore, the only question that we have to determine here seems to me to be whether this case comes within the class of cases with which I have just been dealing, where the management had, in fact, agreed that the artiste should play a part. It appears to me, on the wording of the agreement, that nothing could be plainer than the express words that the management in this case promised to the artiste that she should play the named part at a particular time, subject to the management fixing the time for rehearsals. I will refer to the words once more. It is "an agreement made between George Edwardes (Daly's Theatre), Limited (hereinafter called the manager), of the one part and Miss Fay Marbé, of the Savoy Hotel, Strand, W.C.2 (hereinafter called the artiste), of the other part, whereby it is agreed as follows: (1) The manager engages the artiste to rehearse and play the part of Lolotte in the play called *Yvonne* from the date of the first rehearsal hereinafter stated at such times and at such theatres in the West End of London as the manager shall from time to time direct, and the artiste accepts the said engagement upon the terms and conditions herein appearing. (2) The said engagement shall be (*a*) for the period of rehearsal hereinafter mentioned and the run of the play. Then it provides: "The period of rehearsal shall commence on June 2, 1926, or not later than one week thereafter and shall end on a date to be determined by the manager." Then it further provides that the engagement shall commence on June 12, 1926. There is a slight inaccuracy in that. What is meant is that the salary will commence then, because the artiste is engaged to rehearse on the terms of the standard contract, which are that artistes who receive a salary of more than a certain amount have to rehearse without any reward, whereas artistes who are remunerated at a lower rate are paid for rehearsals. That appears to me to be a quite definite promise on the part of the management that the artiste named shall play that part. They have no right to offer her any other part, and the artiste could have refused to play any other part. On the other hand, if the artiste had been unwilling or unable to play that particular part, then the management would have been—if she had been unwilling—certainly not bound by the contract, and possibly so if she were actually incompetent. As to that I do not decide. The result seems to me to be that on the contract as it stands, quite apart from any collateral matter, there was a plain obligation on the part of the defendants in this case to allow the plaintiff to play the part of Lolette, and that engagement, if it existed, is admitted to have been broken, and if it was broken it appears to me also to follow that the plaintiff would be entitled to recover damages—namely, such damages as would flow, in addition to the salary, from the fact that she was not allowed to play the part. One has the authority of Lord Justice Stirling—Mr. Justice Stirling as he then was—that the result of that would be that she would be entitled to substantial damages. I think there can be no question but that every artiste certainly would consider that he had suffered damage, and probably every management would have to admit it. But in this case the circumstances are similar to those raised in *Bunning v. Lyric Theatre, Limited* (*supra*). In this case by a collateral contract it was plainly proved that there was, in fact, an express promise to bill the lady and put her in the programme, and, adopting Mr. Justice Stirling's reasoning, that means that the fact must exist which they promised to advertise—namely, that the lady should play the part, and that she should be advertised to play that part. That again makes it quite plain that there was an obligation that she should play the part.

Now the only other question which arises is that in regard to damages. That was a matter for the jury. I am bound to say that for a time I had some doubt about the damages, and it appears to me that they were very substantial, but, on the other hand, the circumstances in this case seem to indicate that the plaintiff has, in fact, suffered very substantial damage from the breach of this contract. It also is to be remembered that she is an American artiste with a high reputation coming to this country desiring to obtain and maintain a substantial English reputation, and she lost that opportunity. She had an engagement at Daly's Theatre, and the management refused to allow her to play. They admitted that the result of that was disastrous, and I think one is entitled to take into account not merely the loss of the reputation, or an enhanced reputation, that she would have had if the contract had been performed, but the injury caused to her existing reputation by the circumstances of the actual breach, and I think this damage must have been well within the contemplation of the parties, because it was contemplated that she should be advertised up to the time of the play. She was advertised up to the time when the play was produced, and then suddenly and unexpectedly she was not played at all. I think that that factor is one to be taken into account as arising immediately out of the circumstances of the breach.

For those reasons it appears to me that there is no need to say that the damages given by the jury are unreasonable and such as no reasonable man could give, and I see no reason for supposing that the jury, in giving them, took into consideration matters that they ought to have disregarded, or omitted matters that they ought to have considered.

The result is that I think this appeal should be dismissed.

Lord Justice Lawrence.—I agree. The solution of the main question on this appeal depends, in my opinion, chiefly, if not entirely, upon the true meaning of the contract between the parties in this case. Many authorities have been cited in which the Court has dealt with the rights of parties under contracts which differ, both in form and in substance, from the contract that we have to consider in the present case. In those circumstances, speaking for myself, I do not find much assistance in construing the contract here.

Now I think it is plain that contracts of employment, speaking broadly, fall under two distinct categories, the first being those contracts in which an employer enters into no greater obligation towards the employee than the payment of his remuneration, and does not engage himself to give the employee active occupation or work. This class of contracts is, perhaps, the more usual. On the other hand, there is the other class of contracts in which the employer engages not only to pay the salary of the person whom he employs, but also to give him the opportunity of actually doing the work for which he engages him. Whether a particular contract falls within the first or the second of these categories depends, in my opinion, entirely upon the express words of the contract, or may depend upon the nature of the employment, or the nature of the remuneration which the employer agrees to give to the person whom he employs.

With these preliminary remarks I turn to the contract in the present case. It is a contract made between the manager of a theatre and an actress to rehearse and play a particular part in a given play. The period of the employment is stated in the contract, and also the commencement of that period. Now it is clear that the contract here is one which provides for an engagement for a period of rehearsal, and for a period of actually acting in the play when produced. The actress accepts that employment, and the manager agrees to pay her a salary of £100 a week from the commencement of the run of the play. In addition to that agreement there is also proved to have been an agreement entered into at the time of the signing of that contract—namely, that the defendants agreed, in consideration of the plaintiff's entering into that agreement, to advertise her in a prominent position. Dealing with the wording of that contract, the first matter to be considered is: What does the word "engage" mean? That is a flexible term, and I think it is not disputed that it is equivalent to the expression "agrees to employ." That may mean simply that the manager agrees to retain the services of the artiste, or it may mean that he agrees to give actual work to be done by the artiste, in other words, afford the artiste an opportunity of acting in accordance with the terms of the agreement. Bearing in mind that this is a contract made with an actress to play a particular part, and bearing in mind that in such a contract the nature of the employment has this element, that it is of importance to the person engaged in his or her profession that such employment should be real, and that he, or she, should be kept in that employment in order to keep herself, or himself, before the public, and bearing further in mind the definite nature of the employment stipulated for between the parties, I have come to the conclusion that the true meaning of the contract is that the defendants agree that the plaintiff shall, if the play is produced, have an opportunity of acting the part of Lolotte in the particular play called *Yvonne* during the run of the play, and that they shall not be entitled only to call upon the actress to act, or not, according to their will and pleasure. It was strenuously contended, both by Mr. Neilson and by Mr. Croom-Johnson, that the words in the first paragraph of the contract, namely, "at such times and at such theatres in the West End of London as the manager shall from time to time direct" operated to give an option to the manager to say whether he would employ her to act in that part or not, in spite of the play being produced, and the run having commenced, at Daly's Theatre. In my opinion that contention is ill founded. Read in conjunction with the rest of the contract, those words, in my judgment, only mean this, that the manager is to have the direction or control of the times at which, and the theatre at which, the rehearsals are to take place, or the play is to be produced, in accordance with the engagement which he has made to employ her. It involves that he may, in so far as is necessary, direct rehearsals at different theatres. It also may mean that if the production of the play takes place first at one theatre, and then at another, he may direct the theatre at which the actress is to act, and also fix the time of the commencement of the performance. It seems to me that it does not mean that he is at liberty to give a direction that she shall not act at all at any time, or at any place. Such a construction would, in my judgment, be inconsistent with the primary obligation contracted for by the parties that the manager was to employ the actress to rehearse and play the particular part. Now it seems to me that if that is the true construction, then the question is not one of enforcing any implied term in a contract, but of enforcing the express terms of the contract between the parties, and it follows from what I have said that there are two distinct obligations entered into by the manager, the one is to pay the salary, and the other is to afford an opportunity to the actress to play her part. It further follows, in my judgment, that there has been a breach of the one term which is material for the purpose of this appeal, that is, the term to employ the actress in acting the part. There has been no breach of the agreement to pay the salary. There has been, as my Lord has said, an additional breach of the collateral agreement. But whether the breach has been of the primary agreement, or of the collateral agreement, there has been a substantial breach of that term. It follows also from what I have said that the jury were entitled to give damages for that breach.

Now as regards the amount of the damages, I agree that they are very large, but after giving full consideration to all the facts, and after reading and considering the summing-up of the learned Judge in the Court below, I find myself unable to say that they are so large as to justify the Court in coming to the conclusion that the jury arrived at that amount on a wrong basis, or that they are so excessive as to show that the jury were in some way misled by the speeches of counsel.

For those reasons I agree that on the question of the breach of contract this appeal must fail, and be dismissed with costs.

The only remaining point is that of the libel, and on that I agree with what has been said by my Lords. It seems to me that in the circumstances of this case the learned Judge exercised a wise discretion in declining to rule at the close of the plaintiff's case that there was no case to go to the jury. It was a matter of discretion for him, and he decided to hear the evidence on the other side. That evidence having

been given, I am clearly of opinion that there was evidence to go to the jury that there was malice in this case, and that the Judge was right in leaving the question of malice to the jury.

In the result the appeal fails on both grounds, and will be dismissed with costs.

[Solicitors—Messrs. Speechly, Mumford, and Craig ; Messrs. Deacon and Co.]

K.B. Div. (McCardie, J.) } 1927. July 29.

MESSAGER v. BRITISH BROADCASTING COMPANY, LIMITED.*

Copyright — Broadcasting — Opera — Music — Performance in public—"Broadcasting" by wireless telephony—Grant by composer of right to perform—Assignment or licence—Whether grant determinable on death—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 1.

By an agreement dated March 23, 1905, the plaintiff granted to G. E. "the sole and exclusive right of representing or performing" in certain areas a play, of the music of which the plaintiff was the composer.

G. E. died in 1915, and in 1920 his executors assigned to a limited company the benefits of copyrights and other rights previously held by G. E.

In October, 1926, the limited company agreed to permit the defendants to "broadcast" by wireless telephony a performance of the opera. The defendants "broadcast" the opera from their studio, to which the public was not admitted.

Held, that the defendants, in doing so, gave a public performance of the opera within section 1 of the Copyright Act, 1911, and that, as the agreement of March 23, 1905, was not an assignment by the plaintiff to G. E. of all his performing rights, but was a licence confined to ordinary performances at a theatre, and of such a personal character as to be determinable on the death of G. E., the defendants had acquired no lawful licence to perform the opera in public and were, therefore, liable in damages to the plaintiff for breach of copyright.

This was an action in which M. André Messager, the musical composer, of 103, Rue Jouffroy, Paris, claimed an injunction to restrain the British Broadcasting Company, Limited, from infringing his copyright in the music of the play, *The Little Michus,* of which he was the composer, and damages for alleged infringement of his copyright.

The defendants denied that M. Messager was the owner of any exclusive right in relation to the performance of the play in public. They admitted broadcasting the play on November 10, 1926, but said that they had the right to do so under a licence which they had acquired.

The Little Michus was produced at Daly's Theatre in 1905 under the following contract between M. Messager, the authors of the play, and the late Mr. George Edwardes :—

Memorandum of Agreement, made this 23rd day of March, One thousand nine hundred and five, between André Messager, Albert Vanloo, and Georges Duval, all of Paris (hereinafter called the "licensors"), of the one part, and George Edwardes, of Daly's Theatre, London (hereinafter called the "licensee"), of the other part. Whereas the said André Messager is composer and the said Albert Vanloo and Georges Duval are the authors of the comic opera in three acts entitled *Les Petites Michus* (hereinafter called "the play"), which expression shall comprise both words and music), and Whereas the licensors have delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned, Now it is hereby agreed as follows :—

1. The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions.

2. The copyright in the music of the play shall remain the property of the said André Messager, and he shall be at liberty to use the English lyrics for sale with the music.

3. The play shall be adapted for the English stage at the expense of the licensee.

4. The licensee shall in consideration of the rights hereby granted pay to the licensors the following royalties or fees :—(*a*) Four per cent. of the gross receipts up to £800 and 6 per cent. of the gross receipts over that amount for London and New York, and half of these amounts for all other towns, with the exception of No. 3, or fit-up, towns, the fees of which are to be one-fourth of London and New York, such fees, in the case of the United Kingdom of Great Britain and Ireland, to be paid weekly, and, in respect of America and the British Colonies and Dominions, monthly.

5. If the play be not produced in London by the said George Edwardes within three months from this date all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors.

6. The licensee agrees not to interpolate into the score any piece or number not composed by the said André Messager without the said André Messager's permission, but the said André Messager agrees to furnish and compose such alterations and additional numbers required for the English version as the said George Edwardes may reasonably require.

7. The said André Messager shall assist at such rehearsals as may be agreed and shall conduct the orchestra on the occasion of the first production of the play at Daly's Theatre aforesaid.

8. Proper books showing the gross receipts of the theatre or theatres at which the said play shall be represented shall be kept by the licensee, and the licensors or their agent duly authorized in writing shall be entitled at all reasonable times to inspect the said books and all vouchers, accounts, and other documents relating to the said receipts so as to enable the licensors to verify the amount of percentage payable to them as aforesaid.

The defendants pleaded that, by this agreement, M. Messager granted to Mr. Edwardes the sole and exclusive right of performing the play in the United Kingdom, America, and the British Empire, and that in October, 1926, George Edwardes (Daly's Theatre), Limited, in whom Mr. Edwardes's rights in the play

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

had become vested after his death in 1915 under an agreement between his executors and the company in May, 1920, had licensed them to perform the play.

M. Messager denied that Mr. Edwardes acquired the broadcasting rights by the agreement of March 23, 1905.

The Hon. S. O. Henn Collins, Mr. A. J. Duhamel, and Mr. K. E. Shelley appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. Trevor Watson for the defendants.

Mr. Henn Collins submitted that the damages suffered by M. Messager were substantial. The play was written for the stage; it was conceived as a whole to be seen on the stage; its music required most careful rehearsal, and it was inconceivable that the defendants could produce it in any way as Mr. Edwardes did. The agreement of March 23, 1905, was only a licence. The personal element in it was so great as to render the rights under it not assignable. Mr. Edwardes was supreme in producing that class of play. M. Messager was intimately concerned in how *The Little Michus* was produced, and he chose Mr. Edwardes to produce it because he trusted him to do his best with it. Such agreements, in which personal qualifications were relied on, had been held not to be assignable. Both M. Messager and Mr. Edwardes were jointly interested in the financial success of the play. The agreement was similar to publishing agreements in the sense that the parties were trusting each other personally. He referred to *Stevens v. Benning* (1 K. and J., 168) and *Hole v. Bradbury* (12 Ch.D., 886).

Other parts of the agreement obviously referred to stage productions of the play alone. If it were an assignment it was limited to rights to produce the play on the stage.

M. Messager, in evidence, said that *The Little Michus* was first produced in 1899 in Paris. He did not give any licence to the British Broadcasting Company, Limited, to broadcast the play on November 10, 1926.

He relied on Mr. Edwardes's reputation and skill when he entered into the contract of March 23, 1905. He thought that Daly's Theatre was the best theatre in London for his play.

Mr. William Boosey, managing director of Messrs. Chappell and Co., said that he heard on his own "wireless" receiving set the broadcast performance of *The Little Michus* on November 10, 1926. The performance lasted from one-and-a-half to two hours, and the play was announced in the programme as being M. Messager's work.

Mr. Shelley.—What effect would that broadcasting have on the value of M. Messager's copyright in the work?—I think that it would have a very damaging effect on his performing rights. The conditions of the performance were such that you could not possibly get a proper idea of the musical value of the work.

The play, explained Mr. Boosey, had obviously been inadequately rehearsed and the performers were not first class.

Sir Duncan Kerly, opening the defence, submitted that M. Messager had parted with the performing rights in his play. When the Copyright Act, 1911, came into operation it created a copyright which extended to cinematograph performances and other mechanical reproductions which probably now included broadcasting or such a performance as was the direct result of broadcasting. In the case of works existing at the time when the Act came into operation copyright was conferred, by section 24 of the Act and the first schedule to it, on the owner of the performing rights in all cases where the performing rights had been separated from the remainder of the copyright. Copyright was, therefore, conferred in the the present case on Mr. George Edwardes and his successors. M. Messager's assignment to Mr. Edwardes of the performing rights in the play was an absolute and out-and-out assignment for all time.

He referred to *British Actors Film Company, Limited v. Glover* (34 *The Times* L.R., 162; [1918] 1 K.B., 299); *Stevens v. Benning* (*supra*); *Taylor v. Neville* (38 L.T., 50); *Barstow v. Terry* ([1924] 2 Ch., 316); and *Falcon v. Famous Players Film Company* (42 *The Times* L.R., 666; [1926] 2 K.B., 474).

The agreement between M. Messager and Mr. Edwardes was not personal. The only reason for suggesting that it was—which would have been a great surprise to both parties—was the fact of the decisions on publishers' contracts.

Mr. Justice McCardie.—It would be a serious thing in the theatrical world if contracts of this sort were held to be personal. So far, they have not been treated as personal and incapable of assignment in the absence of particular provision on that point. The evidence given in *Taylor v. Neville* (*supra*) showed what the practice had been, and it tallies with my experience at the Bar. In these days, when large sums are spent on productions, a man might spend £15,000 or £20,000 on a play and then die, and, if his rights were not assignable, his executors would be unable to continue the performance of the play.

Mr. Cecil Paget, general manager of George Edwardes (Daly's Theatre), Limited, said that, if contracts between authors and managers transferring performing rights were not assignable, no theatrical manager would be able to do business.

Mr. Justice McCardie.—What is your view about the effect of broadcasting theatrical productions?—We have had plays broadcast from Daly's Theatre and it has been very successful. Part of *Yvonne* was broadcast, and so was half-an-hour of *The Blue Mazurka*. We had crowds of people who heard the broadcasting coming to see the original.

But you selected the most attractive parts to be broadcast?—The most amusing parts.

Would you have cared to broadcast the whole of *The Blue Mazurka*?—After we had finished with it we should not have minded doing so.

That means that while a play is running you would not care to broadcast the whole of it?—No, I do not think that I should.

It might satisfy curiosity unduly?—It might.

Mr. Henn Collins, in reply, referred to *In re Jude's Musical Compositions*; *Jude v. Reid Brothers, Limited* (23 *The Times* L.R., 461; [1907] 1 Ch., 651). After he had replied on the construction of the contract of March 23, 1905, and the authorities relied on by counsel for the defendants, he pointed out that under the contract M. Messager granted Mr. Edwardes the "sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions." Even if the defendants acquired that right from George Edwardes (Daly's Theatre), Limited, it must be inferred that their broadcasting was heard outside the area mentioned in the contract—for instance, in France and Germany. Whatever other rights they might have, the defendants were clearly not entitled to perform the play in these countries.

Mr. Trevor Watson said that no evidence had been given that anyone outside the United Kingdom had heard the broadcasting. In any case the place of the performance was in London—and therefore

the play was produced in the United Kingdom—and not where a listener heard it. The sole interest and the intention of the defendants were to broadcast the play to their subscribers in this country. Reception abroad was outside their power of control, owing to the limitations of science, and had nothing whatever to do with them.

MR. JUSTICE MCCARDIE.—New inventions may call for the application of new principles of law or the new application of old principles.

SIR DUNCAN KERLY said that it had never been held, and he thought that it never would be held, that the pilot of an aeroplane could be successfully sued for trespass because he flew over a person's field.

MR. JUSTICE MCCARDIE.—That is a moot point, isn't it? It might be a question of degree.

MR. JUSTICE MCCARDIE read the following considered judgment:—This case raises points of novelty and importance on the intricate subject of copyright law. The plaintiff, M. Messager, is a French subject and a distinguished musician. He is the composer of the well-known comic opera called *The Little Michus*, which was successfully produced at Daly's Theatre in London in the year 1905. He alleges that the defendants, the British Broadcasting Company, infringed his musical copyright in that opera by a wireless performance given by them in November, 1926. Hence his claim for damages. I desire to state at once that the points involved in this action carry no reflection whatever on the good faith or honour of the defendant corporation.

The history of the matter lies within a narrow compass of facts. By a written agreement dated March 23, 1905, the plaintiff and others granted certain rights in the opera *The Little Michus* to Mr. George Edwardes, the well-known theatrical producer and director. Several vital points in the case turn on the wording of that agreement. I, therefore, set it out in full, for it is not of great length.

[HIS LORDSHIP read the agreement as set out above and continued:—] Such was the agreement under which Mr. Edwardes produced the opera in 1905. I assume that clause 2 refers only to the rights of printing and publishing the music for sale. Mr. Edwardes died in 1915, leaving a will. In May, 1920, his executors assigned in writing to a limited company called George Edwardes (Daly's Theatre), Limited, "so far as they lawfully could," the benefit of the contracts referred to in the schedules to the deed and the benefit of "all other copyrights, rights of representation, licences, and the rights (if any) to which the vendors were entitled in connexion with the business of the deceased." In the schedule appeared the following: "No. 13, *The Little Michus*," and other details which I need not now read. In October, 1926, the defendants negotiated with George Edwardes (Daly's Theatre), Limited, for the right to give a broadcast performance of *The Little Michus* and, by letters passing between that company and the defendants, George Edwardes (Daly's Theatre), Limited, agreed to permit a wireless performance by the defendants for £60. The defendants paid the £60 to that company. No step was taken to inform the plaintiff of the intended performance. His assent was never obtained. Pursuant to the permission of George Edwardes (Daly's Theatre), Limited, the defendants gave a broadcast performance of substantially the whole opera on November 10, 1926. This is the alleged infringement.

I will now take in order the points of law which arise, and with respect to each I will state any further facts which may call for mention. The first question is raised by paragraph 4 of the defence, which reads as follows: "The defendants admit that on November 10, 1926, they caused to be performed at their studio at Savoy-hill the music of the comic opera entitled *Les Petites Michus*, and that the said performance was transmitted by wireless telephony. Such performance was not public within the meaning of the Copyright Act, 1911." This contention raises a question of complete novelty which rests upon the words of the Copyright Act, 1911. The material words of section 1 are these: "(2) For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public." If, therefore, the defendants did not on November 10, 1926, give a performance in public, this action fails at once. Now, whether a performance is in public or not must, in my view, depend on the particular circumstances of each case. A purely domestic or private performance will not, as a rule, amount to an infringement of copyright. (See *Duck v. Bates* (13 Q.B.D., 843).) On the other hand, a performance given in a dancing or social club may upon the facts be "public" within the Copyright Act, 1911, although no charge for admission be made. It must be remembered that members together with their guests may constitute a body of persons who would otherwise pay to hear a performance of the piece at a theatre, concert hall, or the like place of entertainment. (See *Harms (Incorporated), Limited v. Martans Club, Limited* (42 *The Times* L.R., 729; [1926] Ch., 870; 43 *The Times* L.R., 21; [1927] 1 Ch., 526).) To hold otherwise would deprive an author or composer of the protection that he may justly claim. Now so far as I am aware no decision has yet been given within the United Kingdom as to broadcasting by wireless telephony. By section 35 of the Copyright Act, 1911, "performance" is defined as meaning "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." Although wireless telephony may not be wholly "mechanical" in the narrow sense of that word, yet I think that the Copyright Act, 1911, extends to that which, though perhaps not definitely in the contemplation of those who framed the Act, yet falls substantially within the wide and embracing words employed in the defining clauses. The principle indicated in *Gambart v. Ball* (14 C.B., N.S., 306) is of assistance. I need not set out the facts in the case, which turn upon the words of early statutes for the protection of artists and engravers. In the course of his judgment (at p. 317) Chief Justice Erle said: "I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time and to such other modes of multiplying copies as the ingenuity of man may from time to time discover." It is, I think, reasonably clear that a person who gives to a public audience a performance made audible and effective to them by means of a receiving instrument in the place where that public is assembled together may be liable for infringement of copyright. In the case now before me, however, the actual performance of *The Little Michus* was given in the defendants' private studio at Savoy-hill, London, by the orchestra and performers engaged by the defendants. The public were not admitted to the studio. Officials and a few friends only were present apart from those who rendered the opera. It was by means of electrical instruments that the defendants, by modulating the waves in the ether, were able to

affect as they intended to affect a vast number of electrical instruments possessed by members of the public and thereby to render audible to that public the performance given within the walls of the defendants' studio. In my view, however, the defendants, in doing what they did, clearly gave a public performance. Instead of gathering the public into a vast assembly room, they set in motion certain ether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act. I have no doubt that the defendants gave a public performance within the principle of *Harms (Incorporated), Limited v. Martans Club, Limited* (*supra*). In Australia, I find, it has been expressly held that broadcasting constituted an infringement of copyright. (See *Chappell and Co., Limited v. Associated Radio Company of Australia, Limited* ([1925] Victoria Law Reports, 350).) The same view has been taken in the United States of America, where the Court, in dealing with the matter, justly said: "Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of rendition than any other medium of performance." (See *Remick and Co. v. American Automobile Accessories Company* (5 Fed. Rep. (2nd series), 411).) I am satisfied that the correct view of the matter has been presented by the learned author of the 6th Edition of Copinger on Copyright at pages 153 to 155. I agree with his lucid observations.

Holding then as I do that the defendants gave a public performance on November 10, 1926, I am, therefore, obliged to consider the second group of questions raised in this action. I need not formulate at length the respective contentions of the parties or analyse in detail the able arguments of counsel on both sides. I can summarize the points at issue in a few words. Briefly put, the defendants contended in substance that the plaintiff, by the agreement of March, 1905, had completely assigned all his performing rights in *The Little Michus* to Mr. George Edwardes with respect to the areas mentioned, that this assignment was free of all limitation, that it left Mr. Edwardes at liberty to assign or licence as he wished, and that the plaintiff was, therefore, unable to sue in this action for the alleged infringement of copyright by the defendants. Exactly the opposite contentions were raised by Mr. Collins for the plaintiff. In substance he submitted that Mr. Edwardes had only obtained a licence of a limited and not assignable character.

Before I deal with the contentions it is necessary to mention three points. First, no question arises here upon the fact that the plaintiff is a French subject. The points dealt with in *Falcon v. Famous Players Film Company, Limited* (42 *The Times* L.R., 666; [1926] 2 K.B., 474) were not again argued. (See also section 29 of the Copyright Act, 1911, and the Orders in Council made thereunder.) Secondly, the agreement between the parties was made six years before the Copyright Act, 1911, was passed. The rights possessed by the plaintiff before that enactment were conferred by the provisions of the Acts of 1833 and 1842. (See Copinger (5th Ed.), pages 12 and 14, and (6th Ed.), page 17.) By the operative effect of section 24 of the Copyright Act, 1911, the plaintiff got the rights substituted by the First Schedule to that Act for such rights as he may have possessed immediately before the passing of the Act. So far as the plaintiff had not parted with them he still had the performing rights in *The Little Michus*. Thirdly, only the owner of copyright can sue for damages. (See Copinger, 6th Ed., p. 166.) But under subsection 3 of section 5 of the Act of 1911 an assignee under a partial assignment of copyright can sue.

Now, three main questions arise upon the agreement of 1905. The first is this: Was it an assignment or a licence? Such a question often gives rise to difficulty, and at the present time it is made none the less easy of solution by the singular breadth of subsection 2 of section 5 of the Copyright Act, 1911. It is important to remember once more, however, that the agreement now in question was made before and not after the passing of this Act. This should be borne in mind when consideration is given to the somewhat debatable decision of Mr. Justice Lush in *British Actors Film Company, Limited v. Glover* (34 *The Times* L.R., 162; [1918] 1 K.B., 299), where the agreement in question was made in 1917. Some of the tests which indicate the distinction between an assignment and a licence are mentioned in Copinger on Copyright (6th Ed.), at pages 113, 114, 167, and 307. The breadth of the agreement in *Falcon v. Famous Players Film Company* (*supra*) and *Barstow v. Terry* ([1924] 2 Ch., 316) should be observed and should be contrasted with the terms of the document before me. Intention must be the ultimate test for deciding whether an agreement is an assignment or a licence, and intention is to be gathered from the document itself and the surrounding circumstances. In my view, the document before me is not an assignment but a licence. If made as an assignment nothing could have been easier than to say so. Throughout the document the words "licensors" and "licensee" are expressly used. There is no mention of the executors or the assigns of Mr. George Edwardes. Express duties are cast upon the licensee; express obligations of a continuing nature are thrown upon him as to royalties and fees. There is no payment of a gross sum and there is no indication of a sale of rights. (See *per* Mr. Justice Fry in *Hole v. Bradbury*, 12 Ch.D., 886.) The whole wording of the agreement is framed on the lines of a licence in particular terms and not on the lines of an assignment. If the document in *Taylor v. Neville* (38 L.T., 50) did not amount to an assignment, as was held by the Court of Appeal, still less is the document before me an assignment. I hold that the document before me is a licence only.

The second question is this: To what extent did the licence to Mr. George Edwardes go? In my opinion, it was a strictly limited licence. It was confined to theatrical representations of the ordinary character at theatres and no other places. It gave no other rights to Mr. George Edwardes. Just as the agreement in *In re Jude's Musical Compositions* (23 *The Times* L.R., 461; [1907] 1 Ch., 651) was held by the Court of Appeal to give only "the sole and exclusive right of printing and publishing the compositions in question in a particular form" (see *per* Lord Alverstone at p. 659, citing *Lucas v. Cooke*, 13 Ch.D., 872), so here the agreement only gave to Mr. George Edwardes the right of performing *The Little Michus* at particular places, namely, theatres. Practically every clause of the agreement points to performances at a theatre and a theatre only. Clauses 4 and 8 point in the clearest manner to performances to be given at a theatre at which proper books are kept so as to enable the plaintiff to secure his just

percentage of the box-office receipts. If, as the defendants contended, the document granted to Mr. Edwardes the right within the specified areas to perform *The Little Michus* as he wished and when he wished, and wholly or in part as he wished, then it would follow that he could perform any part of the opera in a public park, a seaside shelter, or any village concert hall, or even, if he pleased, by means of a street band or a negro troupe. This cannot be so, and I think that it is reasonably clear that all that was granted to Mr. Edwardes was the right to perform the opera as a play and at theatres under normal conditions and so as to fulfil the requirements in particular of clauses 4 and 8. It follows, therefore, that apart from the next point, Mr. George Edwardes, if living in November, 1926, would have had no right to authorize or licence a wireless performance by the defendants.

Thirdly, there is, however, a third and still more serious question, namely, whether or not the agreement of March 23, 1905, ended with the death of Mr. George Edwardes in 1915. That the licence was irrevocable during the life of that gentleman, provided that he observed the terms of the agreement, is, of course, clear. (See *Hurst v. Picture Theatres, Limited* (30 *The Times* L.R., 642 ; [1915] 1 K.B., 1).) The point in this last cited case is, of course, wholly distinct from the point now before me, namely, whether the agreement was personal to Mr. Edwardes or whether his rights under it were assignable. It is, of course, obvious that a contract by an artist to paint a picture, or by an author to write a book, is terminated by death. (See the cases cited on such points in Leake on Contracts, 7th Ed., pp. 874-5.) Contracts which import direct consideration of personal skill and confidence are not assignable, but end with death. This rule has been applied by the Courts in several directions. It has, for example, been held that an agreement by a publisher to publish a book is personal to him and cannot in the absence of express provision be assigned. Striking illustrations of this are to be found in *Stevens v. Benning* (1 K. and J., 168) and *Hole v. Bradbury* (*supra*) *per* Mr. Justice Fry. Still more striking is the decision of Mr. Justice Stirling in *Griffith v. Tower Publishing Company, Limited* (13 *The Times* L.R., 9 ; [1897] 1 Ch., 21), where he held that the principle of *Stevens v. Benning* (*supra*) and *Hole v. Bradbury* (*supra*), which established that a publishing agreement between author and publisher is personal to the individuals entering into it, and that the benefit of such an agreement is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company of publishers. Mr. Justice Stirling there says (13 *The Times* L.R., at p. 10 ; [1897] 1 Ch., at p. 24) : "An author may have confidence in a limited company as well as in an individual publisher. A limited company may have a reputation for producing books in good style and attractive form." Such being the decisions, can I draw any sound distinction between the case of a publisher and the case of a theatrical producer ? In my view no distinction exists. The work of the latter is even more personal than that of the former. It requires an even larger measure of personal experience and instinct, knowledge and skill. Personal qualifications and particular technical experience are essential for successful theatrical production. Mr. George Edwardes was a man of unusual gifts. He held a high and almost unique position in the world of theatrical production. His reputation was world-wide. I have no doubt that M. Messager relied, as he stated in his evidence, on the personal reputation, skill, and ability of Mr. George Edwardes when making his agreement with that gentleman in 1905. The wording of the agreement itself points clearly to the personal character of the respective obligations. There is, as I have already pointed out, no reference whatever to the executors or assigns of Mr. George Edwardes. The first production was to be by Mr. Edwardes alone. (See Clause 5.) Under clause 6 the plaintiff was to furnish such additional numbers as Mr. Edwardes himself might require. The whole agreement is, I think, personal on both sides. That the agreement required the personal first production by Mr. Edwardes is, as I have said, clear, and I think that Mr. Collins is right in his submission that the agreement must be regarded as one and indivisible. I must, therefore, hold that this agreement, resting as it did upon obvious personal considerations, ended with the death of Mr. George Edwardes, and that the benefits of that agreement could not be assigned by the executors of that gentleman. It follows, therefore, that the purported transfer of the benefits of the agreement from the executors to George Edwardes (Daly's Theatre), Limited, in May, 1920, was of no effect, and that the executors were well advised in their cautious wording of the deed. It also follows, therefore, that George Edwardes (Daly's Theatre), Limited, had no power to grant a licence to the defendants in November, 1926, for a wireless performance of *The Little Michus*.

In reaching the above conclusion I do not overlook the evidence of Mr. Paget for the defendants—namely, that licences such as that now in question have been generally regarded by the theatrical world as assignable. Nor do I overlook the passage on page 131 of the recent and excellent treatise by Mr. Sidney Isaacs on "The Law of Theatres, Music Halls, and Cinemas." The distinction, however, must never be forgotten between licences which are independent of personal consideration and those which, as in the present case, directly involve such consideration. The case of *Taylor v. Neville* (*supra*), so far as it touches the present point, must be deemed to turn on special facts and particular evidence and must, moreover, always be weighed in the light of later decisions.

The result of what I have said is that the defendants gave their wireless performance in November, 1926, without lawful licence, and thereby infringed the performing rights in *The Little Michus* which were vested in the plaintiff. I need not, therefore, consider the most interesting further point submitted by Mr. Collins for the plaintiff—namely, that the defendants in any event committed an infringement by giving a public performance abroad by means of their wireless apparatus here acting in unison with the receiving instruments of persons on the Continent and thus outside the regions specified in the agreement of March, 1905.

There remains the question of damages. In such a case as the present the amount of damages is at large. The defendants, as I have said, acted in perfect good faith. Good faith, however, does not relieve them of liability to compensate the plaintiff. The injury done to a composer by a wireless performance will vary with the circumstances. If the whole of a current and popular opera be given by "wireless," much hurt may be inflicted, inasmuch as the curiosity and interest of many thousands of persons may be thereby diminished or satisfied. If a part only of a current and popular opera be given, then the wireless performance, if good, may awaken or stimulate the desire to see and hear the whole of the piece at the theatre where it is running. In the present case the

presentation of *The Little Michus* at Daly's Theatre ceased more than 20 years ago, although it has from time to time been played at minor theatres in the suburbs or provinces. It is true that substantially the whole opera was given by the defendants and that it was heard by several million people, but I doubt, however, whether, apart from the point to which I next refer, the mere performance inflicted any real injury to the value of the plaintiff's performing rights. It was stated, however, by Mr. Boosey, a man of wide experience, in his evidence for the plaintiff, that the performance in November, 1926, by the defendants was not a good one. Substantially, he said that the defendants' performance had a damaging effect on the plaintiff's rights because the conditions of the performance were such that the full musical value and quality of the plaintiff's work could not be presented to those who listened to the performance. He added that not only was the performance not good, but that the rehearsal had obviously been inadequate. In his view, moreover, the wireless performance by the defendants was the worst possible advertisement that a musical play could have. No evidence was led by the defendants in contradiction to that given by Mr. Boosey. I cannot, however, help feeling that Mr. Boosey does not favour wireless performances of music at all. I am bound to state for my own part that I regard broadcasting, taken as a whole, as an enormous and indeed incalculable advantage to the nation. I must weigh the evidence for myself, and I must not forget that those who heard *The Little Michus* in November, 1926, were aware of the disadvantages which may surround a wireless performance, and were also aware of the cast by which and the conditions under which the performance was given. Taking all the relevant considerations into mind, I have come to the conclusion that I should award the sum of £150 as damages to the plaintiff. There must be judgment in the plaintiff's favour for £150 damages, with costs.

[Solicitors—Messrs. Gery and Brooks; Messrs. Steadman, Van Praagh, and Gaylor.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. July 27.

ALLISON v. ALLISON.*

Divorce—Restitution of conjugal rights—Order against husband—Non-compliance—Application by wife for order to secure periodical payments—Reversionary interests of husband—Immediate order to secure—Whether competent—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 187.

Where a husband refuses to comply with an order for the restitution of conjugal rights, and the wife applies for an order on the husband to secure periodical payments to her for their joint lives, the Court has no power to order the husband to secure a part of his reversionary interests, unless and until it comes into possession or he sells them.

This was an appeal by a husband from a Registrar's order. The Registrar directed the husband, who had refused to comply with an order for the restitution of conjugal rights, to secure to his wife for their joint lives £120 per annum *plus* one-third of the income to be received by him from his reversionary interests under a will.

Mr. Noel Middleton and Mr. Harold R. Barker appeared for the wife, the petitioner; Mr. H. B. Durley Grazebrook for the husband.

Mr. Justice Hill, in his considered judgment, said that the wife obtained a decree of restitution of conjugal rights on January 24, 1927. She petitioned the Court for an order on the husband to secure during the joint lives of her husband and herself such periodical payments for the maintenance of herself and her children and for the education of the children as seemed just.

The Registrar ordered that the husband should secure to the wife during the joint lives £120 per annum, less tax, payable monthly, *plus* one-third of the income to be received by him from his reversionary interests under the will of his late father.

Both parties were dissatisfied with the order as to the amount, but the husband further contended (1) that, having regard to a settlement made on May 21, 1924, the petitioner was precluded from asking for any sum for maintenance beyond the income agreed under the settlement; (2) that the Registrar had no power to direct the husband to secure to the petitioner during the joint lives one-third of the income from the reversionary interests.

Those two contentions raised points of principle. As to the first, the settlement, which was made in contemplation of a resumption of cohabitation, provided that the income of the trust fund should be paid to the wife during her life,

"such income to be expended by the wife so long as she and the settlor shall continue to reside together in or towards the joint upkeep of their establishment, and for pin money and dress allowance of the wife but should the settlor and the wife hereafter live apart, the wife shall be entitled to receive and use such income in or towards the maintenance of herself and her child or children, as the case may be."

Then followed provisions about what was to be done after the death of the wife. He could not read into the settlement an agreement by the wife to limit her claim to maintenance to the income of the trust fund. He rejected the husband's contention on that point.

The second contention raised a more difficult question—namely, whether, in proceedings in respect of disobedience to a decree of restitution of conjugal rights, there was power to order an immediate dealing with the reversionary interests of the husband by making him secure to the wife a part of that reversionary interest. Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, empowered the Court to make an order for alimony on a decree of restitution of conjugal rights. Section 187, the relevant section, empowered the Court to order the husband to secure to the wife periodical payments, and section 196 gave power to vary those payments. But the periodical payment must first be fixed before an order could be made to secure it. That was inconsistent with a power to order the immediate securing of prospective periodical payments which were uncertain in amount and which might hereafter be ordered.

His Lordship cited a passage from the judgment of Sir Samuel Evans in *Tangye v. Tangye* (30 *The Times* L.R., 649; [1914] P., 201), which was decided on section 2 of the Matrimonial Causes Act, 1884, now section 187 of the Act of 1925, and said that he thought that Sir Samuel Evans meant that the

* Reported by William Latey, Esq., Barrister-at-Law.

order for securing payment could not be made until the reversionary interest came into possession or was sold, and that it could then be made in conjunction with an increase in the periodical payments. That accorded in principle with the difference which the Court had always considered to exist between decrees putting an end to the marriage and decrees which did not put an end to the marriage. A decree for restitution of conjugal rights must always be made on the assumption that it would some day be obeyed, and the arrangements made were properly tentative and alterable from time to time; whereas, when a marriage was finally declared null or was dissolved, it was more natural that some permanent arrangement should be made.

The result was in the present case that the order for periodical payments was properly made, but the direction that the husband should now secure any proportion of his reversionary interests must be omitted.

His Lordship referred back to the Registrar the questions of the annual payment to be made to the wife and of the provision for the children. The question of costs would be reserved.

On the application of Mr. Grazebrook, leave was given to appeal.

[Solicitors—Messrs. Johnson, Weatherall, Sturt, and Hardy; Messrs. Stokes and Stokes, for Messrs. Criddle, Ord, and Muckle, Newcastle-upon-Tyne.]

K.B. Div. (Salter, J.) 1927. July 22.

SALISBURY AND FORDINGBRIDGE DISTRICT DRAINAGE BOARD v. SOUTHERN TANNING COMPANY (1920), LIMITED.*

Land Drainage—Statutory body—Power to remove obstruction—No finding of justices—Trespass—Prescription—Right of action—Land Drainage Act, 1861 (24 and 25 Vict., c. 133), ss. 16 to 20, 33.

The plaintiffs were a statutory body of drainage commissioners, and the defendants were the owners of a mill with a tumbling bay or weir adjoining it. The defendants, as the plaintiffs alleged (and as the jury found to a lesser extent) raised the weir to a greater height than they were entitled to, with the result that adjoining meadows were flooded. The plaintiffs pulled down the alleged enhancement, and the defendants replaced it. In an action by the plaintiffs for an injunction to restrain the defendants from enhancing the weir, the defendants counterclaimed for trespass.

Held, (1) that the plaintiffs not having obtained a finding of two justices as required by s. 18 of the Land Drainage Act, 1861, were not entitled to remove the alleged enhancement and the defendants were entitled to succeed on the counterclaim; (2) that the plaintiffs had no proprietary rights entitling them to sue; (3) that in the absence of any valid order made by them under s. 33 of the Land Drainage Act, 1861, the plaintiffs had no right of action in respect of obstruction of their statutory duties. *Quære,* if they had made an order under s. 33 whether they would still have had to comply with the procedure laid down by ss. 16 to 20 of the same Act.

This was the further consideration of an action tried before Mr. Justice Salter and a special jury at Winchester Assizes.

The facts appear from the judgment.

Mr. Holman Gregory, K.C., and Mr. A. H. Armstrong appeared for the plaintiffs; Mr. du Parcq, K.C., and Mr. E. H. C. Wethered for the defendants.

Mr. Justice Salter.—This action raises a question of some importance with regard to the right of drainage boards and commissioners of sewers to bring actions in respect of alleged obstructions to the drainage within their districts. The action was heard before me, with a Special Jury, at the last Winchester Assizes. The defence, among other things, alleged that the statement of claim disclosed no cause of action by the plaintiffs against the defendants. It was agreed that the wiser plan would be to reserve that question, to assume for the moment that there was a cause of action, and to try with the aid of a jury the issues of fact which were raised by the pleadings. The complaint made was, in substance, that the defendants, who are the owners and occupiers of a water mill on the River Avon at Downton, in order to obtain the maximum of power for their wheels, kept their mill-pond at a greater depth than that at which they were entitled to keep it, and they thereby caused the irrigation meadows, the water meadows immediately above the mill-pond, to become to some extent, and in the lower parts, waterlogged, because the irrigation of these meadows was rendered less efficient by reason of the height at which the water was kept in the mill-pond; and it was said that the defendants had caused this improper height of the water in the mill-pond by maintaining the weir, which, together with the hatches, regulated the height of the water in the mill-pond, at too great a height. There was opposite this weir, upon an old brick wall on the other side of the river, an old mark, obviously an old water-mark, and there was at the mill another mark—namely, a peg driven into the wall near the point at which the water entered the mill to turn the wheels. The contention of the plaintiffs was that the defendants were not entitled to keep the water above the old water-mark—that is, of course, so far as the flow of water was under their control; that they were not entitled by means of the height of their weir, or by manipulation of their hatches, to keep the water at a greater height than that mark. The defendants, on the other hand, said that the mark by which they were entitled to regulate the height of the water in the mill-pond was the peg to which I have referred, and there was a great difference between the heights of the old mark and of the peg. In the result the jury found that the defendants had acquired by prescription by constant user for 20 years a right to have the water in their mill-pond at a height which was greater than that shown by the mark, but less than that indicated by the peg: that is to say, they found that the defendants had exceeded their rights, but that their rights were greater than the plaintiffs claimed that they were. The questions which were put to the jury and answered by them, questions which were shown to counsel and approved by them before I summed up, were four in number. "(1). Was the present depth of water (*i.e.,* up to the peg, 118ft. 8 2/5th inches above

* Reported by J. W. Hall, Esq., Barrister-at-Law.

ordnance datum) actually enjoyed by the defendants and their predecessors as of right without interruption from 1905 to 1925 ? "—those were the 20 years before action brought. Answer : "No." "(2) Was any depth of water greater than is shown by the bench mark "—that is the old mark to which I have referred —" (118ft. and a quarter of an inch above ordnance datum) actually enjoyed by the defendants and their predecessors as of right without interruption from 1905 to 1925 ? " Answer : "Yes." "If Yes, what depth ? " Answer : "118ft. 2¼in. ; 4in. above the masonry crest." Those are two ways of answering the question and of indicating the height of water to which, in the opinion of the jury, the defendants had a prescriptive right to dam the river. Then : "(3) Is the present depth of water injurious to the drainage of the meadows above the weir ? " Answer : "Yes." "(4) Did the defendants at some time between 1922 and 1924 increase the height of the weir ? " Answer: "Yes." That question, I think, was put because of a conflict of evidence upon that point, but for the present purposes I think that the first three questions and answers are material. The result is that whereas the defendants claimed that they were entitled to a depth up to 118ft. 8 2/5in. above ordnance datum, the plaintiffs alleged that all that they were entitled to was 118ft. ¼in. above ordnance datum ; the jury found that they were entitled to a height of 118ft. 2¼in.—that is to say, 2¼in. more than the plaintiffs said, and some 6in. or thereabouts lower than the defendants claimed. That was the verdict of the jury on the issues of fact raised on the pleadings.

The question now arises whether the plaintiffs have, or whether they proved in this case, a right to bring this action against the defendants, whether they showed as against the defendants a cause of action for any part of the relief claimed. The plaintiffs are a Drainage Board, a corporate body constituted by the Salisbury and Fordingbridge Drainage Order of 1923, under the Land Drainage Acts, 1861 and 1918, and this mill, the mill-pond and the river at this point, are within the plaintiffs' drainage district. The defendants, as I have said, are the owners and occupiers of the mill ; they are not using it for its ancient purposes of a corn mill, but they are using it to provide electric light for their tannery and other industrial purposes.

Now the statement of claim alleges in paragraph 3 : "In or about or shortly prior to the month of February, 1923, or alternatively at some date unknown to the plaintiffs but between that month and the month of April, 1925, the defendants without just cause or excuse unlawfully raised or enhanced the crest or head of the said tumbling bay or weir 5/16 inches by adding or fixing thereto on the top thereof cement and concrete and/or a plank and posts (hereinafter called the enhancement) and thereby increased the said tumbling bay or weir and unlawfully obstructed the said river and created a nuisance therein." Then the statement of claim goes on to say that by a certain letter and by a subsequent written notice the plaintiffs had called upon the defendants to remove or pull down the enhancement, that the defendants did not do so, and thereupon the plaintiffs entered upon the land of the defendants and themselves removed the enhancement, that the defendants restored it, that the plaintiffs again removed it, and that the defendants again restored it. Then it is alleged in paragraph 7 : "The enhancement holds back the water in the said river and causes and will cause the same to percolate through the banks thereof and to flood the water meadows adjacent thereto and causes and/or will cause 'washouts' or 'blowouts' in the banks and overtopping of the banks by water from the said river and will interfere with the duty of the plaintiffs effectively to drain and will prevent them from draining their said district and will put them to additional expense therein and will reduce the rateable value of their said district whereby the plaintiffs have suffered and will suffer loss and damage." The relief claimed was: "An injunction to restrain the defendants their servants or agents from erecting or re-erecting any planks posts timbers enhancement or obstruction upon or of or on the crest or head of the said tumbling bay or weir on the north side of land adjoining Wild Weir Hatches situate on the west side of the River Avon near Downton Mill in the county of Wilts within the jurisdiction of the plaintiffs." Secondly : "An injunction to restrain the defendants from interfering by their agent or agents with the due performance and carrying out by the plaintiffs of their duties as such Drainage Board at the said tumbling bay or weir." Then thirdly : "A mandatory injunction upon the defendants to remove or pull down the enhancement of the said weir so as to reduce the same to a level of 117.86ft. above ordnance datum," and damages.

Now to that statement of claim the defendants pleaded (but it is not necessary to go into the defence in detail) that there was no cause of action shown, and that the plaintiffs had no legal right to bring this action against them ; they said that no Order under section 33 of the Land Drainage Act of 1861 had been made, or was alleged to have been made, and that without such Order the plaintiffs could not sue ; they further relied upon sections 17 to 21 of the Land Drainage Act of 1861, and said that the effect of reducing the weir would be to impair the water power of the mill, and that the plaintiffs had no right to bring this action, at any rate, until it had been determined by a jury that what they had done was an injury to the drainage of the district. Then they pleaded : "The said tumbling bay or weir had existed from time immemorial or alternatively for 40 years or alternatively for 20 years at the same height, at which height it had been maintained by the defendants and their predecessors in title for keeping up the level of the water for the purposes of their said mill, and the defendants have a right at common law and/or under the Prescription Act, 1832, to the maintenance of the said tumbling bay or weir at such height or in the alternative they have the right to do so until the plaintiffs have obtained a decision under and taken the steps mentioned in sections 17, 18, 19, and 20 of the Land Drainage Act, 1861." They further contended that they were entitled to a judicial determination by the plaintiffs, and that no judicial determination had ever taken place, relying on section 63 of the Act of 1861, and they counterclaimed that the plaintiffs had entered upon their property and had interfered with this weir by pulling away the upper part of it. The reply admitted that no order had been made under section 33 of the Act, and paragraph 3 of the reply is in these terms : "The plaintiffs admit that the said tumbling bay or weir (whereby the level of the water is raised for milling and other purposes of profit as alleged) has existed for 40 years at the least but not at the same height and they further admit for the purposes of this action only that if the same has been maintained at the same height as alleged in paragraph 5 of the amended defence (which is denied) the defendants have the rights claimed by them in paragraphs 5 and 6 of the amended defence and that there was no such judicial determination.

Paragraphs 2 and 3 of the amended claim are repeated," that is to say, that if this height had been maintained from time immemorial or for 40 years or for 20 years, the defendants had the rights claimed by them in paragraphs 5 and 6 of the amended defence. That I understand to be the right to a judicial decision. Now those are the pleadings.

The Land Drainage Act of 1861 under which the plaintiff board exists and is empowered, provides for two methods by which the Board may deal with and cause the removal of that which is in fact an obstruction to the drainage of its district. The first of those powers is by way of actual physical removal, the second is by way of judicial decision and order. The first method, actual removal, as regards mills and matters of that kind, is regulated by sections 16 to 20 of the Act, and those sections give the authority power to remove obstructions to the drainage of their district, but such right is subject to the restrictions which immediately follow section 16, and which form sections 17, 18, 19, and 20. Those sections provide that there is to be no interference with mills or with the damming up of water for milling purposes and profit unless upon the verdict of two justices at petty sessions, and that the authorities must obtain the verdict of two justices first (I am not quoting the exact words of the Act because it is not necessary), that the removal of the alleged obstruction is necessary for the efficient drainage of the district, and next that any damage or injury caused to the millowner by such a removal is of a kind which can be fully compensated in money. Unless a finding can be obtained from the justices upon both those grounds, there is no right to remove the obstruction, and if a finding on both those points can be obtained from the justices, then compensation has to be assessed. When those findings have been obtained, then the amount of compensation must be determined, and then upon payment of that compensation, the authority have a right to remove the obstruction. That is the method provided for its removal. The other method is under section 33. The Commissioners of Sewers have acted for the most part with a jury, but on some matters they were entitled to act without a jury. Section 33 of the Act of 1861 provided : "Commissioners of Sewers, acting within their jurisdiction, may, without the presentment of a jury, make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with such presentment ; subject to this proviso, that any person aggrieved by any such order made by the Commissioners without the presentment of a jury may appeal therefrom in manner hereinafter mentioned." Whether the Commissioners of Sewers could enforce the removal of an obstruction when the obstruction was a new weir, by making an order under section 33, and whether, if either the miller did not appeal to quarter sessions or quarter sessions upheld the order, they would then be entitled to remove the weir without the proceedings contemplated in sections 17 to 20 as to compensation, it is not necessary to determine ; but this is the second method provided by the Act to enable the Commissioners to carry out their duties and to remove obstructions. Now the plaintiffs in this case intended to proceed under section 33, they intended to make an order under that section, and when they brought this action they were under the impression they had made an order under that section and they so pleaded. Paragraph 5 as it originally stood was as follows : "By an order dated the 12th August, 1925, and duly served on the defendants upon the same day the plaintiffs in exercise of their statutory powers under section 33 of the Land Drainage Act, 1861, in that behalf ordered and directed the defendants within 14 days from the date thereof to remove or pull down the enhancement of the said tumbling bay or weir so as to reduce the same to a level of 117.86ft. above ordnance datum." The action was brought to enforce, as was thought, obedience to an order. Whether if they had made an order an action would have been a proper way of enforcing obedience to it, or *the* proper way, need not now be considered. In fact they had made no order. The defendants were so advised and applied for a writ of *certiorari* on two grounds as I remember, because I was a member of the Divisional Court which considered the matter. The grounds were that this was not an order in matter or form, and that in any case it was invalid as an order in that one of the Commissioners who had taken part in making it had an interest in the matter. It is unnecessary to deal further with that matter, because when the matter came before the Divisional Court, it was admitted on behalf of the plaintiffs that this was not an order, and it was agreed that the pleadings should be amended so as to contain an express admission that no order had been made under section 33 or at all, and upon that the Court made no order on the motion for the rule except as to costs, and the pleadings were amended accordingly.

Now upon the pleadings as they stand, I have to consider and I think it will be convenient to consider first the question which is much the shortest and simplest, whether it was a trespass, as alleged in the counterclaim, for the plaintiffs to go, as they did upon more than one occasion, on the lands of the defendants and forcibly to remove a portion of this weir. If the plaintiffs had a right to remove the weir, then of course it was no trespass ; if they had no right it was a trespass, and therefore the question is whether they had a right to remove the weir.

Now that brings me to section 16 of the Act of 1861 : "The powers of Commissioners of Sewers acting within their jurisdiction shall extend to the following acts." Then the section gives them power to cleanse, repair and maintain existing things, to deepen, widen, straighten, or otherwise improve existing things, and, thirdly, to make new things for the purpose of maintaining and improving the drainage of their district. Then there are four provisos, the last of which is : "That the exercise of the foregoing powers shall be subject to the restrictions hereinafter mentioned," those are restrictions (I have already referred to them) which gave to the millowner certain rights because they are restrictions which relate to any "mill-dam, weir, or other like obstruction whereby the level of the water is raised for any milling or other purpose of profit" ; the thing is an obstruction, but it is an obstruction of that particular kind ; they are not entitled to remove or otherwise interfere with any "weir or other like obstruction whereby the level of the water is raised for any milling or other purpose of profit"—that is this case—"so as to injuriously affect the supply of water"—that is this case—"otherwise than with the consent of the owner of such mill-dam, weir, or other like obstruction"—no such consent was obtained—"until the following things have been done," that is to say, the miller has the protection of the finding of the justices.

Now in my opinion the meaning of those sections 16 to 20 is quite clear, when you are dealing with a mill-dam, or weir of this kind, and they give to the

authority no power in any way to interfere with any such weir as this except after the intervention and decision of justices as there provided. In my opinion the Act of 1861 gave no power to the plaintiffs to do what they did, that is to say, without conducting any judicial inquiry or obtaining the sanction of any justices to come upon the lands of the defendants and interfere with their property.

Section 60 of the Act provides that the powers given by this Act are "in addition to and not in derogation of any other powers conferred on Commissioners of Sewers by Act of Parliament, law, or custom," and "Commissioners of Sewers may exercise such other powers in the same manner as if this Act had not passed." Therefore, if the plaintiffs who are, and have the powers of, Commissioners of Sewers, could, before the Act of 1861, lawfully have done what they did in this case, it was no trespass for them to do what was done. With regard to that I can only say that I have not found any power under earlier statutes, nor any authority for saying that they had at common law any right to go upon the lands of the defendants and interfere with this property in the circumstances in which they did so. For these reasons I think that it was a trespass, and the counterclaim succeeds ; if I am right, the damages were agreed at £10.

Now I come to a matter which is, I think, more difficult, and that is the right to sue, that is to say, not the right to sue in the abstract, but the right to bring this action against these defendants, that is, whether the statement of claim alleges, and whether the evidence proved, a legal right on the part of the plaintiffs to any part of the relief claimed.

Now it is obviously necessary to look first and see what this action is. Is it to be regarded as an action brought by the plaintiffs in virtue of proprietary rights by them in the meadows and banks alleged to be injured and threatened ? We know that the proprietor of one of these meadows immediately above the weir was to some extent injured by the undue height at which the water was being kept, and might have brought an action against the millers, his neighbours, and have obtained damages, or an injunction or both, and that a 20 years' prescription, if the defendants could have proved it, would have been a good defence as between them and the plaintiff. It would then be shown that his meadow had become servient to the dominant tenement of the mill, and that he could no longer complain of the injury done to his meadow by reason of the fact that the water in the mill-pond was kept at a level to which the millers had become entitled from long user, openly and as of right. Now is this an action brought upon that footing ? Is it an action brought upon the footing that the plaintiffs have and are entitled to exercise rights in respect of these meadows on this mill-pond, which are the same as those which the owner of the injured meadow could exercise, so that unless a prescriptive right to dam the river to this extent can be proved they would have a right to cause the obstruction at the weir to be lowered ; is it an action of that kind, or is it an action brought by a public authority to prevent interference with a dam in the discharge of their public duties, or to enforce the removal of something which is in fact an obstruction to the efficient drainage of their district ? That, it seems to me, would be an action of an entirely different kind, and one has to consider, first, which of those two kinds of action it is. Now it seems to me quite clear upon the pleadings that this was intended to be and is an action of the former kind, and it was so conducted and so fought for some four days ; it is an action complaining of injury to the meadows above and to the banks which separate the water from those meadows. It was said that the water was kept to such a height as to interfere with the drainage of the meadows, and that the banks which kept it from flooding the meadows were being injured, and the water was making its way over the meadows, and the defence raised was prescription. Now it appears to me that if this were an action to prevent an interference with the plaintiffs in the discharge of their public duties, or an action to enforce the removal of something which was obstructing the general drainage of the district, any question of prescription would be perfectly immaterial. It is true that there is an allegation here that the water had been kept to this depth from time immemorial. The jury did not so find and were not so asked to find. This is an old mill, no doubt a very old mill ; it used to belong to the Bishops of Winchester, and it doubtless has been there for centuries, but that is not the point. The point is whether the maintenance of the water at this depth has been maintained for 20 years, 40 years, or from time immemorial. No attempt was made to show that it had been so maintained for 40 years, and certainly no attempt was made to show that it had been so maintained from time immemorial ; indeed, the evidence all went to show that, if any right had accrued to keep it at the full height which the defendants claimed, it was a user for not more than 20 years, or very little more than 20 years, and the dispute before the jury turned on whether or not a 20 years' prescription was made out. With regard to the existence of the obstruction complained of in this case, the weir, from time immemorial, I do not profess completely to understand the principle of the decision in the case of the Monmouth Weir, which is reported in Callis, Third Edition, page 310 ; there the Commissioners having taken all proper proceedings to remove the weir, or some such obstruction which was in the River Severn in their district, it was held that they had no right to remove it because the mill was an ancient mill which had existed from time immemorial. I will suppose that that means that the things complained of had existed from time immemorial. I do not myself understand on what principle that would deprive the plaintiffs of their statutory right, or relieve them from their statutory duty of removing a thing which was in fact an obstruction to the drainage of their district, but it is not necessary to go further into that, because here there was no suggestion at all that this obstruction, the weir as complained of, and the depth of water resulting, were things which had existed from time immemorial. They had existed not very much more than, if so long as, 20 years. Prescription was pleaded, it was the defence relied upon ; 20 years' prescription was the matter fought before the jury, and, moreover, it was admitted in the reply : "That if the same has been maintained at the same height as alleged in paragraph 5 of the amended defence (which is denied)," that is to say, maintained for more than 20 years, "the defendants have the right claimed by them in paragraphs 5 and 6," that is, a right to succeed in this action ; so it is admitted on the pleadings that 20 years' prescription, if made out, is a good defence to this action.

Now that seems to me to show quite clearly that this is an action upon the footing that the plaintiffs are entitled to exercise the same rights as the rights

of adjoining riparian proprietors, otherwise 20 years' prescription could not be any defence against them. Moreover, the evidence was entirely the evidence which is always brought in cases between adjoining riparian proprietors where prescription is set up, evidence of old inhabitants and persons who have known the place for many years, evidence of continuous user, evidence of interruption, and evidence of objection made, and so forth. Now dealing with the action as an action of that kind (I am going to deal with it afterwards as an action of the other kind), but supposing that I ought to treat it as being an action based upon proprietary right, have the plaintiffs any proprietary right to support such an action, have they any such right in or vesting of the meadows which have been injured or in the bed of the stream, or in the banks which keep the water from flooding on to the meadows, have they any such vesting or proprietary rights in those things as would entitle them to bring this action? Now in the case of *Duke of Newcastle and Others v. Clark* (8 Taunton, 602), the Commissioners of Sewers were seeking to bring trespass in respect of their own works, things which they had themselves made, and paid for. It was held that they had no right to sue, and this decision resulted, I should think not unnaturally, in section 47 of the Sewers Act of 1833. That section declares that the property in certain lands, tenements, hereditaments, buildings, erections, works, and so forth shall be vested in the Commissioners of Sewers. Now the meaning of that section came before the Court of Appeal in *Stracey v. Nelson* (12 M. and W., 535), and that Court, perhaps (if one may presume to say so) slightly straining the actual wording of the section in order to give effect to the obvious intention of Parliament, decided that the meaning of that section was that it vested in the Commissioners of Sewers their own works and their own property and no more. In the case of *Crossman v. Bristol and South Wales Union Railway Company* (11 W.R., 981), there was a pebble beach in the River Severn which was under the jurisdiction of Commissioners of Sewers, which was an extremely valuable beach as a protection against the sea, and as a protection to navigation, and the Commissioners had always refused all applications to remove any part of it. An application was made to them by the defendant railway company to remove some of it, and was refused; thereupon the railway company took it away without leave, and the Commissioners brought an action, and obtained an interim injunction. What relief exactly was claimed does not, I think, appear from the report, and there is nothing to show what became of the case; the Court was only concerned with an interim injunction; it was a very strong and special case indeed, and in those circumstances, *Stracey v. Nelson* (*supra*) not apparently having been quoted, an interim injunction was granted.

In the case of *Nesbitt v. Mablethorpe Urban District Council* ([1917] 2 K.B., 568), before Mr. Justice Bailhache, and ([1918] 2 K.B., 1), in the Court of Appeal, the Courts followed *Stracey v. Nelson* (*supra*) in construing the meaning of this section 47. I have no doubt at all in this state of the authorities that I ought to follow *Stracey v. Nelson* (*supra*) and *Nesbitt v. Mablethorpe Urban District Council* (*supra*), and to hold that this section does not vest this weir, or these banks, or the body of the stream, or these meadows, or any part of them, in the plaintiffs, so as to give them any proprietary rights, and it is to be observed that the statement of claim does not allege any vesting in the plaintiffs of any of those things, or that the plaintiffs have any property in any of those things. Therefore, if this is to be treated, as I think it must be treated in its form and on the evidence, as an action based upon proprietary right, I think that no cause of action was alleged or proved.

Now I will consider the matter upon the footing that this case can be treated as a case in which the plaintiffs are alleging a cause of action apart from any right of property. It is said that they have a right to sue given to them by section 16 of the Act of 1861. The side note is: "Declaration of powers of Commissioners"—"The powers of Commissioners of Sewers acting within their jurisdiction shall extend to the following acts: (1) To cleansing, repairing or otherwise maintaining in a due state of efficiency, any existing watercourse," and so forth. "(2) To deepening, widening, straightening, or otherwise improving any existing watercourse or outfall for water, or removing mill-dams, weirs, or other obstructions to watercourses, or outfalls for water, or raising, widening, or otherwise altering any existing wall or other defence against water," and so forth. "(3) To making any new watercourse or new outfall for water, or erecting any new defence against water, to erecting any machinery," and so forth. Now in my opinion that is a section which is confined to works; it is confined to acts which they may do to keep in good order, to improve and to add to existing physical things which may be in their districts; it is not in my opinion a section which confers any right to bring actions which was not in existence before; and in the next place I think that even if it does give a right to bring an action, it gives that right subject, so far as a mill dam and works are concerned, to sections 17, 18, 19, and 20, and that if it gives any right to sue to enforce the removal of a mill dam it only gives that right after the steps contemplated in sections 17 to 20 have been duly taken. If that section does not give a right to bring an action, was there any right existing before that Act? If there was, then the plaintiffs may enjoy it. Now with regard to that, I think that the absence of precedents of actions, I will not say of this kind, but of actions such as this case might have been if the pleadings had been differently drawn, and the evidence differently directed, the absence of all such cases is very strong to show that there did not exist in the Commissioners of Sewers a right to bring an action of this kind to enforce, without any previous steps, the removal of an alleged obstruction to the drainage of the district. In *Duke of Newcastle v. Clark* (*supra*), which was an exceedingly strong case and a decision which had to be corrected by legislation, Mr. Justice Burrough said: "My Lord Chief Justice has truly observed that, as there has been no instance of such an action, it is a strong presumption, under the circumstances of this case, that no such action could be maintained." There is the decision of Vice-Chancellor Wood in the case of *Crossman v. Bristol and South Wales Union Railway Company* (*supra*), but upon all the authorities I think that that is not a decision on which I ought to found my judgment in this case. I can find no reported case which can fairly be said to be an action brought by Commissioners of Sewers without any previous proceedings to enforce the removal of an obstruction to the drainage of their district. The Commissioners or Justices are a Court of Record, they are armed with ample powers for the removal of obstructions, and for the discharge of all their duties, and I do not think that it was intended that they should bring actions, I will not say in a case

like this, but in a case such as this might have been.

With regard to the highways cases to which it has been suggested there is an analogy, I think there is no analogy ; in the case of highways there is a statutory vesting of the highway itself in the highway authority, and, moreover, the obstruction of the highway is a public nuisance. I do not find in these pleadings any allegation of a public nuisance, and certainly I think there is no evidence to support such an allegation. The case of *Bagshaw v. Buxton Local Board of Health* (1 Ch.D., 220) is certainly a remarkable case. That action was brought before the statutory vesting of highways. The judgment was given after such statutory vesting ; it was a most exceptional case. The Master of the Rolls was dealing with an equitable remedy, and all that he said was that in the circumstances of that case he would not interfere to restrain a public authority from removing a thing which he found to be a nuisance. There is nothing in that case, or in any of the highway cases, to alter the view which I have taken on this matter.

Then there is the gas case, *London County Council v. South Metropolitan Gas Company* (20 *The Times* L.R., 83 ; [1904] 1 Ch., 76), where there was a series of statutes which authorized the predecessors of the London County Council to make a daily inspection at the office of the South Metropolitan Gas Company ; it had been customary to make those inspections on the six working days of the week, and not on Sundays. The London County Council claimed that they had a right, and therefore a duty, to make the inspections seven days in the week. The defendants differed from that reading, and refused to admit the inspectors on Sundays, and thereupon the London County Council brought an action ; it was held that they were entitled to do so ; they brought an action for a declaration as to the meaning of the statute. That was a case in which they were being obstructed in the exercise of their public duties, and, further, it was a case in which it was necessary to obtain the decision of the Court somehow or other as to the meaning of the statute. In this case there is no allegation and there is no proof of any obstruction by the defendants of the plaintiffs in the exercise of their public duties. The only thing that the plaintiffs did was to trespass on the premises of the defendants and to resist that trespass was no obstruction of them in the discharge of their duties, nor does any question with regard to that arise for the decision of the Court as to the meaning of the statute. I think therefore there is nothing in that case.

In this case no declaration is claimed, and there is no allegation, as I say, of interference with the plaintiffs in the discharge of their duties. Therefore, I come to this conclusion : That if this had been an action in which the plaintiffs ought to have alleged and proved that this was a public nuisance, I do not think that they alleged it, and certainly they did not prove it ; if it had been an action in which they ought to have alleged and proved that this was an obstruction to the general drainage of their district, I do not think they alleged that, and they certainly did not prove it ; but if this had been an action of that kind, and if the thing in question had not been a mill dam, I do not propose to express an opinion, although I doubt very much whether such an action could be brought, except after proceedings under sections 16 to 20, or section 33 ; but this is a mill dam, and, therefore, I will not express any opinion as to what the rights of the parties might have been if it had not been a mill dam, but, as it is a mill dam, I am clearly of opinion that the plaintiffs if they had alleged and could have proved the matters to which I refer, a public nuisance or obstruction to the general drainage of the district, would not have been entitled to bring an action for an injunction except after proceedings under sections 16 to 20, or section 33. As I said just now, I should think it would be very arguable whether they could succeed under section 33 in the case of a mill dam without giving the defendants the rights which are given by sections 16 to 20, but it is unnecessary to consider that. On this part of the case, as to the right of a drainage board to sue without any previous steps for the removal of something which was said to be an obstruction to the drainage of their district, I will refer to the observations of Lord Justice Romer in *Devonport Corporation v. Tozer* (19 *The Times* L.R., 257 ; [1903] 1 Ch., 759, at p. 764). The plaintiffs were a municipal corporation and the defendants were erecting certain houses at Devonport, which the plaintiffs said infringed the by-laws, and they sued, and they claimed an injunction and declaration that they were entitled to pull down and remove the work ; the by-laws, which were framed under the Public Health Act of 1875 and prescribed a penalty for infringement, to be recovered by summary proceedings, provided that the plaintiffs might remove and pull down the work. It was held that they had in those circumstances no right to sue, and Lord Justice Romer made some general observations to which I wish to refer : "The decision of Mr. Justice Joyce on the question of whether this action would lie without the Attorney-General being a party, appears to me to be a perfectly right decision. It is to be borne in mind that the plaintiffs here have no proprietary rights which are being interfered with by what is being done by the defendants. The plaintiffs, no doubt, have powers conferred upon them to make by-laws, but that alone gives them no special rights over other bodies, or other members of the public, as to initiating proceedings to enforce those by-laws. Such powers as the plaintiffs, the public body, have to enforce by by-laws, must be conferred upon them by special powers given to them by statute, and, in fact, you do find special powers here given ; and, except in so far as special powers are given, they have no inherent right to take proceedings. And I think it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings, such as these, at their own will. The fact that you do find a special power given to a public body, such as the plaintiffs, to initiate proceedings at law, or in equity, in certain special cases, is an additional proof that the Legislature never contemplated that, apart from special legislative permission, they should have a right to take any proceedings they might think fit for the purpose of enforcing the by-laws, apart from the special power conferred upon them by statute." I think that those observations as general observations are very material in this case. The result is that, in my opinion, the plaintiffs have never alleged or proved any cause of action against the defendants for any part of the relief claimed, that the action therefore fails, the counterclaim succeeds, and I must enter judgment in the action for the defendants, and on the counterclaim for the sum of £10.

[Solicitors—Messrs. Woodcock, Ryland, and Parker, for Messrs. Louch and Son, Langport ; Messrs. Torr and Co., for Messrs. Osborne, Ward, Vassall, Abbot and Co., Bristol.]

Court of Appeal. (Bankes, Atkin, and Lawrence, L.JJ.) 1927. July 26.

CONTINENTAL CONTRACTORS, LIMITED v. MEDWAY OIL AND STORAGE COMPANY, LIMITED.*

Practice—Costs—Taxation—Claim and counterclaim—Dismissal of both, with costs—Apportionment of costs.

Where in an action there are both a claim and a counterclaim arising out of the same contract, and, except with regard to the amount of the respective damages, all the substantial contentions on either side are common to both claim and counterclaim and judgment is given for the defendant, with costs, on the claim, and for the plaintiff, with costs, on the counterclaim, the costs of the litigation must be apportioned between the parties, and it is for the Taxing Master in his discretion to say what in his opinion is a fair apportionment as between the plaintiff and the defendant.

Christie v. Platt ([1921] 2 K.B., 17) approved and followed.

Wilson v. Walters ([1926] 1 K.B., 511) dissented from.

This was an appeal from an order of Mr. Justice MacKinnon. The question raised was with regard to the taxation of costs in an action where there were both a claim and a counterclaim, and where an order was made giving the defendants the costs of the claim and the plaintiffs the costs of the counterclaim.

It was an action by sellers against buyers claiming damages for repudiating a contract to take delivery of a large quantity of oil. The amount claimed was £62,000. The plaintiffs alleged that the original contract time for delivery had been extended at the request of the buyers because the tanks of the latter were not ready to take all the oil. The defendants denied that any extension of time had been asked for or given, and they counterclaimed £46,000 damages, asserting that breaches of contract on the part of the plaintiffs justified them in putting an end to the contract. The defendants raised on their counterclaim substantially the same matters that they had alleged as a defence, and the plaintiffs raised in defence to the counterclaim substantially the same matters as they alleged in reply to the defence, and all the substantial contentions on either side were common to both claim and counterclaim.

The Judge who tried the action dismissed both claim and counterclaim, and gave the costs of the claim to the defendants and the costs of the counterclaim to the plaintiffs.

On taxation, the Taxing Master held that the costs of certain issues were attributable to the claim and those of other issues were attributable to the counterclaim and taxed the costs accordingly. On appeal, Mr. Justice MacKinnon ordered re-taxation, as he differed from the Taxing Master with regard to the issues which were attributable to the claim and those which were attributable to the counterclaim. From this order an appeal was brought to the Court of Appeal.

Mr. Cyril Atkinson, K.C., and Mr. Roland Burrows appeared for the appellants; and Mr. van den Berg for the respondents.

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

Lord Justice Bankes.—This appeal from an order of Mr. Justice MacKinnon raises the much debated question how the costs should be taxed in cases where orders have been made for payment of the costs of the claim by one of the parties to the action and of the counterclaim by the other party. The question in the present case does not really turn on what the rule in such cases is, but as the authorities on the point have been cited and discussed, I will express my opinion on the question quite shortly.

In his judgment in the recent case of *Wilson v. Walters* ([1926] 1 K.B., 511) Lord Justice Scrutton refers with approval to the judgment of Lord Justice O'Connor in the Irish case of *James Crean and Son, Limited v. M'Millan* ([1922] 2 I.R., 105). There is in that judgment much which is instructive, though I am not prepared to accept all that the Lord Justice says. There is, however, one passage in his judgment and one in the judgment of Lord Justice Andrews, with both of which I cordially agree. The first passage is where Lord Justice O'Connor in criticizing Mr. Justice Fry's view in *Saner v. Bilton* (11 Ch.D., 416), that the principle on which a taxation should proceed is rested on expediency, says that he prefers to speak of it as resting on justice. The other passage is where Lord Justice Andrews, in referring to the case of *Christie v. Platt* ([1921] 2 K.B., 17), says that that case only illustrates the absurdity of trying to lay down any one rule which must govern all cases.

The perusal of the judgments in *James Crean and Son, Limited v. M'Millan* (*supra*) as well as other judgments in which all the decisions on this particular question of taxation have been reviewed drives me to the conclusion that the path leading to justice is obscured by the number of these decisions, and the variety of judicial opinions on the point, and that a clear way to arriving at the desired result will be found by concentrating on the view expressed by Lord Justice Atkin in *Christie v. Platt* (*supra*), namely, that what the Master has to ascertain is what costs have in truth and fact been incurred by the one party and by the other to whom costs have been awarded.

This cannot, in my opinion, be ascertained by any rigid application of a principle or a formula applicable to all cases. Each case must be separately examined and all the circumstances involved in the fighting of the issues must be examined as well as the mere issues themselves. As an illustration, I will refer to a case that was put during the arguments in the case of *Hilliard v. Dugon* (unreported, Court of Appeal, June 18, 1926). It was said, take the case of a collision between two motor vehicles. Both drivers were injured, the one only slightly, the other very seriously—the respective insurance companies had taken the matter up and each had instructed its solicitors to take proceedings. The solicitors for the insurance company interested in the case of the driver only slightly injured were the first to commence proceedings, and the less injured driver consequently became plaintiff in the action. Both claim and counterclaim were dismissed with costs. In support of so much of the plaintiff's claim as related to the extent of his personal injuries it would have been necessary to call only his own medical man, a general practitioner, but in view of the very serious nature of the counterclaim it was essential to be provided with the opinion of specialists of position and standing. As these gentlemen had to be present at the trial they were called as witnesses for the plaintiff in support of his case and the services of

his own medical man were dispensed with. On taxation no attention ought, in my opinion, to be given to the fact that one of the two parties happened to be plaintiff, nor ought the fees of these specialists, if justice is to be done, to be treated as solely occasioned by the claim or solely occasioned by the counterclaim, but a fair adjustment should be made which, if I was acting as Taxing Master, would be by treating a small portion of the costs of these witnesses, or possibly of one of them, as costs of the claim and a substantial portion as costs of the counterclaim. This view is, I think, in accordance, not only with the decision in *Christie v. Platt* (*supra*), but with the unreported case of *Hilliard v. Dugon* (*supra*), both of which were cases in this Court, and which, therefore, we must follow.

There is, in my opinion, in the decision of *Wilson v. Walters* ([1926] 1 K.B., 511), having regard to the facts of that case, nothing which is inconsistent with the above-mentioned decisions in this Court, but if in the judgments there are passages which appear to be inconsistent with the decision in *Christie v. Platt* (*supra*), it is the latter decision which must prevail.

I pass now to consider what is the real difficulty in the present case, namely, to arrive at what, for the purposes of a just taxation, were the issues in the present case. For this purpose, as I shall indicate later, it does not appear to me that the question what from the pleading point of view were the issues in the action, is an infallible guide to what costs should be allowed. The substance of the main claim in the action by sellers against buyers was for damages for repudiating a contract to take delivery of a large quantity of oil within the original contract time, that time having been extended at the request of the buyers because their tanks were not sufficiently completed to take the oil. The subsidiary claim was for breach of an agreement to take from the plaintiffs all the oil that the defendants required. By their defence, the defendants denied that any extension of time had been asked for or given and they counterclaimed for damages, asserting that breaches of contract on the part of the plaintiffs justified their putting an end to the contract. By their reply the plaintiffs, for the first time in their pleadings, set up as a justification for the non-fulfilment of their contract the alleged failure to provide tankage accommodation. They also, in the amended reply, for the first time, set up as an answer to the defendants' counterclaim a failure on the part of the defendants to give the guarantee required by the contract.

The action was tried by Mr. Justice MacKinnon. He dismissed both the claim and the counterclaim with costs.

As he explained when the matter was brought before him on a later occasion, he dismissed the counterclaim, not because the defendants had been in any default in carrying out the terms of their contract, but because they had suffered no damage, having been enabled to supply themselves with oil at a less price than the contract price. Whether in these circumstances judgment should have been entered for the plaintiffs on the counterclaim is not now in question. The order of the learned Judge dismissing the counterclaim with costs, though challenged both in this Court and in the House of Lords, was not seriously criticized in either place and it stands and must be accepted as a direction as to how the costs are to be taxed.

Both before the learned Judge and in this Court the matter has been treated as one in which four issues, or points of controversy, were raised: (1) Whether there was an agreement to extend the time for the delivery of the oil; (2) whether the tanks of the defendants were ready to receive the oil at the contract dates of delivery; (3) the questions which were involved in regard to the giving of the guarantee; and (4) the question of the alleged arrangement with the suppliers to the plaintiffs whereby the plaintiffs were prevented from obtaining the oil.

The Master has treated the whole of the costs incurred under the last three heads as solely attributable to the counterclaim and has taxed the bills accordingly, allowing to the plaintiffs as their costs of the counterclaim and cross-appeal £2,033 4s. 4d., and to the defendants as their costs of the claim £913 15s. 8d., and of the appeal £409 4s. 5d., together £1,323 0s. 1d. Against this taxation the defendants appealed, alleging that the taxation had proceeded upon a wrong principle and that as the successful parties in the action it was unjust that on balance they should be called upon to pay the plaintiffs any such amount as £700, that sum being the difference between the amount allowed to the plaintiffs and the amount allowed to them.

The appeal came before Mr. Justice MacKinnon, and he directed a re-taxation of the costs. From this order the present appeal is made.

The points on which the Judge differed from the Master were that he considered that the question under heads 3 and 4 arose solely upon the claim, whereas the Master had treated them, as well as the question under head 2, as arising solely upon the counterclaim, and he considered that the question under head 2 was common to both claim and counterclaim, but in reference to the latter he considered that no apportionment should be made.

With respect to both the Master and the Judge I cannot agree with the view of either of them. In considering what the real contest between the parties under each of these heads was, I do not think that justice can be done except by treating the costs of the litigation under each head as costs which must be apportioned if the order as to costs is to be complied with. For these reasons I think that the order for a re-taxation must stand, but it must be in accordance with the judgment of this Court, and the order of Mr. Justice MacKinnon must be varied accordingly. As the appellants have succeeded they must have the costs of the appeal and before the Judge. It will be for the Taxing Master in his discretion to say what, in his opinion, is a fair apportionment as between the two parties of the various items falling under these several heads.

Lord Justice Atkin.—In this case judgment was eventually entered for the defendants on the claim with costs, and for the plaintiffs on the counterclaim with costs. It appears to me that the provisions of Order LXV., rule 2, do not apply: that no separate issues in fact and law were raised upon claim or counterclaim decided for either party so as to produce an event other than the final event, the failure of both claim and counterclaim. Moreover, if *Bush v. Rogers* ([1915] 1 K.B., 707) is to be treated as an authority that the provisions of that rule can only be brought into effect by an order of the trial Judge defining the issues, it is plain that the learned Judge did not make an order at the trial, or thereafter, if thereafter he had any jurisdiction to do so. I think therefore that the learned Master was correct in his general answer to the objections in assuming the complete defeat of each party in respect of his affirmative claims. This, however, leaves open the question whether there were costs incurred over matters which were common to both

claim and counterclaim, and if so upon whom such costs should fall. The pleadings seem to disclose the following contentions :—1. The plaintiffs sued for £62,000 damages for breach of a contract to take oil, alleging an oral agreement to extend the first date of delivery to March 15, 1924, relying upon an alleged repudiation in writing, dated February 18, 1924. 2. The defendants denied the oral extension of the time and relied upon a fundamental breach by the plaintiffs, namely, a failure to deliver any oil by February 15. 3. The plaintiffs in reply said that they had committed no breach on February 15, because (*a*) the time was extended as originally alleged, (*b*) the defendants had committed a breach of a condition precedent, namely, a condition that they would provide on request a banker's guarantee ; and that the defendants were not ready and willing to take delivery on February 15, for their tanks were not ready on that date to receive the oil. Those seem to me to be the matters raised on the claim. The defendants counterclaimed on their part against the plaintiffs for £46,000 damages for breach of the same contract in not delivering the oil. They raised on their counterclaim the same matters that they had alleged as a defence, and the plaintiffs raised in defence to their counterclaim the oral extension of the time and the other matters that they had alleged in reply to the defence. In addition they raised for the first time in their defence to the counterclaim a suggestion that the defendants had themselves procured the plaintiffs' inability, if any, to deliver the oil by collusion with the plaintiffs' suppliers. At the hearing this matter was also treated as matter of reply to the defence. In the result it appears to me that there were a substantial claim and a substantial counterclaim arising out of the same contract, and that except as to the amount of the respective damages, all the substantial contentions on either side were common to both claim and counterclaim.

The question arises how the costs are to be taxed on a judgment which gives the costs of the claim to the defendants and the costs of the counterclaim to the plaintiffs. This point as to the costs of items common to claim and counterclaim arose in the Court of Appeal in *Christie v. Platt* ([1921] 2 K.B., 17). There the plaintiff sued for rent of a furnished house ; the defendant raised as a defence the contention that it was uninhabitable and repeated the allegation by way of counterclaim and claimed damages. The question whether it was uninhabitable was therefore common to claim and counterclaim. It was not a good plea in law to the claim, but that in itself is obviously no reason for not awarding costs to a plaintiff who incurs costs in resisting it. The plaintiff succeeded with costs on the claim for rent not otherwise disputed, and the defendant succeeded with costs on the counterclaim for damages exceeding the rent. The Master had allowed the plaintiff £214 costs and the defendant £3. He had taxed the costs, as he said, on the footing that he had to inquire whether the item would have been reasonable had there been no counterclaim ; and as to the costs of the counterclaim he had inquired, is this an item which was incurred by reason of the counterclaim ? He came to the conclusion that the whole of the witnesses were called for the defence, and their allowances were not increased by the counterclaim. They would have been necessary if there had been no counterclaim. Lord Justice Younger and myself considered all the cases on the topic of taxation of costs common to claim and counterclaim. We were aware that there had been conflicting decisions and *dicta* in the Courts of first instance and the Court of Appeal, and we had in mind in particular the decision of Lord Justice Lindley and Lord Justice Chitty, in *Atlas Metal Company v. Miller* ([1898] 2 Q.B., 500), which appeared to be an authoritative statement of the practice. As a result we came to the conclusion expressed in the judgment in that case, holding that the Master was wrong in principle and remitting the case for taxation. I have nothing to vary in that judgment, which appears to be binding upon the Court of Appeal. Since that case there has been decided by a Divisional Court, consisting of Lord Justices Scrutton and Sargant, the case of *Wilson v. Walters* ([1926] 1 K.B., 511). The judgments in that case distinguish *Christie v. Platt* (*supra*), but I am unable to reconcile the two decisions. It appears to me that the later case applies principles which were intentionally discarded in *Christie v. Platt* (*supra*) as working in practice the injustice complained of in that case. The case of *Christie v. Platt* (*supra*) was under discussion in the Irish Courts in *James Crean and Son, Limited v. M'Millan* ([1922] 2 I.R., 105). That was a case where the plaintiffs sued for the price of goods bargained and sold and for £346 damages for non-acceptance, and the defendant counterclaimed for £57 damages for non-delivery, the claim and counterclaim turning upon investigation of the same facts. Both the plaintiffs and the defendant failed. The Master in taxing had given the defendant all the general costs of the action and had only given the plaintiffs such costs as were incurred solely by reason of the counterclaim, and had allowed none of the costs that would have been incurred if there were no counterclaim, and allowed altogether only £5. It appears that in the proofs and brief for the plaintiffs there was no mention of the counterclaim or any instructions as to the damages of the counterclaim. The result of the taxation was therefore apparently in accord with the principle laid down in *Christie v. Platt* (*supra*). But I cannot agree with some of the judgments delivered, notably so much of the judgment of Lord Justice O'Connor as appears to approve the application of the rule in *Saner v. Bilton* (11 Ch.D., 416). I prefer the judgment of the late Lord Justice Bowen, and would accept as substantially correct the first three principles laid down by Lord Justice Andrews with the exception of the last words, " or where both claim and counterclaim arise out of the one transaction and in effect raise the same issue."

By reason of the later cases I will add a few words to what I said in *Christie v. Platt* (*supra*). The question is in every case what are the costs reasonably occasioned by the claim, what are the costs reasonably occasioned by the counterclaim. The plaintiff in an action bases his claim on the allegation that a certain event, or events, occurred ; for example, that the defendant was negligent or broke his contract ; presumably he is from the commencement of the action prepared to prove the event as he alleges. The defendant meets the claim by saying that the alleged events did not occur, but goes on to say that the real events were that the plaintiff was negligent or broke the contract, and the defendant counterclaims. The same evidence is relevant on both contentions. It appears to me that after the counterclaim is put in the plaintiff is in a different position. On claim alone he had to incur expense to support his claim ; with counterclaim delivered he has to incur expense to resist his opponent's claim. The claim involves recoupment of loss, the counterclaim exposes him to further loss, possibly affecting his whole fortune. The determination of the event has a double interest to him, and in seeking to prove it the expense which he incurs is occasioned not by the claim alone or by

the counterclaim alone, but by both. It appears to me wrong, both in law and in fact, to say that when a man sues for £62,000 and is sued in counterclaim for £46,000, and the event is to be determined by consideration of the same evidence, he incurs all the cost of evidence because of the claim. It seems to me that obviously he incurs the cost because of both; in other words, the costs are occasioned by both. And it is quite irrelevant as to such costs to consider what he would have incurred if there had been no counterclaim, that is, with no other cause operating. The result of the rule now laid down is that where there is a substantial counterclaim involving common evidence, the Master will apportion. But "apportion" does not necessarily mean "divide into equal moieties." He will decide how much in fact should be attributed to the claim, how much to the counterclaim. Nor does this rule preclude him in appropriate cases from finding that all the costs, or substantially all, have been in truth and in fact occasioned by claim or counterclaim. Some counterclaims are merely intended to be consequential upon the defence, as where there is a defence of fraud and there is a counterclaim for delivery up of the document or for a declaration of non-liability. Some counterclaims have no substance, as in *James Crean and Son, Limited v. M'Millan* (*supra*). In other cases the Master has grounds for concluding that all the costs were, in fact, incurred in meeting the claim, as in the case of *Hilliard v. Dugon* (unreported), decided on June 18, 1926, in this Court. The opposing principle seems to give to an order for costs of the counterclaim the same effect as though a counterclaim were an issue in an action in respect of which an order was made in the terms of Order LXV., rule 2. The reason given by Lord Justice Fry in *Saner v. Bilton* (*supra*), that the plaintiff is to be regarded as letting loose the waters of litigation, and, therefore, if unsuccessful is to be in a worse position than an unsuccessful counterclaimant, appears to me, with respect, to be unsatisfactory. I see no reason for inflicting punishment on anyone, for bringing a *bona fide* dispute before the Courts, in excess of his obligation to pay the costs actually occasioned to his opponent, and, if the question were really material who began the litigation, it would often be found that the effective cause was the defendant, and that the plaintiff's writ was due to his having won the race to be first in the contest brought about by the defendant.

It follows that the principles adopted by both Master and Judge cannot be approved, and the case must be remitted for taxation on the lines laid down in this Court. The plaintiffs should have their costs here and before the Judge.

Lord Justice Lawrence.—This appeal raises once again the vexed question what is the proper principle of taxation in cases where the plaintiff has failed in his claim and the defendant has failed in his counterclaim and the Court has dismissed both the action and the counterclaim with costs.

It is apparent from the authorities that there is no consensus of judicial opinion on this question, and the Taxing Masters may well be in doubt as to the right principle to apply. There appear to me to be three divergent views, in support of each of which authority may be found either in actual decisions or in judicial *dicta*. Speaking for myself I find it impossible to reconcile all the decisions and *dicta*. Although I propose to confine my judgment to the principles applicable to cases in which the Court has dismissed the action and the counterclaim with costs, the same principles, in my opinion, apply conversely to cases in which both parties have succeeded, and the Court has ordered the defendant to pay the costs of the action and the plaintiff to pay the costs of the counterclaim.

The first view is that the proper principle of taxation is to treat the counterclaim as being in effect a cross-action and to allow to the defendant the costs which he had in fact incurred in defending the action as if there had been no counterclaim, and to allow to the plaintiff the costs which he had in fact incurred in resisting the counterclaim as if there had been no action. (For example, see *Atlas Metal Co. v. Miller* ([1898] 2 Q.B. 500), and *Christie v. Platt* ([1921] 2 K.B. 17).

The second view is that the proper principle of taxation is to allow to the defendant the costs of the action as if there had been no counterclaim, and to allow to the plaintiff only the extra costs occasioned by the counterclaim, that is to say, only the amount by which his costs of action had been increased by the counterclaim. (For example see *Saner v. Bilton* (11 Ch.D., 416) and *Wilson v. Walters* ([1926] 1 K.B. 511).

And the third view is that the proper principle of taxation is a combination of the two previously mentioned principles, viz., that if the counterclaim raises a separate and substantial question the first of the above mentioned principles is the proper principle of taxation, whereas if the subject-matter of the counterclaim is substantially the same as the defence, or part of the defence, the second of the above principles is the proper principle of taxation. (See *James Crean and Son, Limited v. M'Millan* ([1922] 2 I.R. 105).

Before considering which of these three principles is the proper principle of taxation, it is necessary to explain what I consider to be their effect in practice. In applying the first of these principles the Taxing Master would have to allow to the plaintiff all such costs as he had in truth and in fact incurred in opposing the counterclaim, and would have to allow to the defendant all such costs as he had in truth and in fact incurred in defending the action. In taxing the plaintiff's costs of the counterclaim on this principle, no allowance would, of course, be made in respect of any costs which the plaintiff had been spared by reason of the counterclaim being made in the action instead of in a separate cross-action; on the other hand every item of costs properly incurred by the plaintiff which is common both to the action and to the counterclaim would have to be considered on its merits, and the Taxing Master would have to apportion to the counterclaim such portion of the common items as he in his discretion should consider had been incurred by reason of the counterclaim. Thus the plaintiff would get no costs of the counterclaim until after it had been delivered, but from the time of its delivery he would get such costs as he had in truth and in fact incurred in opposing such counterclaims, although at the same time he had been incurring costs in prosecuting his claim. Take as an example the fee paid to the plaintiff's counsel on his brief at the trial; this would fall to be apportioned between the action and the counterclaim on the principle which I have mentioned, and the plaintiff would be allowed such part of the fee as the Taxing Master in his discretion considered to have been incurred by reason of the counterclaim, notwithstanding that the whole fee did not exceed in amount the fee which would properly have been payable if there had been no counterclaim. In the same way, in taxing the defendant's costs of the action, the Taxing Master would have to investigate every item of costs common to the action and to the counterclaim, and to apportion to the action the

part in truth and in fact incurred in defending the action, although the defendant had at the same time been incurring costs in prosecuting his counterclaim.

In applying the second of the above mentioned principles the Taxing Master would have to allow to the defendant the full costs of the action excluding only the amount by which those costs were increased by the counterclaim, and would have to allow to the plaintiff only the extra costs occasioned by the counterclaim, namely, the amount by which his costs of action had been increased by the counterclaim. In such a case there would be no apportionment of any items common to both the action and the counterclaim unless the plaintiff could prove that a common item had been increased by reason of the counterclaim, and then he would only be allowed such increase. Thus, in the example which I have given, the Taxing Master would make no allowance to the plaintiff for counsel's fee on the trial, if that fee did not exceed an amount which might properly have been allowed if there had been no counterclaim.

In applying the third of the above mentioned principles the Taxing Master, before commencing the taxation, would have to determine upon which of two different principles he was going to tax and for that purpose he would have to decide whether the counterclaim did or did not raise a separate and substantial question, or whether the subject-matter of the counterclaim was or was not substantially the same as the defence or part of the defence, and then, according to his decision on that preliminary point, he would have to tax the costs either on the first or on the second of the above mentioned principles.

No useful purpose would, in my opinion, be served by a detailed examination of the authorities; they are all discussed and commented upon at length in the cases which I have mentioned. What I deduce from the authorities is that the only proper principle of taxation generally applicable to all cases of the kind under consideration is the first of the above mentioned principles, which moreover is laid down as the proper principle of taxation in *Christie v. Platt* (*supra*), a case binding on this Court. This principle is elastic; it does not bind the Taxing Master down to any set formula, but on the contrary allows him ample latitude, and in applying it he can do substantial justice in every case. In dealing with common items he should take into account whether the counterclaim raises a separate question, whether it is substantial or unsubstantial, and whether it is or is not based on the same facts as the claim, and should exercise his discretion in apportioning such items accordingly. As regards the second of the above mentioned principles, I am of opinion there are valid reasons why it should not be adopted as a general principle of taxation. Under the express provisions of the Judicature Acts and of the Rules a counterclaim is for all purposes of procedure and evidence placed upon the same footing as a cross-action, and may be proceeded with although the action be stayed, discontinued or dismissed. The application of this second principle of taxation, however, places the counterclaim in the same position as if it were an issue in the action upon which the plaintiff had succeeded, and as if at the trial the Judge had made an order upon the defendant to pay the amount by which the plaintiff's costs of action had been increased by reason of such issue. In some cases no doubt the application of this principle may work substantial justice, for example, where the success or failure of the counterclaim is merely consequential upon the success or failure of the claim, or where the counterclaim is really in the nature of a defence. On the other hand in many cases the application of this principle would obviously work injustice, for example, where the counterclaim raises a separate and substantial question or where the real controversy between the parties is raised by the counterclaim, and the plaintiff has forestalled the defendant in order to gain the advantage of being in the position of plaintiff. *Christie v. Platt* (*supra*) furnishes a striking example of a case in which injustice would result from the application of this principle. Even in cases where a substantial counterclaim is based on the same facts as the claim, the application of this principle may work an injustice, for example, in the example given in the judgment of Lord Justice Bankes. In my opinion there is no valid reason why the plaintiff should not be allowed such costs as he has in truth and in fact incurred in resisting the counterclaim, merely because the facts are common to both claim and counterclaim, and because the defendant has been able to take advantage of the cheaper procedure by way of counterclaim afforded to him by the Judicature Acts and the Rules. In such cases the unsuccessful counterclaiming defendant would still reap considerable advantage if the first of the above mentioned principles of taxation were applied, as he would not only be saved the initial expenses of commencing a separate cross-action but also would have to pay only an apportioned part of all common items, which in a separate cross-action he would, for the most part, have to pay in full. In my opinion the taxation of the plaintiff's costs of the counterclaim on the second of the above mentioned principles, should only take place where a special order to that effect has been made. Moreover I think that the Court ought to exercise great caution in making any such special order as in most cases the Judge is not in a position to know merely from what takes place at the trial what costs the plaintiff has in truth and in fact incurred in resisting a counterclaim. It often happens that the plaintiff has had to make serious preparations, and to incur substantial costs in meeting an apparently substantial counterclaim, only to find at the trial that it is abandoned or minimized under the advice of leading counsel in such a way as to produce the impression in the Court that it was never put forward seriously. The Taxing Master on the other hand sees the advice on evidence, the proofs of witnesses, and the brief, and is therefore in a far better position than the Judge to arrive at a just conclusion as to what costs the plaintiff has in truth and in fact incurred in resisting the counterclaim, and can exercise his discretion in apportioning all common items of costs accordingly.

As regards the third of the above mentioned principles, although at first sight it seems to approximate closely to the first principle, I am of opinion that it is objectionable in that it places all counterclaims, however substantial, if based on the same facts as the claim, in the same category as unsubstantial and consequential counterclaims; moreover it has this serious disadvantage that it compels the Taxing Master before commencing the taxation to decide which of two different principles he is going to apply to the taxation. The duty of determining this preliminary point would not only lead to a serious contest between the parties, but would also in most cases lead to an application by the dissatisfied party to review the taxation. Many cases are on the border line and in such cases there might be a real difficulty in determining which of the two principles ought to be adopted, whereas if the first of the above mentioned principles were applied, the allowances and disallowances in respect of all common items would be reduced to questions of quantum only, and finality would then be assured. Turning to the present case I am of

opinion that neither the Taxing Master nor the learned Judge has applied the proper principle of taxation. In my judgment all the four issues raised in the pleadings and at the trial are common both to the action and to the counterclaim though in a varying degree. In taxing the bills of costs of the parties in accordance with the terms of the order the Taxing Master should apply the first of the above mentioned principles as above explained.

In the result therefore these bills of costs must be remitted to the Taxing Master for re-taxation, and as the plaintiffs have substantially succeeded on this appeal, they must have their costs here and below.

[Solicitors : Messrs. Dehn and Lauderdale ; Messrs. Cosmo Cran and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton and Sargant, L.JJ.)
1927. July 27.

INLAND REVENUE COMMISSIONERS v. PAKENHAM AND OTHERS.

INLAND REVENUE COMMISSIONERS v. COUNTESS OF LONGFORD.*

Revenue — Super-tax —Infant — Income of his trust property—Sums paid by trustees for maintenance — Accumulation of balance——Accumulations "receivable by infant"—Infant's liability to super-tax — Liability of trustees and guardian to make super-tax returns—Representative assessments—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 72 (2) (5) (6)—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), ss. 5 (3) (c), 7 (2) (5) (6), 161—All Schedules Rules, Rule 4.

Where trustees of a settlement set apart certain sums annually for the maintenance of an infant beneficiary and allow the balance of the income to accumulate, the income that is being accumulated is "receivable" by the infant within the meaning of s. 5 (3) (c) of the Income Tax Act, 1918, and he is liable to be assessed to super-tax in respect of it. But representative assessments to super-tax cannot be made upon the trustees or the guardian of the infant beneficiary, either in respect of the actual total income of the infant, or in respect of a total income limited, as regards the particular trustee or guardian, to that income with which the trust or guardianship is concerned.

So *held* by the Court on the first point, and by the Court on the second point as regards the guardian, and by Lord Hanworth, M.R., and Scrutton, L.J., as regards the trustees. But *held* by Sargant, L.J. (dissenting), that the words of section 72 (6) of the Finance (1909-10) Act, 1910, or the equivalent words in section 7 (6) of the Income Tax Act, 1918, are wide enough to enable such assessments to be made upon trustees.

Decisions of Rowlatt, J. (43 *The Times* L.R., 157 ; [1927] 1 K.B., 594), affirmed.

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

The facts of these appeals are fully set out in the report of the case before Mr. Justice Rowlatt (43 *The Times* L.R., 157 ; [1927] 1 K.B., 594), but may be summarized as follows.

The sixth Earl of Longford was born on December 29, 1902. He became in 1915 tenant in tail under a settlement made by his father on August 22, 1899, of estates in Ireland. The settlement contained no express power of management during minority, and no direction that the statutory provisions were not to be applied. The trustees were appointed trustees for the purposes of section 42 of the Conveyancing Act, 1881. The sixth Earl was also tenant in tail under a settlement made upon the marriage of his grandparents in 1862. That settlement contained a clause directing the trustees to enter and receive and apply the rents and profits during minority, and they were given powers of management and, subject thereto, were to apply such sums as they should think fit to the maintenance of an infant son of the fourth or fifth Earl entitled as tenant in tail, and to accumulate the surplus. The trusts of the accumulations were, if the son should attain 21 or die under that age, leaving inheritable issue, for the son, but, if he should die under 21 without such issue, then the accumulations were to be treated as capital money. The provisions were to apply, so far as they were or could be made applicable, to the minority of any person for the time being entitled under the settlement to the rents and profits. The sixth Earl became tenant in tail of these estates in 1918. The trustees of this settlement were not the same persons as the trustees of the settlement of August 22, 1899.

After the sixth Earl became entitled to the estates that were the subject of the settlement dated August 22, 1899, the trustees of that settlement paid yearly during his minority a sum of £2,500 for his maintenance, and after he became entitled to the estates that were the subject of the settlement of 1862, the trustees of that settlement paid yearly during his minority a sum of £500 for his maintenance, and the balance of income arising from both estates was accumulated.

During 1919 the question of the Earl's liability to super-tax arose. The Countess of Longford was called upon, as guardian of the Earl, to make a return for the year ending April 5, 1917 ; and upon her failure to do so an estimated assessment to super-tax was made upon her for that year with the intention of bringing into assessment the total income of the previous year of the Earl from all sources, including the whole income arising from the estates that were the subject of the settlement of August 22, 1899, but not the income arising from the estates that were the subject of the settlement of November 8, 1862, as the Earl did not become entitled to such estates until January 22, 1918.

At a later date notices to make returns of the total income of the Earl from all sources for super-tax purposes for the years ending April 5, 1918, 1919, and 1920 respectively were served on the trustees, and the returns were in due course made by Mr. H. N. Walford on behalf of himself and co-trustees. In these returns there was included as the income of the Earl arising from both the settled estates each year only the sums paid by the respective trustees of both settlements for maintenance in the respective previous years. Assessments to super-tax were subsequently made upon the trustees with the intention of including therein each year the total income of the Earl from all sources for the respective previous years, including the whole income arising from both estates, whether used for maintenance or accumulated, but, as regards the

income from the estates which were the subject of the settlement of November 8, 1862, only from the time at which the Earl succeeded thereto.

It was contended on behalf of the trustees and the guardian :—

(*a*) That the guardian was not liable to assessment as guardian for any year.

(*b*) That by virtue of section 43 of the Conveyancing Act, 1881, the Earl was not entitled, under the settlement of August 22, 1899, to receive more than the sums allowed to him for maintenance under that settlement, and that by the provisions of the settlement of November 8, 1862, he was assessable on the same principle as regards the income of that settlement.

(*c*) That the trustees of neither settlement were under any obligation to make super-tax returns on behalf of the Earl.

It was contended on behalf of the Crown (*inter alia*) :—

(*a*) That the trustees were liable to be assessed to super-tax in respect of the total income of the Earl from all sources.

(*b*) That such total income included for the purposes of super-tax for each of the three years ending April 5, 1918, 1919, and 1920 respectively, the whole income arising during the respective previous years (i.) from the estates which were the subject of the settlement of August 22, 1899, and (ii.) from the estates which were the subject of the settlement of 1862, from the date at which the Earl succeeded to them.

(*c*) That the trustees were liable to make super-tax returns of the income of the Earl.

(*d*) That the guardian was liable to be assessed to super-tax in respect of the total income of the Earl from all sources.

(*e*) That such total income included the whole income arising from the estates that were the subject of the settlement of August 22, 1899, during the year ending April 5, 1916.

The Special Commissioners held that the trustees were debarred from objecting to the form of the assessments, so far only as the minor was liable either through his trustees or his guardian to assessment to super-tax ; that the liability through the guardian was restricted to so much of the income of the minor as passed through her hands ; that, since the liability of the minor to super-tax did not depend on the estates, but upon his total income from the estates and all other sources, the trustees were not liable to make the returns ; and that the income of the minor which was being accumulated by the trustees was not " receivable " by the minor so as to be liable to super-tax. They accordingly discharged the assessment for the year ending April 5, 1917, and reduced the assessments for the years ending April 5, 1918, 1919, and 1920.

Upon appeal by the Crown, Mr. Justice Rowlatt held that the total income of the estates was " receivable " by the infant Earl so as to be liable to super-tax. Upon the question of the liability of the guardian or the trustees to make returns he upheld the decision of the Special Commissioners.

The present appeal was brought by the Crown upon this latter point.

The Attorney-General (Sir Douglas Hogg, K.C.), Mr. J. H. Stamp, and Mr. Reginald Hills appeared for the Crown ; Mr. A. M. Latter, K.C., and Mr. A. Andrewes-Uthwatt for the guardian and trustees.

The MASTER OF THE ROLLS, in his considered judgment, said :—The present, or sixth, Earl of Longford was born on December 29, 1902, and thus came of age on December 29, 1923. His father died on August 21, 1915, and after that date until he attained his majority his mother, the Countess of Longford, acted as his guardian, and in the year 1916-17 received £2,500 for his maintenance from funds held in trust for him.

The Hon. G. M. Pakenham, G. F. Stewart, and H. N. Walford are the trustees of the marriage settlement made upon the marriage of the late, the fifth, Earl and the Countess of Longford in 1899, and in the financial years 1917-20 received the income of that particular trust and paid therefrom the £2,500 a year to the Countess for the maintenance of her son.

In 1862, upon her marriage with the fourth Earl of Longford, certain estates were settled by the grandmother of the present Earl, and upon her death on January 22, 1918, the present Earl became entitled as tenant in tail to the rents and profits of these estates. The trustees of this settlement of 1862 were not the same as the trustees of the settlement made in 1899. During the minority of the present Earl these trustees of the settlement of 1862, since the present Earl became entitled in 1918, have contributed a sum of £500 a year for his maintenance, thus increasing the total sum paid to the Countess for his maintenance to £3,000 a year. The balance of the income received by the two sets of trustees under the two settlements was accumulated.

The Countess of Longford was called upon by the Special Commissioners of Income Tax to make a return for super-tax for the year ending April 5, 1917, in respect of the income of the present Earl, and failed to do so. The Special Commissioners thereupon made an estimated assessment of £12,000 for that year upon her as guardian, based upon the total income of the Earl in the previous year from all sources, including the whole income arising from the property the subject of the settlement of 1899, but not the income arising from the estates subject to the settlement of 1862, which, as already stated, did not fall into the possession of the Earl till the death of his grandmother in January, 1918.

For the financial year ending April 5, 1918, the trustees of the settlement of 1899 were called upon to make a similar return for super-tax of the income of the Earl, but returned only the sum paid for his maintenance in the previous year.

In the years ending April 5, 1919 and 1920, these trustees returned the total sum paid for his maintenance from both settlements of 1899 and 1862 in the previous years respectively, but not the full sums received as the income of both settlements.

The Special Commissioners thereupon made estimated assessments upon the trustees as follows : For the year ending April 5, 1918, £16,000 ; for the year ending April 5, 1919, £16,500 ; for the year ending April 5, 1920, £26,000.

The Special Commissioners claim the right to make these assessments upon the guardian and trustees respectively by virtue of the powers given originally by section 41 of the Income Tax Act, 1842, which is now replaced by section 7, subsection 5, of the Income Tax Act, 1918. Inasmuch as the earlier assessments were made before the later Act superseded the Act of 1842, I have in this judgment referred to the original sections, but have given a reference to the existing sections.

The question in these appeals is whether the guardian and trustees can be assessed to super-tax in a representative capacity under section 41 (General Rule 4) to the full amount of the income of the minor or their beneficiary respectively.

The Special Commissioners decided in favour of the Countess of Longford upon the assessment for

the year ending April 5, 1917; and inasmuch as the income received by her for the maintenance of the Earl for the previous year ending April 5, 1916, fell below the total income upon which super-tax was payable for the financial year ending April 5, 1917, they discharged the assessment altogether.

For the year ending April 5, 1918, the Special Commissioners made an assessment upon the trustees in respect of the income paid over for the use of the minor in the previous year under the 1899 settlement, and for the years ending April 5, 1919 and 1920, upon the income paid over from the settlement of 1862, as well as that of 1899. The figures were agreed, but the above is the nature of the assessments made. The Special Commissioners held that the amounts received by the trustees which were not paid over for the use of the minor, but accumulated in their hands, were not income which should have been included in the assessments.

Mr. Justice Rowlatt has upheld the decisions of the Special Commissioners. The result is that the assessments upon the trustees are only upon the amounts actually allowed to the minor, and not upon the full sums received by them under their trust, part of which was not paid over, but accumulated. Counsel for the Crown have argued in this Court both points, and claimed that the guardian and the trustees can be assessed in a representative capacity (*a*) upon the total income of the minor whether in fact it is paid into her hands or is received by the trustees from the trust which they administer, or from a trust or trusts, not under their control, and (*b*), alternatively, upon the full sum in fact received by the trustees whether that sum is, or is not, immediately payable to and enjoyed by the minor, or is in part accumulated for his ultimate benefit when he has become of full age.

The charge to super-tax was imposed by section 66 (1) of the Finance Act (1909-10), 1910 (Income Tax Act, 1918, section 4), in respect of the income of any individual the total of which from all sources exceeded the original limit of £5,000, as an additional duty of income-tax, and by section 66 (2) (now Income Tax Act, 1918, section 5 (1)) the total income of any individual from all sources was taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts, subject to certain directions thereinafter specified. These latter words in section 5 (1) have now been altered to "is required to be estimated in a return made in connection with any claim for a deduction from assessable income, but subject to the provisions hereinafter contained." These words were introduced in substitution for the previous ones by section 32 of the Finance Act, 1920, when the system of assessable income was introduced. But there is no substantial change in effect. Their meaning is that section 190 of the Act of 1842 is introduced whereby Schedule G, with its rules and directions, is to be followed, "so far as the same are respectively applicable to the case of each person, corporation, company or society, described or mentioned in this Act, on behalf of themselves and also of others for whom they act in any of the characters described in this Act, . . . by each such person, corporation, company or society, or by his or their agents or officers, in the cases where such agents or officers are authorized to make such returns." That is to say, the returns are to be made according to the several schedules, and these are to be followed and attended to by persons who act in a representative character. The same system is preserved by section 207 of the Act of 1918 and the rules and directions contained in the Fifth Schedule to that Act.

By section 72 (2) of the Act of 1910 (Income Tax Act, 1918, section 7 (2)) every person upon whom a notice is served requiring him to make a return of his total income from all sources is to make that return, whether he is or is not chargeable with super-tax after the return has been made. This section expressly lays this duty upon a person who is chargeable in a representative capacity under section 41 of the Act of 1842 (Income Tax Act, 1918, section 7 (2)).

It has been held that under this subsection trustees are to make a return, to the full extent of their knowledge and information, of all the sources of income of their beneficiary, whether that income is derived from their own trust or another source. See *Brooke v. Inland Revenue Commissioners* (34 *The Times* L.R., 142; [1918] 1 K.B., 257). But that subsection only secures the return to the extent of the best ability of the person on whom the duty of making it falls, and expressly leaves open the question of chargeability in respect of the income returned. The right to charge the trustees as claimed in the present appeals is said to be derived from section 72 (6) of the Finance (1909-10) Act, 1910 (section 7 (6) of the Act of 1918).

The subsection applies the provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, to assessments, and to the appeals against these assessments, and to the collection and recovery of the duty and the like, "so far as they are applicable" to the "charge, assessment, collection, and recovery of duty under this section." There are persons who are chargeable under that section, for the super-tax, which is primarily charged under section 66, is to be assessed and charged by the Special Commissioners, and they have power under section 72 (5) to make an assessment to the best of their judgment upon any person who fails to make such a return as is required of him under s. 72 (2) of the Act of 1910 and to make additional assessments under section 7 (7) of the Act of 1918.

It is thus, in my opinion, pressing the words of section 7 (6) a very long way to claim that under it the sections of the Income Tax Act, 1918, which are introduced by reference "so far as they are applicable," and in reference to persons who are to be chargeable, have made trustees who are compelled to make a return also chargeable fully, not only to the extent of the income which they receive, but also to the extent of the totality of the income of the beneficiary for whom they receive and hold a contributory part. The mere reference to section 41 of the Act of 1842 in s. 72 (2) and the actual words "who are to be chargeable" in subsection (6) will not, in my judgment, have such an effect, and if there is such a power, it must be derived from elsewhere.

Under section 41 of the Income Tax Act of 1842 an agent who was charged in respect of the profits of a foreign principal was chargeable to the extent only of moneys received into his hands. That was by virtue of the words in section 100, "shall be charged annually on and paid by the persons . . . receiving . . . the same," and was decided in *Colquhoun v. Brooks* (5 *The Times* L.R., 728; 14 App. Cas., 493). It was not until section 31 of the Finance (No. 2) Act, 1915, came into force that an agent was made liable in respect of profits on business carried on through his agency, whether he received them or not. Thus section 41 of the Act of 1842, as it was originally interpreted, did not contemplate or impose a liability beyond the actual receipt of income into the hands of the representative person.

An infant can be directly assessed to super-tax.

This was decided in *Rex v. Newmarket Income Tax Commissioners—Ex parte Huxley* (32 *The Times* L.R., 353; [1916] 1 K.B., 788), and by section 173 of the Act of 1842, upon default of the infant to pay income-tax, the parents or guardians or tutors of such infant were made liable and charged with the payments which the infant ought to have paid. See also section 92 of the Taxes Management Act, 1880. Both these sections contemplate the direct liability of an infant by their words, "where a person chargeable with the duties is under the age of 21 years."

In my judgment, therefore, no inference can be drawn from the Income Tax Acts as they stood that there was any liability imposed upon guardians or trustees beyond the sums actually received by them in their representative capacity.

Lord Dunedin in his speech in *Whitney v. Inland Revenue Commissioners* (42 *The Times* L.R., 58; [1926] A.C. 37) stated that there are three stages in the imposition of a tax: (1) The declaration of liability—that is, the part of the statute which determines what persons, in respect of what property, are liable. (2) The assessment which fixes the amount that a person has to pay. (3) The methods of recovery if the person taxed does not voluntarily pay. Applying the process of these three stages to the present case, by section 66 of the Act of 1910 (section 4 of that of 1918) super-tax is levied in respect of the income of any individual the total of which from all sources reaches a certain standard. In *Tischler v. Apthorpe* (1 *The Times* L.R., 344) it was decided that direct assessment upon a firm can be made even though supplementary machinery under sections 41 and 53 of the Act of 1842 is available whereby their agent could be assessed; and see *per* Lord Justice Fry in *Werle v. Colquhoun* (4 *The Times* L.R. 396; 20 Q.B.D. 753). In *Rex v. Newmarket Income Tax Commissioners—Ex parte Huxley* (*supra*) Lord Cozens-Hardy took this same view. Looking at section 173 of the Act of 1842 and section 92 of the Taxes Management Act, 1880, he said (at p. 798): "I cannot escape from the language of those two sections. They seem to assert that the infant is a Crown debtor, except so far, if at all, as a different result may follow under the earlier sections where there is a trustee or guardian." The other members of the Court used language to the same effect. This case also decides that the machinery of direct assessment can be used. Mr. Justice Rowlatt in *Maclaine and Co. v. Eccott* (10 Tax Cas., 480, at p. 545) pointed out that when the liability of non-resident persons was enlarged it is the non-resident who remains chargeable and assessable though in the name of, and by the instrumentality, of the agent. Thus there can be no question that the first two stages stated by Lord Dunedin can be fulfilled without recourse to the imposition of the liability upon the trustee or guardian. The third stage is easily complied with, for, in addition to the usual methods of recovery, sections 41 and 173 of the Act of 1842, and section 92 of the Taxes Management Act, 1880, come in aid to lay the duty of payment upon the representative person (General Rules of 1918, r. 13) in lieu of the person primarily liable.

But the argument for the Crown in the present case is in the reverse order. It is claimed that because representative persons are required to make returns for super-tax, and because sections relating to the income-tax are made available "so far as they are applicable," and relating to persons who are to be chargeable, there must be a liability laid upon these representative persons.

Section 31 (2) of the Finance (No. 2) Act, 1915, provided that a non-resident person should be chargeable in respect of certain profits or gains under section 41 of the Act of 1842, as amended and enlarged by section 31, and it was attempted in *Greenwood v. F. L. Smidth and Co.* (38 *The Times* L.R., 421; [1922] 1 A.C. 417) to impose a liability upon a non-resident in respect of trade even though it was not exercised in the United Kingdom, because section 31 (1) (*b*) had extended section 41 so as to cover profits not actually received by the agent. The attempt failed, and Lord Buckmaster observed that the Courts cannot assent to the view that, if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer.

I have already said in *Whitney v. Inland Revenue Commissioners* (40 *The Times* L.R., 705; [1924] 2 K.B., 602) that I agree with Lord Sterndale's view expressed in *Davis v. Inland Revenue Commissioners* (39 *The Times* L.R., 102; [1923] 1 K.B., 370) that, if it be sought to deduce from the statement that super-tax is an additional income-tax "this proposition that therefore all provisions with regard to income-tax or super-tax are to be considered as common to them both, there is no foundation for such a deduction." I agree with Mr. Latter that it is a big jump to hold that the agent, trustee, or guardian is assessable and chargeable for the total income of the person whom he represents, and of whose income from all sources he may have imperfect knowledge, both as to its total amount and as to the deductions which that person may be entitled to make from it; while, as I have already pointed out, the same system of estimation of the income is retained as is required in a return made for income-tax in connexion with any claim for a deduction from assessable income under the distributive schedules and with the deductions allowed under them.

The inconveniences—indeed hardships—which the view contended for by the Crown involves are well set out by Mr. Justice Rowlatt in his judgment. Assume three trusts with a beneficial income in each of £1,500 a year; how can the super-tax, with its graduations of the rate to be charged, be estimated upon the total income of £4,500 and recovered from one set of trustees? In *Williams v. Singer* (35 *The Times* L.R., 455; [1919] 2 K.B., 108) it was clearly stated in the judgments of the Court, which was considering section 41, that the person liable to be taxed is the beneficiary, and that the purpose of the section is to provide machinery by which, in the cases specified, income-tax may be more readily recovered.

In the report of the same case in the House of Lords (36 *The Times* L.R. 661; [1921] 1 A.C., 65) Lord Cave expresses the view that there may be cases in which a trustee in receipt of trust income may be chargeable with income-tax upon such income, but that, in cases where a trustee or agent is made chargeable with the tax, the statutes recognize the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals—see also *per* Lords Wrenbury and Phillimore. For these reasons I agree with Mr. Justice Rowlatt on the first point.

The second point, as to the liability of the guardian, was apparently not fully argued before Mr. Justice Rowlatt, but it has been fully argued by Mr. Hills in this Court. In my judgment, the judgment of Mr. Justice Rowlatt is right upon both points. I agree with his reasoning upon the second point and do not desire to add more, for the reasons which I have given upon the first point apply in a large measure to the second.

The appeals must be dismissed with costs.

LORD JUSTICE SCRUTTON.—The present Earl of Longford was born on December 29, 1902, succeeded to the earldom on August 21, 1915, and came of age on December 29, 1923. He had, on succeeding to the title, a total income which subjected him to the payment of super-tax. These appeals relate to the endeavours of the Inland Revenue to find the best way of making him pay.

1. For the year April 6, 1916, to April 5, 1917, the Crown assessed his mother and guardian, the Countess of Longford. She paid on the amount of income which she administered; the Revenue desired to assess her on the total income of the Earl. The Special Commissioners declined so to assess her, and Mr. Justice Rowlatt affirmed their decision. The Crown appeals.

2. For the year 1917-18 the Crown assessed the trustees of the settlement under which the whole income of the Earl was derived on the whole income of the year. The Special Commissioners discharged the liability as to such part of the income as the trustees were accumulating, as not being income of the Earl, and also declined to assess the trustees personally for either the whole income or the part of the income which they handed over. Mr. Justice Rowlatt disagreed with their decision as to the accumulated funds, but held that the trustees could not be assessed either on the whole income or on that part of the income which was paid to the guardian of the Earl. The Crown appeals.

3. On January 22, 1918, the Earl, by the death of his grandmother, became entitled under another settlement with different trustees to a further income. The Crown accordingly assessed for the years 1918-19 and 1919-20 the first trustees on the whole income of the Earl. The Special Commissioners again declined to assess either the whole income of both trusts or of either trust or the part accumulated or the part administered. Mr. Justice Rowlatt disagreed as to the part accumulated, but declined to assess both sets or either set of trustees either on the whole income of the two trusts, or the whole income of either trust, or on the part handed over.

4. For the year 1920-21 the Crown assessed the Earl of Longford directly. The assessment was discharged by the Special Commissioners, but restored by the Judge on the authority of *Rex v. Newmarket Income Tax Commissioners—Ex parte Huxley* (32 *The Times* L.R. 353; [1926] 1 K.B., 788), and there is no appeal against this decision.

All infants therefore can be directly assessed to super-tax, and having been so assessed, under section 173 of the Act of 1842 (now section 161 of the Act of 1918), the parent, guardian, or tutor can be made liable for the tax originally charged on the infant.

The questions in the appeal are:—

i. Whether the guardian can be directly assessed to super-tax in respect of the infant, either on the infant's whole income or the part of it which the guardian administers, without the necessity of assessing the infant.

ii. Whether the trustees of the settlement under which the infant receives income can be assessed directly to super-tax in respect of the infant, and, if so, whether on the whole of the infant's income from every source or the whole of the income from the settlement of which they are trustees. The distinction between funds paid over and funds accumulated is no longer in question; both are income of the infant.

Super-tax was granted by the Finance (1909-10) Act of 1910, and is now dealt with in Part II. of the Income Tax Act of 1918, as modified by subsequent Finance Acts, especially that of 1925, which imposes a graduated tax at a rate rising with the amount of income. Income up to £2,000 is free; the next £500 pays ninepence in the pound, and so with gradual rises till each thousand pounds above £30,000 pays six shillings in the pound. By section 66 of the Act of 1910 super-tax is charged on "the income of any individual" (which excludes companies); it is charged on the total income of that individual from all sources for the previous year. By section 72 (1) the super-tax is assessed by the Special Commissioners. In this it differs from income-tax, which is assessed on various parts of the income by various general or additional commissioners, according to the situation of the property or residence of the individual, or schedule under which the income is taxable.

Section 72 (2) of the Finance (1909-10) Act, 1910, provides for returns of total income, and section 72 (4) provides for penalties if the person who has to make the return "without reasonable excuse" fails to make such a return. The "persons" who have to make returns are:—

(1) A person required to make a return of "his total income";

(2) A person who is chargeable with or liable to be assessed to income-tax under section 41 of the Income Tax Act, 1842, as representing an incapacitated or non-resident person, . . . who makes a return of the total income from all sources of the incapacitated or non-resident person;

(3) A person who is chargeable with or liable to be assessed to income-tax under section 24 of the Customs and Inland Revenue Act, 1890, as representing a deceased person, who makes a return of the total income from all sources of the deceased person. The recited section provides that, if a person dies without having made a return of his profits, his executors or administrators may be directly charged in respect of the profits arising before his death.

Every person in clauses (1), (2), and (3) is to make a return "whether he is or is not chargeable with the super-tax"; and this assumes that some of them are not chargeable with super-tax. These words may refer to total incomes under £2,000, not chargeable, as compared with incomes over £2,000 which are chargeable; or to persons chargeable, such as the owner of the income, or the executor, who is chargeable though his testator is not assessed, as compared with trustees, if they are not chargeable on the whole income of the *cestui que trust*.

Section 41 of the Income Tax Act of 1842 provides that certain classes of persons, (1) bearing certain relations to a second class of persons (who are described in the Act of 1910, section 72 (2), and the Act of 1918, General Rules, Rule 4, and section 237 (definitions), as "incapacitated persons," and (2) having the direction, control, or management of the property of such incapacitated persons, shall be chargeable to the duties of income-tax in the same manner and to the same amount as the incapacitated person would be charged if he were not incapacitated. The first class of persons is described as "trustees, guardians, tutors, curators, or committee"; the incapacitated persons as "infants, married women, lunatics, idiots, or insane" (one would have liked to ask the draftsman the difference between a lunatic and an insane person). The first class of trustees, &c., were to be taxed, whether the incapacitated person was or was not resident in Great Britain. Section 41 dealt with a further class of person. The resident factor, agent, or receiver of a non-resident person, who had the receipt of any profits or gains belonging to such non-resident person, was chargeable in the like manner and to the like amount as if

such non-resident person were resident in Great Britain and were in the actual receipt of such profits.

Of the persons whose own income could be taxed in the name of a representative, it will be seen that (*a*) the infant was also directly assessable (*Huxley's* case (*supra*), (*b*) the married woman under section 45 was taxable in the name of her husband and not in the name of her trustee or in her own name. Now under Rule 16 of the General Rules of the Act of 1918 a married woman can in certain circumstances and for certain profits be taxed in her own name. Thirdly, as to a lunatic, Mr. Justice Lush in *Huxley's* case (*supra*) seemed to think, *obiter*, that a lunatic could not be directly charged, but Lord Cozens-Hardy in the Court of Appeal appears to take an opposite view.

It seems clear that, so far as income-tax is concerned, the liability of the trustee or agent does not exclude the liability of the principal, whether incapacitated or non-resident, and *vice versa*. It also seems clear that for income-tax purposes the liability of the trustee or agent is limited to the profits which he controls or manages; and, though the limitation of the liability of the agent to profits received has been removed by the Finance (No. 2) Act of 1915, section 31 (now Income Tax Act, 1918, General Rule No. 5), I think the liability of the trustee or agent for income-tax is still limited to the British property or trade which he controls or manages, though he does not "receive" the profits, and it does not extend to all British profits of the principal though the trustee or agent has nothing to do with part of these profits, still less to all profits whether British or not. There may be an assessment for income-tax on the trustee or agent in respect of part of the profits, just as there may be a partial assessment on a resident principal, or one of full capacity.

We now reach the real difficulty in the case. Section 72 (6) of the Finance (1909-10) Act, 1910 (now section 7 (6) of the Act of 1918), enacts that "all provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments . . . shall, so far as they are applicable, apply to the charge . . . of duty under this section," *i.e.*, to the duty of super-tax. The Crown says that the trustee or guardian of an infant is chargeable to income-tax under section 41 of the Act of 1842, and is therefore by this section made chargeable to super-tax. The Crown's contention would also apparently apply to all representatives under section 41, including the agent of a non-resident principal who has British properties yielding profits liable to income-tax. The Crown further contends that it can assess these representatives to super-tax on all profits of their principal, though the representative has no control, management, or receipt of these profits or of the properties from which the profits are derived. Mr. Justice Rowlatt says that the contention of the Attorney-General before him extended to assessment of the total income of the principal and was not put forward in a limited form as to the total income of the trust controlled by the trustees to be assessed. Before us, however, undoubtedly the latter view was contended for, in the alternative at any rate, by the junior counsel for the Crown.

Counsel for the subject contended that section 41 was only to apply "so far as applicable to super-tax," and that the limited assessment for income-tax, which might be one of a number of assessments in different places and by different Commissioners, together covering all the profits liable to tax, had no application to a single assessment for super-tax made by one authority at a rate varying with the amount of the total income. The argument may be illustrated by a case: A, a non-resident principal, has three English agents, carrying on three separate businesses, each producing a profit of £1,500; £4,500 in all. No one of them will be assessed to income-tax at more than £1,500. How in the Crown's view are they to be assessed to super-tax? The income under £2,000 is not to be assessed at all; from £2,000 to £2,500 it pays 9d. in the £; from £2,500 to £3,000, 1s.; from £3,000 to £4,000, 1s. 6d.; and the last £500, making £4,500, at 2s. 3d. To which trustee are you to allot the first £2,000, and at what rate will each trustee pay? There is no provision for this sort of thing in section 41, which is concerned not with assessments on total income at different rates in one assessment, but only with assessments on income, controlled or managed, at one rate. Of course you might have a provision that the total amount due from the principal for super-tax, if he were assessed directly, should be ascertained, and then the liability divided amongst the three trustees proportionately to their respective incomes. But where is there a trace of this in section 41? I do not understand how a provision for liability for income-tax only on income controlled or managed, when applied to super-tax, can produce a liability on the trustee for all income of the principal, whether controlled or managed by the trustee or not. If the trustee cannot be assessed on his *cestui que trust's* total income, I can see nothing in section 41 to provide for a *pro rata* adjustment of the super-tax obtained by one assessment of the total income over the various trustees who manage parts of that income.

It has been held by the House of Lords in *Whitney v. Inland Revenue Commissioners* (42 *The Times* L.R. 58; [1926] A.C. 37) that a non-resident principal can be directly assessed to super-tax on his British profits after notice sent to him. There is, as far as I know, no decision yet in a case where an agent has been assessed to super-tax on the whole or part of the profits of his non-resident principal.

In my opinion, the provisions of section 41 are "not applicable" to the assessment of super-tax on a representative of a principal, in respect either of the whole or of part of his principal's income; and I therefore agree with the judgment of Mr. Justice Rowlatt, and think that the appeals of the Crown should be dismissed.

There are two matters of regret in the case. First, there is the length of time that these proceedings have occupied. In 1927 the assessment for 1916 has not yet finally been determined; and five years were taken to state the special case. No satisfactory explanation was offered to us of the delay. Secondly, I think the case is a bad example of legislation by reference. Probably to get a Bill through Parliament, a number of existing statutory provisions are incorporated "so far as applicable." I doubt whether Parliament, or the draftsman, or the responsible Minister ever considered which of these provisions were applicable, but the whole block is thrown at the heads of the Judges, who have to consider which of them are applicable in whole or part. This case is an example of the deplorable result.

Lord Justice Sargant: In my opinion, in the Countess of Longford's case there is a clear and simple reason for dismissing the appeal. I cannot see that the Countess ever had, within section 41 of the Income Tax Act, 1842, "the direction, control, or management of the property or concern" of her infant son, or the receipt of the profits or gains of the property within the language of Lord Parker in *Drummond v. Collins*

(31 *The Times* L.R. 482; [1915] A.C. 1011). The control or management of the property and the receipt of the profits and gains were in the hands of the trustees, who made to her, from and out of the income of the property, such an allowance as they thought fit for the purpose of the maintenance and education of her son. It was, of course, not she, but they, who were chargeable with income-tax on the whole income of her property, including the amount of any such allowance, which was no doubt a net sum. Nor did she, I think, receive it as guardian in the sense in which that word is used in section 41. She received it not of independent right, but as the person to whom the trustees under their discretionary powers thought fit to entrust the actual expenditure of the allowance in question. Even, therefore, if the allowance in the year 1916-17 exceeded the then limit for super-tax, the Countess was not within section 72 of the Finance (1909-10) Act, 1910, not being a person chargeable with super-tax as representing her son.

With regard to the case of Pakenham and others, super-tax was created and imposed for the first time by Part IV., sections 65 to 72 inclusive, of the Finance (1909-10) Act, 1910. At that time the machinery for the assessment and collection of income-tax was regulated by the Income Tax Act, 1842. Section 72 of the above Act of 1910 contains a general referential application of this machinery to the assessment and collection of super-tax, and the questions to be determined on this appeal depend on the effect of this general referential application, and particularly with regard to any application to super-tax of the special provisions of section 41 of the Act of 1842.

Mr. Justice Rowlatt in his judgment has referred throughout to the similar provisions of the consolidating statute—namely, the Income Tax Act of 1918. But the appeal has been argued before us with reference to the similar provisions of the Income Tax Act, 1842, and Part IV. of the Finance (1909-10) Act, 1910. The latter seems to me the more convenient course and is that which I propose to adopt. For these two Acts do in fact govern the earlier of the three periods which are in question. And further, in considering the incorporation in the later provisions of 1910 of the earlier existing provisions of 1842 it is of assistance to preserve the chronological order of the legislation.

Section 41 of the Act of 1842 provides that (amongst other persons) trustees having the management of the property of an infant shall be chargeable to income-tax in like manner and to the same amount as would be charged if the infant were of full age, and that every such trustee shall be answerable for the doing of all such acts as shall be required to be done by virtue of that Act in order to the assessing of any such infant to the duties granted by that Act and paying the same. It is clear that the respondent trustees were under this section chargeable for and liable to pay the income-tax payable as from August 21, 1915, in respect of the Irish estates which were comprised in the settlement of 1899.

Under subsection 2 of section 72 of the Finance (1909-10) Act, 1910, after service upon any person of a notice by the Special Commissioners requiring him to make a return of his total income from all sources, he becomes bound to make such a return, whether he is or is not chargeable with super-tax, these last words, I think, clearly referring to cases where the subject may think that he is below the super-tax limit, and they prevent such a person from refusing to make a return on that ground. And in the case of such a notice served upon any person who is chargeable with or liable to be assessed to income-tax under section 41 of the Income Tax Act, 1842, as representing an incapacitated person (which phrase, of course, includes an infant), he is liable to make a return of the total income from all sources of the incapacitated person. It seems clear that the terms of this section apply to and include the respondent trustees, and impose a statutory obligation on them to make a return of at least the income of the Irish estates as comprised in the settlement of 1899. Indeed, this was hardly contested by the counsel for the respondents, and appears to be concluded by the decision in *Brooke v. Inland Revenue Commissioners* (34 *The Times* L.R., 142; [1918] 1 K.B., 257). And see also *Inland Revenue Commissioners v. Huni* (39 *The Times* L.R., 459; [1923] 2 K.B., 563), and *Whitney v. Inland Revenue Commissioners* (42 *The Times* L.R., 58; [1926] A.C., 37). Further, the words of the subsection, taken in their ordinary meaning, do in terms appear to impose a *prima facie* obligation on the respondent trustees to make a return of the total income of the infant, though ignorance as to any income other than that from the Irish estates may be a reasonable excuse under subsection (4) for failing to make a return of any such other income.

Then, after subsection (5), which enables the Special Commissioners to make an assessment in default of a satisfactory return, comes subsection (6), which is the really crucial one in this case. Under that subsection: "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court, shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section." The question here is whether the respondent trustees are persons who fall within the words of that subsection and so are liable to have made upon them what the learned Judge in a very convenient phrase has called representative assessments.

Mr. Justice Rowlatt has pointed out with much force the marked distinction between income-tax and super-tax, consisting mainly in the partial, local, and piecemeal assessment of the one and the wide general assessment of the other. He has also pointed out the difficulties that may arise in certain cases through a sweeping application to super-tax of the principle of representative assessment, as enacted with regard to income-tax. And in the result he has, as I understand him, held that representative assessments cannot be made in respect of super-tax at all under this subsection. But in my judgment, and with great respect to him, he has allowed his consciousness of these difficulties to lead him in effect to strike out subsection (6) altogether from the statute. To my mind it is reasonably clear that subsection (6) is consequential on subsection (2), and deals with and renders representatively assessable to super-tax the same classes of representatives as are liable to make returns under subsection (2), who again are the same classes as are liable under section 41 of the Act of 1842 to representative assessments to income-tax. The Legislature in enacting subsection (6) and assimilating the liability of trustees for super-tax to their liability for income-tax must have had in mind the broad distinctions between income-tax and super-tax. And I do not think any construction of section 72, and particularly of subsection (6), is permissible which negatives altogether the possibility of representative assessments to super-tax. The marked distinction pointed out by the learned Judge between income-tax and super-tax

might have formed a good ground for declining to pass legislation applying to the collection of super-tax machinery analogous to that already existing for the collection of income-tax. It does not, in my view, form a reason for interpreting the legislation, when once passed, in any other than the natural meaning of the words used. And I do not think that the language of subsection (6) as to persons chargeable with duty can be satisfied by construing it as referring merely to the liability of a husband to tax on his wife's income under section 45 of the Act of 1842.

The words in subsection (6) "so far as they are applicable" have still to be considered. Much more stress was laid upon them in the argument for the respondents than in the judgment of Mr. Justice Rowlatt. But they do not seem to me sufficient to exclude, in the cases now in question, the *prima facie* representative assessability of the respondent trustees. Taking, for instance, the two years in which the income of the infant was derived from the Irish estates, I cannot see that the mere possibility that there might be some other income of the infant can prevent the provision of the Income Tax Acts with reference to the representative assessment of the trustees to income-tax from being applicable so as to render them representatively assessable to super-tax to the extent of the assessments which were actually made upon them. As regards these years at least the assessments on them would appear to be sustainable, for I omit for clearness the possibility that in the second year some small income had been brought in from the Bedfordshire estates.

Then again, take the case of the year 1919-20, when the income of the infant was derived both from the Irish estates under the settlement of 1899 and from the Bedfordshire estates under the settlement of 1862. Is there sufficient in the fact of there being this double source of income to relieve the trustees of the Irish estates from the obligation to make a return of the total income of the infant from both estates, or to exclude the trustees of the Irish estates from liability to assessment on the total income? I do not think so. No doubt, if these trustees are unable to ascertain and state the income of the Bedfordshire estates, this will be a reasonable excuse within subsection (4) for failure to make a return of total income, and will save them from any penalty under that subsection. But it will not prevent the Special Commissioners from making an assessment under subsection (5) if they choose. And I see no sufficient reason for holding that the circumstances of the case are such as to bring into play the saving words of subsection (6) and to make the provisions of section 41 of the Act of 1842 as to the assessment of these trustees to income-tax inapplicable to their assessment to super-tax in respect of the income of both estates.

There is, indeed, one case in which the provisions of section 41 might not be applicable to the assessment of trustees of a particular fund to super-tax—namely, a case in which the income of that fund was so small in proportion to the other income that the super-tax on the total income actually exceeded the income of the particular fund. In such a case the words "so far as applicable" might, no doubt, prevent any assessment of the trustees to an amount exceeding their trust income. But this would be a very exceptional case, and is obviously not the case here. As matters stand here, I do not see sufficient to render inapplicable the general statutory direction that the liability of the trustees to assessment to income-tax under section 41 is extended to a liability to assessment to super-tax, although that tax will be calculable on the income of both estates.

A great deal was made, in the argument for the respondents, of the difficulties that might arise where there were several trust funds, particularly in view of the present graduated rates of super-tax. I doubt whether it is permissible to rely on this last circumstance in construing the Act of 1910, which imposed a flat rate of duty only, unless, perhaps, for the purpose of urging that the graduation of the rate of duty is another circumstance which has by now prevented the provisions of section 41 of the Act of 1842 from being "applicable." But, in my opinion, these difficulties are more apparent than real. After all, the charge of super-tax falls ultimately not on the trustees, but on the total income of the infant *cestui que trust*, and it matters not at all, either to the infant or to the trustees sought to be assessed, whether the tax is taken from the income of one trust fund rather than of another, so long as the trustees of any one fund are not rendered liable for more than the whole income of their fund. In such a case, where their liability would exceed their funds, and in any other possible case in which the perfectly rigid application of the provisions of section 41 of the 1842 Act would be liable to cause actual injustice, this result would, I think, be prevented by the limiting words of subsection (6), "so far as applicable." But, in cases like the present, where there are two funds only and the figures are such that the assessment of super-tax on the trustees of the one fund (in this case the Irish estates) involves a liability very far short of the income of that fund, I cannot myself see that the provisions as to the assessment of these trustees to income-tax are so inapplicable to their assessment to super-tax as to except this case from the general legislative directions of section 72 and particularly of subsections (2) and (6) thereof.

In my opinion the judgment in this case should be reversed and the assessment on the trustees should be confirmed, subject, of course to the ascertainment of figures, which, it is agreed, need some examination and adjustment.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Walfords.]

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Acquisition of Land (Assessment of Compensation) Act, 1919, becomes incapable of continuing a particular arbitration, the authority of the Reference Committee includes the power to replace him by someone else.—GROSS, SHERWOOD, AND HEALD, LIMITED v. ESSEX COUNTY COUNCIL [Eve, J.] 5

Statute of Limitations—Award a condition precedent to an action—Cause of action not arising till after award—Limitation Act, 1623 (21 Jac. I., c. 16), s. 3].—A steamship belonging to the claimants was requisitioned in 1917 on behalf of the Admiralty on the terms of charterparty T.99. Clause 18 provided that the Admiralty should not be liable for ordinary marine risks, and clause 19 that the war risks should be undertaken by the Admiralty. Clause 31 provided for arbitration as follows :—"Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law." The steamship was sunk by collision in July, 1917, and in November, 1923, the claimants began arbitration proceedings against the Crown in respect of the war risk. The Admiralty set up the defence of the Statute of Limitations, 21 Jac. I., c. 16. The arbitrator made his award in 1925 in the form of a special case, finding that the ship was lost in consequence of warlike operations. Held, that as the words of clause 31 of the charterparty contemplated that an action at law could not be brought until the result of an arbitration had been obtained, no cause of action arose until after the award, and therefore the period of six years, fixed by 21 Jac. I., c. 16, did not begin to run till the making of the award, and no question of the Statute of Limitations arose. Decision of the Court of Appeal (42 *The Times* L.R., 731; [1927] 1 K.B., 269) affirmed.—BOARD OF TRADE v. CAYZER, IRVINE AND COMPANY, LIMITED [H.L.] .. 625

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ASSIGNMENT — Assignment to trustee for benefit of creditors—Business and goodwill—Covenant by assignors to assist trustee in realizing the estate and in distribution of assets—Whether broken by solicitation of customers by assignors on behalf of rival business].—By a deed of assignment, the debtors, who were three brothers who had been carrying on a bakery business in partnership, assigned the business and goodwill thereof to the plaintiff as trustee. The debtors covenanted, *inter alia*, that they would "do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof among

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the creditors as may be reasonably required by the trustee, and will aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof among the creditors." In an action by the plaintiff as trustee under the deed of assignment claiming an injunction to restrain the debtors from soliciting the customers of the business for orders for and on behalf of themselves and the defendant Cooper, who carried on business as a baker, and to restrain the defendant Cooper from instigating the debtors so to do, Held, that the action would not lie against the defendant Cooper, as the acts which it was alleged that he instigated were not wrongful. As the debtors themselves were justified in law in soliciting the customers of the business, and were not precluded from so doing by their covenant, the defendant Cooper could not be restrained from instigating them so to do. *Green v. Morris* (30 *The Times* L.R., 301; [1914] 1 Ch., 562) approved and applied.—FAREY v. COOPER AND OTHERS [C.A.] 803

Chose in action—Debt—Amount recoverable expressed to be less than debt—Whether absolute assignment of the whole—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 136].—The defendant owed £285 to one W., who owed money to the plaintiff bank, and W. assigned to the bank the debt owed to him by the defendant. The assignment, which was in writing, provided that "the amount recoverable under these presents shall not at any time exceed the sum of £150." Due notice of the assignment was given to the defendant. In an action upon the assignment, Held, that the assignment was not an assignment of part only of the debt, but an absolute assignment of the whole debt with a proviso that if the bank recovered more than £150 they must hold the balance as trustees for the assignor, and it was therefore a good legal assignment, and that even if it was an assignment of part only of the debt it would still be a good equitable assignment, and the plaintiffs were entitled to recover.—BANK OF LIVERPOOL AND MARTINS, LIMITED v. HOLLAND [Wright, J.] 29

See also CONFLICT OF LAWS, COPYRIGHT, PRACTICE, and TRADE MARKS.

AUSTRALIA — Crown lands for discharged soldiers—Conditions and forfeitures—Ejectment for arrears].—If a person holding Crown land in South Australia under the Australian Discharged Soldiers' Settlement Act, 1917, and amending Acts fails to carry out the conditions laid down in his agreement with the Government, he can be ejected without a judicial or quasi-judicial inquiry.—LAFFER v. GILLEN [P.C.] 694

See also NEW SOUTH WALES.

BANKERS—Cheques—Company's cheques to be signed by two directors—Payment of cheques not so signed—Negligence—Trade creditors of company—Equity for bank to

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stand in place of creditors].—The defendant bank negligently and in breach of the instructions given by their customer the plaintiff company paid cheques drawn on the company's account signed by one director only. All the cheques were paid to the company's trade creditors. Held, (1) that the bank being put on inquiry and being negligent (as the jury found) were not entitled to rely on the rule in *Royal British Bank v. Turquand* (6 E. and B., 327) and assume that a signature purporting to be that of a new director was that of a person duly appointed; (2) that whether the plaintiff company's account was in credit or in debit at the time of the payments to trade creditors the bank were, on the equitable doctrine under which a person who has in fact paid the debts of another without authority is allowed to take advantage of his payment, entitled to credit for the cheques paid in discharge of the debts of the plaintiff company. An inquiry was ordered into the circumstances of payment of each cheque.—B. LIGGETT (LIVERPOOL), LIMITED, v. BARCLAYS BANK, LIMITED [Wright, J.] .. 449

Garnishee order—Bank balance of debtor in foreign branch of English bank—Banker's duty to customer—Rules of the Supreme Court, Order XLV., r. 1].—Money held by an English bank to the credit of a judgment debtor at a foreign branch cannot be made the subject of a garnishee order by an English Court, as such money is not recoverable within the jurisdiction.—RICHARDSON v. RICHARDSON AND THE NATIONAL BANK OF INDIA, LIMITED [Hill, J.] 631

Negligence—Cheque—Directions by customer to stop payment — Wrong number mentioned — Other particulars correct — Cheque honoured by bank].—The plaintiff, who had an account with the defendant bank, on July 31, 1924, drew a cheque, No. 117285, and post-dated it August 2. On August 1 he telegraphed to the defendants to stop payment of cheque No. 117283, mentioning the payee and the amount. These particulars were correct as to cheque No. 117285, but the number of the cheque was wrong. Cheque No. 117285 was presented on August 6, and the bank officials paid it, supposing that it had been drawn in place of the one that had been stopped. In an action for negligence, Held, that as the one certain item of identification was the number the bank was not guilty of negligence, and the action failed. Decision of the Court of Appeal (42 *The Times* L.R., 423) reversed.—WESTMINSTER BANK, LIMITED v. HILTON [H.L.] 124

Negligence — Transmission of money abroad — Cheque sent by registered letter — No insurance — Failure to reach payee — Forgery of indorsement—Clearance of cheque —Non-liability of bank].—The plaintiffs, being customers of the defendants, who were bankers in London, instructed them to transmit a sum of money to a person in Rumania, and the defendants sent a cheque by registered post to him personally. The cheque never reached him, but someone apparently put on it a forged indorsement of his name, and it was eventually cleared through a bank in Poland, and the defendants debited the plaintiffs with the amount. In an action for negligence the plaintiffs alleged that the defendants should have sent the cheque by a letter which was insured in addition to being registered. Held, that as the loss of a cheque was a rare occurrence, and as the standard of the defendants' duty should not be measured by a consideration of all the precautions which subsequent events might suggest, the action failed.—OSE GESELLSCHAFT, &C., v. JEWISH COLONIAL TRUST [MacKinnon, J.] 398

Overdraft — Fraudulent book-entries by manager for own advantage—Notional credit and debit—Rights of customer].—The account of a customer with the plaintiff bank was overdrawn. The manager, for the purpose of concealing the overdraft from the auditors, fraudulently credited the account with a sum sufficient to put it in credit, and subsequently debited it with a similar sum. In an action by the bank against the customer, Held, that the customer could not rely upon the credit as payment and repudiate the debit as being unauthorized.—BRITISH AND NORTH EUROPEAN BANK, LIMITED v. ZALZTEIN [Sankey, J.] 299

See also BILLS OF EXCHANGE and CONFLICT OF LAWS.

BANKRUPTCY—Bankruptcy notice—Act of bankruptcy—Validity of notice disputed—Fresh bankruptcy notice issued—Whether debtor bound to comply with fresh notice—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), ss. 1 (*g*), 2, 37].—Creditors having obtained judgment issued a bankruptcy notice for £945 and served it on the debtors. The debtors paid a sum of £100, including £5 for costs, nine days later, but in the belief that the notice would be disputed the creditors issued and served a fresh bankruptcy notice about two months later for £857, and, that notice not having been complied with within seven days, a petition based on the fresh bankruptcy notice was presented and served. The debtors gave notice of an application to set aside service of the petition, but the Registrar refused to do so, and made a receiving order on the fresh bankruptcy notice. On appeal, Held, that the debtors could not refuse to comply with the fresh bankruptcy notice on the ground that as the previous notice had resulted in an act of bankruptcy this had put it out of the power of the debtors to make any payment in compliance with the fresh notice or otherwise deal with their property. If, however, they did make a payment in compliance with the fresh notice it might be that if a trustee were appointed under the previous bankruptcy notice the payment might be set aside, and the money made available for the general body of creditors.

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Ponsford, Baker and Co. v. Union of London and Smiths Bank (22 *The Times* L.R., 812 ; [1906] 2 Ch., 444) explained and distinguished.—IN RE DEBTORS (No. 771 OF 1926) [C.A.] 9

Settlement—Property accruing to settlor—Wife's intestacy—Administration granted to husband—Property accruing to husband in right of wife—Settlement by husband upon child of marriage—Bankruptcy of settlor within two years—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 42].—By s. 42 of the Bankruptcy Act, 1914, voluntary settlements made within two years of the bankruptcy of the settlor are void as against the trustee in bankruptcy, with certain exceptions, one being "a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife." A wife who was possessed of certain shares died intestate. Her husband took out administration, settled the shares upon trusts for the daughter of the marriage, and became bankrupt within two years. Held, that notwithstanding the operation of the Married Women's Property Act, 1882, and the independence which it gave to a wife in the holding of her property, the husband had taken the shares *jure mariti*, or "in right of his wife," and the settlement upon the daughter was not void. —IN RE BOWER WILLIAMS [C.A.] 225

Public examination — Refusal to answer questions — Answers detrimental to debtor — Whether sufficient ground for refusal — Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 15 (8)].—A debtor, on his public examination under s. 15 (8) of the Bankruptcy Act, 1914, is bound to answer all such questions as the Court may put or allow to be put to him, and the mere fact that it would be seriously detrimental to the debtor to answer them is not a sufficient ground for refusal.—IN RE PAGET—EX PARTE OFFICIAL RECEIVER AND BOARD OF TRADE [C.A.] 455

BETTING — Betting duty — Bookmaker — Certificate — Carrying on business without — Conviction — Previous conviction on same transactions for keeping betting house — Whether bar to second conviction—Betting Act, 1853 (16 and 17 Vict., c. 119), s. 3—Finance Act, 1926 (16 and 17 Geo. V., c. 22), s. 17 (1) (*b*)].—A conviction of a person for keeping a betting house under s. 3 of the Betting Act, 1853, is not a bar to his conviction, arising out of the same transactions, for carrying on business as a bookmaker without a proper certificate under s. 17 (1) (*b*) of the Finance Act, 1926.—CLARK v. WESTAWAY [Div. Ct.] 786

See also GAMING and JUSTICES.

BILLS OF EXCHANGE — Cheque — Crossed cheque—"Account payee only"—Forgery of indorsement—Non-liability of collecting bank —Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 82].—By section 82 of the Bills of Exchange Act, 1882, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title . . . the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The plaintiffs, who were merchants in London, bought paper from German manufacturers through S., their buying agent in Germany, and sent him a crossed cheque, marked "account payee only," drawn on the National Provincial Bank in London, and payable to the vendors. S. indorsed the cheque by forging the name of the vendors and added his own name, and he then paid it into his own bank at Dresden. The Dresden bank collected the money from their English agents, the defendant bank, and the latter collected the amount from the National Provincial Bank. In an action for wrongful conversion of the cheque the defendants relied on s. 82 of the Bills of Exchange Act, 1882. Held, (1) that since, even if the defendants had scrutinized the cheques, there was nothing which would have put them on inquiry, the defendants had not been negligent ; (2) that the word "customer" in the section included the bank with which the defendants were dealing ; and (3) that, although the defendants were acting as a collecting bank, they "received payment" within the meaning of the section ; and therefore that the action failed. Decision of MacKinnon, J. (43 *The Times* L.R., 325 ; [1927] 1 K.B., 869), affirmed.—IMPORTERS COMPANY, LIMITED v. WESTMINSTER BANK LIMITED [C.A.] 639

Cheque—Partnership—Two partners sued as drawer and indorser respectively—Cheque drawn in favour of third partner—Signatures in blank—Belief that partnership stamp would be affixed—Fraudulent negotiation of cheque to moneylenders by payee—Right of moneylenders to recover].—The plaintiffs, who were moneylenders, sued the defendants as the drawer and one of the indorsers of a cheque indorsed to the plaintiffs for value. The defendants were in partnership together with the payee of the cheque and other persons. The cheque had been signed by them in blank, in the belief that the rubber stamp of the partnership would be added and that the cheque would be used for the partnership's business. The payee, in fraud of the other partners, neglected to affix the partnership stamp and used the cheque for the purpose of raising money from the plaintiffs. The cheque, which was post-dated at the time of the loan, was subsequently presented by the plaintiffs, when repayment of one of the agreed instalments under the loan became due, and was dishonoured. Held, that the plaintiffs were entitled to recover as holders of the cheque for value in due course, as nothing had occurred to put them on inquiry whether the payee was committing a fraud,

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and the defendants could not contend that the cheque was a document given in escrow, so as not to impose liability until the fulfilment of a special condition, since both the drawer and indorser, when signing the document, had intended that it should be used and negotiated as a cheque.—GUILDFORD TRUST, LIMITED v. GOSS AND ANOTHER [Branson, J.] 167

Company—Receiver for debenture-holders—Signature as drawer—Words of description—Surrounding circumstances — Intention of parties—Right of receiver to sue acceptors—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 26 (1) (2)].—By the Bills of Exchange Act, 1882, s. 26, subsection 1 : "Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon ; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." By subsection 2 : "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." The plaintiff, who had been appointed receiver on behalf of the debenture-holders of a limited company, sued the defendants as acceptors of a number of bills of exchange. The bills were signed by "R. Kettle, Receiver, Ford Paper Works (1923), Limited" as drawer. They had been accepted in respect of goods supplied by the company to the defendants, and the plaintiff had stated that it must be "clearly understood that I am in no way accepting any liability or responsibility whatever in respect of the orders themselves." The defendants contended that these were "surrounding circumstances" from which the inference should be drawn that the plaintiff did not intend to make himself personally a party to the bills and that, therefore, he was not entitled to sue upon them. Held, that the above were not "surrounding circumstances" from which the intention of the parties could be inferred, and that such intention must be gathered from the terms of the document alone ; that the words "Receiver, Ford Paper Works (1923), Limited" were words of description only, and that the bills did not purport to have been drawn on behalf of the company. The plaintiff, therefore, was entitled to recover against the defendants upon the bills. *Chapman v. Smethurst* (25 *The Times* L.R., 383 ; [1909] 1 K.B., 927) and *Elliott v. Bax-Ironside* (41 *The Times* L.R., 631 ; [1925] 2 K.B., 301) followed and applied.—KETTLE v. DUNSTER AND WAKEFIELD [Horridge, J.] 770

Indorsement—Signature of payee—Bill drawn in France—Acceptance in England—Indorsement in France by payee's agent in agent's own name—Sufficiency by

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French law—Action by indorsees—Whether acceptors liable on bill—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), ss. 32 (1), 72 (1)].—A bill of exchange was drawn in France by E. V. upon the defendants in London to the order of M. V., and the defendants accepted it. It was indorsed in France to the plaintiffs by E. V. with the authority of M.V., but the signature was not expressed to be for M. V., and on presentment the defendants declined to pay the bill as it did not bear the indorsement of M. V. In an action by the indorsees against the acceptors evidence was given that a valid indorsement might be made according to French law by an agent signing his own name if he was so authorized by the payee, and the trial Judge held that though by s. 72 (1) of the Bills of Exchange Act, 1882, the validity of the indorsement "as regards requisites in form" was governed by French law, this provision did not let in the French law so as to dispense with the signature of the payee as required by s. 32 (1), and the plaintiffs could not recover. Held, that as the trial Judge had accepted the evidence as to the French law, and as by s. 72 (1) of the Bills of Exchange Act, 1882, the validity of the indorsement as regards requisites in form was governed by French law, the plaintiffs were entitled to recover. Decision of Rowlatt, J. (43 *The Times* L.R., 148) reversed.—KOECHLIN ET CIE. v. KESTENBAUM BROTHERS [C.A.] .. 352

See also BANKERS, COMPANIES, and INSURANCE (LOSS).

BY-LAW — Reasonableness — *Ultra vires*—Restraint of trade—Severn Navigation Acts, 1842 to 1920].—By the Severn Navigation Act, 1920, s. 9, extending s. 16 of the Severn Navigation Act, 1914, the Severn Commissioners were empowered to make by-laws "for prescribing the place or places at public wharves and quays at which passengers and goods may be embarked or disembarked. . . . " None of their enabling Acts empowered the Commissioners to impose tolls on persons embarking or disembarking. To prevent the dangerous racing of rival steamers starting from private landing-stages at Worcester, the Commissioners made a by-law : "No person shall anchor or moor any passenger vessel near to or against any portion of Worcester Quay for the purpose of enabling any passenger to be taken on board or disembarked from such passenger vessel . . . if and so long as the Corporation of the City of Worcester maintain . . . a pier . . . or piers . . . connected with the quay and available for giving access from the quay to a passenger vessel . . . and allow any persons desirous of travelling by a passenger vessel to enter upon and pass along the said piers . . . who have previously paid to the Corporation or their authorized agent, such sum, not exceeding twopence, as the Corporation may be entitled to charge in respect of every such person, which sum shall allow the person paying the same to pass along the said piers

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. . . to the quay when disembarking from the said passenger vessel on the same day as that on which the said sum was paid." Held (Shearman, J., dissenting), that this by-law was not *ultra vires,* unreasonable, or in restraint of trade. It did not impose a tax or toll upon the public but restricted the duration of the by-law for the protection of the public to the period during which the charge made (assuming that the Corporation were entitled to make any charge at all) did not exceed twopence. The justification for the charge, if its legality were challenged, was not to be found in the by-law, but must be derived *aliunde. Per* Lord Hewart, C.J. : Though the reasonableness of a by-law is a question of law, the Court should pay great regard to the findings of local justices upon a by-law made by a body of persons with knowledge of local conditions.—EVERTON v. WALKER [Div. Ct.] 554

CANADA—Admiralty jurisdiction—Claims under charterparties—No local residence of parties impleaded—No cause of suit arising within the local jurisdiction—Whether process *in rem* competent—Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict., c. 27), s. 2 (2)].—Under s. 2 (2) of the Colonial Courts of Admiralty Act, 1890, apart from local legislation, a Court of Admiralty in Canada cannot, irrespectively of the residence of the defendant or place of origin of the alleged cause of action, be called upon by arrest of a vessel within its area to adjudicate upon all claims of plaintiffs suing under any charterparty made in respect of the vessel. Similarly, throughout the Empire, outside England, litigants in Courts of Admiralty jurisdiction have, apart from local legislation, no right of proceeding by process *in rem* in respect of like claims, in like circumstances of the absence of local residence of parties impleaded and the non-existence of any cause of suit arising within the local jurisdiction. The above Act defines as a maximum of jurisdictional authority for the Courts to be set up thereunder the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed. The Act therefore does not include in such jurisdictional authority the jurisdiction in claims on charterparties which was for the first time conferred on the Admiralty Division of the High Court in England by s. 5 of the Administration of Justice Act, 1920.—THE YURI MARU. THE WORON [P.C.] 698

British Columbia — Statute — Validity—Taxation — Whether "direct" — British North America Act, 1867 (30 and 31 Vict., c. 3), s. 92—Fuel-Oil Tax Act, 1923, c. 71 (British Columbia statute), ss. 3, 6].—The Fuel-Oil Tax Act, 1923 (British Columbia statute), which provided that every person purchasing within the province fuel-oil sold for the first time after its manufacture in or importation into the province should pay a tax, to be collected and paid to the Government by the vendor, is invalid, since the tax

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is not a "direct" tax within s. 92 of the British North America Act, 1867. Decision of the Supreme Court of Canada ([1927] S.C.R., 185) affirmed.—ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY COMPANY [P.C.] 750

Newfoundland—Labrador boundary].—According to the true construction of the relevant Statutes, Orders in Council, and Proclamations, the boundary between Canada and Newfoundland in the Labrador Peninsula is a line drawn due north from the eastern boundary of the bay or harbour of Ance Sablon as far as the 52nd degree of north latitude, and from thence westward along that parallel until it reaches the Romaine river, and then northward along the left or east bank of that river and its head waters to their source and from thence due north to the crest of the watershed or height of land there, and from thence westward and northward along the crest of the watershed of the rivers flowing into the Atlantic Ocean until it reaches Cape Chidley.—IN RE LABRADOR BOUNDARY [P.C.] 289

Quebec—Custody of a child—Rights of tuteur and parent].—The appointment of a tuteur to a child under the provisions of the Civil Code of Quebec does not deprive the mother of her natural rights in regard to the custody and education of the child.—STEVENSON v. FLORANT [P.C.] 6

Railway Act, 1919—Jurisdiction of Railway Commissioners].—In proceedings brought by the appellants it was submitted that, as their line was a provincial railway, the Dominion Railway Acts had no application and the Board of Railway Commissioners no jurisdiction. Held, affirming the decision of the majority of the Supreme Court of Canada, that as the appellants' railway was, under the circumstances, a railway connecting the Province of Alberta with other Provinces, the railway was one within the legislative authority of the Dominion Parliament under s. 92 (10) (*a*) of the British North America Act, 1867, and the Board of Railway Commissioners had jurisdiction.—LUSCAR COLLIERIES, LIMITED v. MCDONALD AND OTHERS (ATTORNEYS-GENERAL FOR CANADA AND ALBERTA INTERVENANTS) [P.C.] 801

CARRIAGE OF GOODS BY SEA—Damage by oil fuel—Unseaworthiness—Design of ship—Bad workmanship—Leakage from oil bunker—Non-responsibility of shipowners].—The plaintiffs shipped a quantity of carcasses of lamb for carriage from Australia to London by a new oil-fuel steamer built for the defendants. The bills of lading incorporated the rules in the Schedule to the Australian Sea Carriage of Goods Act, 1924, by which the carrier is not liable for damage from unseaworthiness unless caused by want of due diligence to make the ship seaworthy. During the voyage some of the rivets between an oil bunker and the hold became loose,

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and oil leaked through and tainted the meat. In an action for damages the plaintiffs contended that the ship was unseaworthy, in the sense of being unfit for the carriage of the particular cargo, by reason of inefficient design or of bad workmanship, and the defendants pleaded that the unseaworthiness (if any) was not owing to any want of due diligence on their part. Held, that the damage was caused by defects of design, and, although in view of recent experience the particular design was unsatisfactory, yet the adoption of it, at the time when the ship was built, did not involve any lack of due diligence on the part of the defendants, and that, although bad workmanship did to some extent contribute to the damage, yet, as it was not such as could have been discovered by the defendants' inspectors, and as the shipbuilders were not servants or agents of the defendants, the defendants were not liable for it, and therefore the action failed.—W. ANGLISS AND CO. (AUSTRALIA) PROPRIETARY, LIMITED v. P. AND O. STEAM NAVIGATION COMPANY [Wright, J.] 675

See also CONTRACT.

CHILDREN — Youthful offender — Reformatory school — Residence — Liability for maintenance—Children Act, 1908 (8 Ed. VII., c. 67), s. 74 (1) (3) (7)].—A youth resided at various places in London until the end of June, 1926. He was then taken to stay with his grandparents in Wiltshire for three months while his mother went abroad to her husband. He had then no home to which he could return in London. On July 18, 1926, he committed an offence in Wiltshire and was ordered to be sent to a reformatory school, London being specified in the order as his place of residence, the London County Council being thereby made liable for his maintenance. Held, that there was no evidence of an actual residence in London at the date of the offence, and therefore, though he was in Wiltshire only on a temporary visit, he was presumed to reside there under s. 74 (3) of the Children Act, 1908, and the liability for his maintenance fell on the Wiltshire County Council.—LONDON COUNTY COUNCIL v. WILTSHIRE COUNTY COUNCIL [Div. Ct.] 563

See also DIVORCE.

CLUB—Proprietary golf club—Rights of members—Extraordinary general meeting—No notice to women members—Validity of resolution—Rules of club—Women members not full members].—The plaintiffs were the captain and the secretary of the women's section of a golf club, of which the defendant company were the proprietors. At an extraordinary general meeting of the members a resolution was passed deleting from the rules of the club a provision for the election of a women's committee to manage the affairs of the women's section. No woman member of the club received notice of that meeting, as none of the women members held any

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shares in the company. In an action for a declaration that the resolution was invalid, Held, that under the rules women members were not full members and were not entitled to receive notices of general meetings, and therefore the action failed.—COLE AND ANOTHER v. MERTON PARK (WIMBLEDON) GOLF CLUB, LIMITED [Branson, J.] 400

COMPANIES—Articles of association—Alteration of article—Power of shareholders—*Bona fide* for benefit of the company—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), s. 13 (1)].—By s. 13 (1) of the Companies (Consolidation) Act, 1908: "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles. . . ." The power to alter or add to the articles under this section must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and the question whether a given alteration of or addition to the articles is for the benefit of the company is a question for the shareholders, acting *bona fide*, and not for the Court, and the Court will not interfere with the action of the shareholders except on grounds on which it would interfere with a verdict of a jury. *Dicta* of Peterson, J., in *Dafen Tinplate Company, Limited v. Llanelly Steel Company* (1907), *Limited* (36 *The Times* L.R., 428; [1920] 2 Ch., 124) disapproved. — SHUTTLEWORTH v. COX BROTHERS AND COMPANY (MAIDENHEAD), LIMITED, AND OTHERS [C.A.] 83

Bills of exchange—Bills wrongfully drawn by branch manager on behalf of company—Ostensible authority to bind company—Forgery—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 24—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), s. 77].—The defendants, a limited company, by their memorandum had power to sign, make, draw, accept and indorse bills of exchange. By article 18 of the articles of association the directors were empowered "to determine who shall be entitled to sign and make, draw, accept and indorse on the company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts and documents." The defendants carried on business in London as general carriers and forwarding agents, and they had a branch office at Manchester, of which one Sydney Clarke was manager. Clarke was also concerned in the formation of a company known as Clarke and Walker, Limited. Having bought goods on behalf of the last-named company, Clarke, without any authority to do so from the defendants, drew seven bills on behalf of the defendants signed "S. Clarke, Manchester Manager." The bills were made out to the order of the drawers, accepted by Clarke and Walker, Limited, and indorsed on behalf of the defendants "S. Clarke, Manchester Manager." The bills were discounted by the plaintiff bank, and when they were dishonoured by the acceptors the plaintiff bank as holders

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in due course sued the defendants as drawers, but the latter repudiated the whole transaction, and stated that Clarke had acted without authority. Held, (1) that in the absence of evidence that the branch manager had ostensible authority to draw bills on behalf of the company, the plaintiffs were not entitled to assume that he had such authority (*Houghton and Co. v. Nothard, Lowe and Wills*, [1927] 1 K.B., 246, followed), and (2) that the bills were forgeries and therefore null and void and the defendants were not precluded from setting up the forgery or the want of authority of the manager. *Ruben and Ladenburg v. Great Fingall Consolidated* (22 *The Times* L.R., 712; [1906] A.C., 439) followed. Judgment of Wright, J. ([1926] 2 K.B., 450), reversed.—KREDITBANK CASSEL v. SCHENKERS, LIMITED, AND OTHERS [C.A.] 237

Call—Company in liquidation—Action for call previously made—Sums alleged to be due from company to shareholder—No right of set-off].—In a common law action by a company, which is in liquidation, against a shareholder for a call made before the liquidation, the defendant has no right of set-off in respect of sums alleged to be due to him from the company. *Brighton Arcade Company, Limited v. Dowling* (L.R., 3 C.P., 175) not followed.—ALLIANCE FILM CORPORATION, LIMITED v. KNOLES [Acton, J.] 678

Debentures—Rights of debenture-holders—How far majority can bind minority].—The power of a majority of a special class, such as debenture-holders, to bind a minority must be exercised for the purpose of benefiting the class as a whole and not individual members only.—BRITISH AMERICA NICKEL CORPORATION, LIMITED, AND OTHERS v. M. J. O'BRIEN, LIMITED [P.C.] 195

General meeting — Right to attend and vote — Non-cumulative preferred ordinary shares—No right of holders to attend unless dividend in arrear—Meaning of "in arrear" in the articles].—A company's articles of association provided that the original preference shares, carrying a cumulative preferential dividend of 7 per cent., should not confer upon the holders the right to attend and vote at any general meeting or to have notice thereof unless (*inter alia*) the dividend thereon was "in arrear" for more than three months. Subsequently the capital of the company was increased by the issue of preferred ordinary shares with the right to a non-cumulative preferential dividend of 10 per cent. payable in respect of each year exclusively out of the profits earned in each year and to rank after the preference shares. It was further provided that the holders of these preferred ordinary shares should, *mutatis mutandis*, be subject to the same restrictions as to receiving notices of and attending and voting at general meetings as the holders of original preference shares. Since 1920 no profits had been available to

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pay dividends, and for the general meeting of 1926 the holders of preferred ordinary shares received no summonses. In an action by holders of such shares against the company for a declaration that they were entitled to have notice of and to attend and vote at the general meetings, Held, that the words "in arrear," in the context in which they appeared in the articles, could not be construed to cover the non-payment of a non-cumulative preference dividend payable out of the profits of each year and not paid because there were no profits available for the dividend, and the action failed.—COULSON v. AUSTIN MOTOR COMPANY, LIMITED [Tomlin, J.] 493

Voluntary liquidation—Surplus assets—Rights of preference and ordinary shareholders].—IN RE MADAME TUSSAUD AND SONS, LIMITED [Eve, J.] 289

Winding-up—Insurance of company against claims—Judgment against company—Subsequent liquidation—Payment by insurers to liquidator—Whether amount available for general creditors].—The applicant obtained judgment against a limited company for damages for personal injuries and costs. Afterwards the company went into liquidation, and the insurance company with which the company in liquidation was insured paid the amount of the damages and costs to the liquidator. Held, that the applicant was not entitled to have the amount in question paid to him direct by the liquidator, but it formed part of the assets for distribution among the general creditors, including the applicant.—IN RE HARRINGTON MOTOR CO., LIMITED [Eve, J.] 684

Winding-up—Proof—Contract of marine insurance—No stamped policies—Rejection of proof].—The Court held that the liquidator had rightly rejected a proof by the English Insurance Company, Limited, in the winding-up of the National Benefit Assurance Company, Limited, in that the contract between the two companies in respect of which the proof of debt was advanced was a contract of marine insurance and no stamped policy of marine insurance was issued to the English Insurance Company, Limited, as required by law, and therefore the contract was invalid.—IN RE NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED [Eve, J.] 594

See also BILLS OF EXCHANGE, and REVENUE—Income-tax, and TREATY OF PEACE.

CONFLICT OF LAWS — Debt — Assignment—Validity—Deposit in English bank—Assignment made abroad — Invalidity by foreign law—Validity by English law—Which law applicable].—In 1906 the defendant's father, when President of the Republic of Guatemala, deposited a sum of money with London bankers. The President was afterwards deposed and imprisoned, and by letters written in prison in the year 1921 he

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admitted that the money belonged to the Republic, and he ordered the bankers to place the amount at the exclusive disposal of the Government of Guatemala. The defendant gave notice to the bankers that his father had assigned the money to him by a letter written in 1919, during the defendant's infancy, and, when a demand was also made upon them on behalf of the Republic of Guatemala, they declined to hand over the money. The Republic then brought an action against the bankers, and they brought the money into Court, and an interpleader issue was directed between the Republic as plaintiffs and the ex-President's son as defendant. The plaintiffs alleged that the money had been misappropriated from the Republic by the defendant's father, and that the assignment to the defendant in 1919 was invalid by the law of Guatemala owing to non-compliance with the formalities requisite in the case of an infant donee. The defendant pleaded that the assignment to him in 1919 was valid by the law of England, and that the letters of 1921 had been written by his father under duress. Held, that the plaintiffs had failed to prove that the money had been misappropriated from the Republic, and that, although the assignment of 1919 to the defendant was valid by the law of England, yet, as the law applicable was that of Guatemala, the claims of both parties failed. Decision of Greer, J. (42 *The Times* L.R., 625), affirmed.—REPUBLICA DE GUATEMALA v. NUNEZ [C.A.] 187

CONTEMPT OF COURT—Publication of photograph of accused person—Possible question of identity].—Observations on the duty of persons responsible for the production of newspapers to exercise care as to the publication of a photograph of an accused person in cases where it should be reasonably clear to them that a question of identity may arise.—REX v. EDITOR OF THE "DAILY MIRROR" AND OTHERS—EX PARTE SMITH. REX v. EDITOR OF THE "DAILY MAIL" AND OTHERS—EX PARTE SMITH [Div. Ct.] 254

CONTRACT—Agent of friendly society—Alteration of rules — Amendment providing for compulsory retirement—Whether binding on agent appointed before amendment].—The plaintiff was appointed an agent of the defendants, a friendly society, whose rules, though subject to alteration, provided at that time for the retention of agents in office so long as their conduct was satisfactory. After the plaintiff reached the age of 65 the defendants altered their rules by providing that agents should be compulsorily retired at the age of 65, and in accordance with the amended rules the defendants terminated the plaintiff's employment. In an action for a declaration that the defendants were not entitled to do so, Held, that as the rules, on the face of them, were alterable, the plaintiff was not entitled to

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the declaration claimed, and the action failed. Decision of Rowlatt, J. (43 *The Times* L.R., 375) affirmed.—PAGE v. LIVERPOOL VICTORIA FRIENDLY SOCIETY [C.A.] .. 712

Carriage by sea—Responsibility of carrier—Fault of his agents or servants—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV., r. 2 (*q*)].—By Art. IV., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . . (*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." The plaintiffs shipped a case of cotton goods on the defendants' steamer at Liverpool for carriage to Tampico and delivery there. Without the fault or privity of the defendants, and in spite of the vigilance of the ship's officers, the goods were stolen by the servants of the stevedores, who were employed by the ship's agents to discharge the cargo at Vera Cruz, where the ship called before going to Tampico. In an action for non-delivery, Held, that the stealing of the cargo was not an act in the management of the ship, and therefore the defendants were not protected by rule 2 (*a*) ; and that in rule 2 (*q*) the words "or without" must be read as "and without," and therefore, although the defendants themselves were free from blame, yet, since the servants of the stevedores were the defendants' agents, and since the defendants, in order to succeed, had to prove that both they themselves and their servants or agents were free from blame, the plaintiffs were entitled to recover. Decision of MacKinnon, J. (43 *The Times* L.R., 394), affirmed.—R. F. BROWN AND CO., LIMITED v. T. AND J. HARRISON [C.A.] .. 633

Carriage of goods by sea—Obligations of shipowners — Alleged breach of duty—Damage to cargo—Negligence—Onus of proof—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. III., rr. 2, 6, 8 ; Art. IV., r. 2].—The plaintiffs had a quantity of tinplates shipped for conveyance by the defendants' steamer from Swansea to Vancouver, and after the tinplates had been taken on board the ship went to Liverpool and had to be detained there for repairs. For this purpose part of the cargo had to be shifted, and rain got into the hold, and when the tinplates were discharged at Vancouver they were found to have been damaged by rust. In an action for damages for breach of duty in the carriage of the tinplates, the Court found that the facts were as above stated and that if the

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damage was not caused by rain getting into the hold the cause was unexplained. Held, that the defendants had failed to carry out the obligation imposed on them by Art. III., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, carefully to stow, keep, and care for the goods, and that, even if the cause of the damage was unexplained, the onus was not on the cargo-owners to prove negligence but on the shipowners to prove that neither they nor their servants had been guilty of negligence contributing to the loss, and the plaintiffs were entitled to recover.—GOSSE MILLARD, LIMITED v. CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED [Wright, J.] 544

Carriage of goods by sea—Theft from steamer at discharge wharf—Absence of fault or privity of carrier—Discharge by stevedores—Responsibility of carrier for his "agents or servants"—Whether stevedores within that expression—Burden of proof—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. III., r. 2, Art. IV., r. 2].—The plaintiffs shipped at Liverpool on the defendants' steamer a quantity of cloth for carriage to Shanghai. By the bill of lading the defendants were to have the protection given by the Carriage of Goods by Sea Act, 1924. After discharge was begun at Shanghai by stevedores, who were independent contractors, some of the cloth was stolen from the steamer. It was admitted that the loss had occurred without the actual fault or privity of the defendants themselves. In an action for damages for breach of contract, Held, that the stevedores must be treated as "agents or servants" of the defendants within Rule 2 of Article IV. of the Schedule to the Act, and, as on the facts the defendants had failed to establish that the theft had not been committed by the stevedores' men, the plaintiffs were entitled to recover.—HEYN AND OTHERS v. OCEAN STEAMSHIP COMPANY, LIMITED [MacKinnon, J.] 358

See also CARRIAGE OF GOODS BY SEA.

Indemnity—Undertaking to indemnify against all claims—Whether inclusive of claims by the persons giving the undertaking].—The plaintiffs took a lease of premises from the defendant railway company, and, by an agreement supplemental to the lease, the defendants gave the plaintiffs permission, on certain terms, to use for the transport of materials a portable gangway which could be moved over certain of the defendants' railway lines. One of the terms was that the plaintiffs "agree and undertake to indemnify the said [railway] company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway." When the plaintiffs were using the gangway some trucks were shunted down the line, and the gangway was destroyed. In an action for damages for negligence and/or breach of duty the defendants denied liability and pleaded the aforesaid term of the supplemental agreement. On a preliminary point as to the construction of the agreement, Held (Sargant, L.J., dissenting), that the undertaking was only one to hold the defendants harmless against claims by third parties, and the preliminary point must be decided in favour of the plaintiffs. Decision of MacKinnon, J. (43 *The Times* L.R., 527), affirmed.—JAMES DURNFORD AND SONS, LIMITED v. GREAT WESTERN RAILWAY COMPANY [C.A] 679

Sale of goods — Condition — Breach—Right of rejection—Whether validly exercised—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), ss. 11 (1) (*c*), 30 (3), 35].—The appellants sold to the respondents, for shipment from Hamburg to Liverpool, a cargo of coal to consist of briquettes, size 2in., the contract providing as follows:—"Bills of lading to be accepted by buyers as absolute and conclusive proof of weight, quality, and description, the buyers having right of inspecting the cargo. No warranty is expressed or implied, and sellers accept no responsibility in regard to the description, size, quality, condition, or fitness for steaming purposes or otherwise of the coal or fuel contracted for or supplied, and no reduction in price will be made in respect of any such matters." The respondents required the coal to supply power stations, and at the time of the contract the appellants were aware of this. The cargo was shipped, some of it being in the holds and the remainder on deck and covering the hatch covers. On arrival at Liverpool the vessel had to wait for a discharging berth, and the captain, finding that the cargo in the holds was heating, bought the deck cargo from the respondents and removed it and opened the hatches. The respondents then found that though the briquettes on the deck were of the contractual size the briquettes in the holds were larger and were not suitable for use in power stations, and they gave notice of rejection of the whole cargo. Held, on a case stated by an arbitrator, (1) that it was a condition of the contract that the briquettes should be of the size of 2in., and the condition was effective as the warranty clause dealt only with warranties as such and did not affect a condition; (2) that the respondents had a right to reject the underdeck part of the cargo, but that as they had claimed the right to reject the whole cargo they had never validly exercised their right to reject the underdeck part; and (3) that they were remitted to their right to recover damages for breach of a condition, namely, failure to ship a cargo in conformity with the contract.—WILLIAM BARKER (JUNIOR) AND CO., LIMITED v. ED. T. AGIUS, LIMITED [Salter, J.] 751

Sale of goods—Defect—Cylinder for ship's engines — Supply to ship repairers—Subject to "our usual" guarantee clause — Damages for detention of ship — Uncertainty as to clause indicated].—The plaintiffs, a ship-repairing company, requiring a new intermediate pressure cylinder for

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the engine of a steamer which they had contracted to repair, obtained a quotation from the defendants, who were marine engineers. At the head of the defendants' letter was a printed notice, "All offers are subject to our usual strike and guarantee clauses, accidents, &c." The plaintiffs ordered the cylinder, but after it had been delivered and fitted it was found to be defective. A new cylinder was subsequently supplied by the defendants, but owing to the delay the plaintiffs were not able to complete the repairs in accordance with their contract with the shipowners, and had to pay them damages. In an action to recover the amount of the damages the defendants alleged that the contract for the supply of the cylinder was made subject to "our usual" guarantee clause and that their guarantee clause provided (*inter alia*) that "the contractors shall not in any case be liable for any detention of the vessel or other consequential damages howsoever arising." Held, that as it was not clear what guarantee clause was incorporated, since the clause suggested by the defendants was inapplicable to the contract, and as it was not proved that the defendants had made it clear that they intended to limit their liability, the plaintiffs were entitled to recover. Decision of Roche, J. (43 *The Times* L.R., 104), affirmed.—J. Gordon Alison and Co., Limited v. Wallsend Slipway and Engineering Company, Limited [C.A.] .. 323

Sale of goods—Specific performance—Purchase of 1,000 tons of wheat to be loaded on named ship—Sale of 500 tons—Arrival of ship with wheat in bulk—Payment—Bankruptcy of vendor—"Specific or ascertained" goods—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), s. 52].—One W. made a c.i.f. contract to buy 1,000 tons of wheat to be loaded in America on a named ship for Avonmouth, and the respondents then made a c.i.f. contract to buy 500 tons of it from him. Subsequently the wheat was shipped in bulk and a bill of lading for the 1,000 tons was received by W. on January 4, 1926, the price being payable on February 6. On January 5 W. delivered to the respondents a provisional invoice for the 500 tons, the price of which, less half the freight payable at destination, was due on February 6. On February 5 the respondents gave W. a cheque for the price of the 500 tons. On February 24 W. was adjudicated bankrupt, and on February 28 the vessel arrived at Avonmouth with the wheat in bulk. On an application by the respondents against the trustee for specific performance of the contract by delivery of the 500 tons on payment of their proportion of the freight, Held (Sargant, L.J., dissenting), that the 500 tons were not specific or ascertained goods within s. 52 of the Sale of Goods Act, 1893, and therefore specific performance of the contract would not be ordered. Decision of the Divisional Court ([1926] Ch., 962) reversed.—In Re Wait—Ex Parte Collins [C.A.] 150

See also SALE OF GOODS, and SHIP—Sale.

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Theatrical engagement—Agreement to advertise the performer—Refusal by employers to allow performer to play the part—Payment of full salary—Action for breach—Obligation to allow performer to act—Damages for loss of reputation].—The plaintiff, an actress, was engaged by the defendants to play a certain part in a play for the period of rehearsal and for the run of the play, and there was a collateral agreement that the defendants would advertise her in a prominent position. The defendants refused to allow the plaintiff to play the part, but they paid her the whole of her salary down to the end of the run of the play. In an action for breach of contract the jury awarded to the plaintiff, over and above her salary already paid, damages for loss of reputation through her not being employed to play the part. The defendants contended that under the written contract they were under no obligation to give the plaintiff an opportunity of acting, and that the plaintiff was not entitled to damages for loss of reputation. Held, that there was an obligation to give the plaintiff an opportunity of acting, and the plaintiff was entitled, in addition to her salary already paid, to the damages awarded by the jury for loss of reputation. Decision of Horridge, J. (43 *The Times* L.R., 460), affirmed.—Marbé v. George Edwardes (Daly's Theatre), Limited [C.A.] 809

Turkish baths—Obligations of proprietor].—The keeper of Turkish baths, who allows persons to use them in return for payment, impliedly warrants that the couches are reasonably fit for reclining on, and he owes a duty to those persons to take reasonable care that no dangerous insects infest his premises.—Silverman v. Imperial London Hotels, Limited [Swift, J.] .. 260

CONVERSION—Mercantile agent—Possession as such—Consent of owner—Wrongful sale by agent—Title of purchaser—Estoppel—Factors Act, 1889 (52 and 53 Vict., c. 45), ss. 1, 2].—The plaintiff was the owner of certain tapestries, known as the Aubusson tapestry and the Leopard tapestry, and he gave to one P., a dealer in antiques, a limited authority to obtain and submit offers from possible purchasers. P. falsely represented to the plaintiff that he could obtain £525 for the Aubusson tapestry, and the plaintiff allowed him to take it away for delivery to a purchaser, who in fact did not exist. P. then sold the Aubusson tapestry to the defendant for £250. Subsequently P., who never had authority to sell the Leopard tapestry, stole it from the plaintiff and sold it to the defendant. In an action for conversion the defendant contended that P. had been in possession of the tapestries as a mercantile agent within the meaning of the Factors Act, 1889, and that as he had bought them from P. in good faith he had acquired the property in them. He also contended that the plaintiff had held out P. as a person with authority to sell and was therefore estopped from saying that P. had no such

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authority in fact. Held, that although P.'s authority was limited, and although he was not acting for any principal other than the plaintiff, yet these facts did not prevent him from being a mercantile agent, and, in the circumstances he was a mercantile agent in possession of the Aubusson tapestry with the consent of the plaintiff, and therefore as to that tapestry the defence under the Factors Act, 1889, was established, but, as to the Leopard tapestry, that as P. was never in possession of it with the plaintiff's consent, the defence under the Act failed, and, as the plaintiff had never represented to the defendant that P. had authority to sell it, there was no estoppel, and therefore the plaintiff was entitled to recover the value of the Leopard tapestry alone.—LOWTHER v. HARRIS [Wright, J.] 24

COPYRIGHT — Broadcasting—Opera—Music—Performance in public—"Broadcasting" by wireless telephony—Grant by composer of right to perform—Assignment or licence—Whether grant determinable on death—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 1].—By an agreement dated March 23, 1905, the plaintiff granted to G. E. "the sole and exclusive right of representing or performing" in certain areas a play, of the music of which the plaintiff was the composer. G. E. died in 1915, and in 1920 his executors assigned to a limited company the benefits of copyrights and other rights previously held by G. E. In October, 1926, the limited company agreed to permit the defendants to "broadcast" by wireless telephony a performance of the opera. The defendants "broadcast" the opera from their studio, to which the public was not admitted. Held, that the defendants, in doing so, gave a public performance of the opera within section 1 of the Copyright Act, 1911, and that, as the agreement of March 23, 1905, was not an assignment by the plaintiff to G. E. of all his performing rights, but was a licence confined to ordinary performances at a theatre, and of such a personal character as to be determinable on the death of G. E., the defendants had acquired no lawful licence to perform the opera in public and were, therefore, liable in damages to the plaintiff for breach of copyright.—MESSAGER v. BRITISH BROADCASTING COMPANY, LIMITED [McCardie, J.] 818

Infringement — Musical work — Performance in public — Copyright Act, 1911 (1 and 2 Geo. V., c. 46), ss. 1, 2].—The question whether the performance of a musical work was a performance in public, so as to constitute an infringement of copyright, is a question of fact, and, in determining that question, the quantum of damage likely to accrue and the number and class of persons having a right to be present at the performance are factors to be noted. Decision of Eve, J. (42 *The Times* L.R., 729; [1926] Ch. 870), affirmed.—HARMS (INCORPORATED) AND OTHERS v. EMBASSY CLUB, LIMITED, AND OTHERS [C.A.] 21

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COUNTY COURT — Jurisdiction—Breach of promise of marriage—Action for return of articles given during engagement—Alleged bailment].—The respondent brought a County Court action against the applicant for the return of certain money and articles, alleging that the parties had promised to marry one another and that the applicant had broken the promise. The applicant applied for a writ of prohibition to be directed to the County Court on the ground that the action was really one for breach of promise of marriage and that therefore the County Court had no jurisdiction. The respondent contended that the action was brought on a bailment, which was within the County Court jurisdiction. Held, that in substance the claim was for damages for breach of promise of marriage and the writ must issue. *Hunt v. North Staffordshire Railway Company* (2 H. and N., 451) followed.—PARSONS v. BURGESS [Acton, J.] 713

Practice—Action claiming relief under Moneylenders Acts—Commenced in High Court—Claim limited to £100—Transfer to County Court — "Contract" — Moneylenders Act, 1900 (63 and 64 Vict., c. 51), s. 1—County Courts Act, 1888 (51 and 52 Vict., c. 43), s. 65—County Courts Act, 1919 (9 and 10 Geo. V., c. 73), s. 1].—By s. 65 of the County Courts Act, 1888, as amended by s. 1 of the County Courts Act, 1919: "In any action commenced in the High Court, where—(1) the plaintiff's claim is founded either on contract or on tort and the amount claimed or remaining in dispute . . . does not exceed £100, whether the action could or could not have been commenced in a County Court, . . . either party may . . . apply to the Court or a Judge for an order that the claim . . . shall be transferred" to the County Court. Where a borrower from a moneylender issues a writ in the High Court, claiming relief under the Moneylenders Acts, the claim being limited to £100, such a claim is one founded on contract within the meaning of s. 1 of the County Courts Act, 1919, and can be transferred to the County Court for trial under that section.—WHITE v. SMITH [C.A.] 288

See also MONEYLENDERS and PRACTICE.

CRIMINAL LAW—Assault on prison officer—"Powers, authorities, protection, and privileges of a constable"—Sentence as for assault on constable—Prevention of Crimes Act, 1871 (34 and 35 Vict., c. 112), s. 12—Prison Act, 1898 (61 and 62 Vict., c. 41), s. 10].—Section 10 of the Prison Act, 1898, enacts that "Every prison officer while acting as such shall have all the powers, authorities, protection, and privileges of a constable." A convict who assaults a warder on duty is therefore liable to be sentenced by a Court of summary jurisdiction to six months' hard labour, that being the punishment provided by s. 12 of the Prevention of Crimes Act, 1871, for assaulting a constable

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when in the execution of his duty.—Pointing v. Wilson [Div. Ct.] 44

Habitual criminal—Leading persistently a dishonest or criminal life—Previous convictions—Proof—Evidence of an admission by the prisoner—Whether evidence of identification required.—Rex v. Hayward, Rex v. Lawrence [C.C.A.] 356

Procedure — Appeal — Notice of appeal—Complaint of summing-up—Particulars].—On an appeal to the Court of Criminal Appeal substantial particulars of misdirection and of any other objections to the summing-up must be included in the notice of appeal or must be sent to the Registrar of the Court with the notice of appeal.—Rex v. Cairns [C.C.A.] 455

Procedure — Indictment — False pretences—Amendment—Introduction of allegation as to representation of existing fact—Indictments Act, 1915 (5 and 6 Geo. V., c. 90), s. 5 (1)].—A count for obtaining goods by false pretences, consisting in a promise to do something in the future, cannot be amended under s. 5 (1) of the Indictments Act, 1915, so as to introduce for the first time the fundamental ingredient of the representation of an alleged existing fact.—Rex v. Hughes [C.C.A.] 250

Procedure—Right of Judge to call witness—Close of defence—Limitation on right—Something arising *ex improviso*].—On a criminal trial the right of the Judge to call a witness, after the close of the case for the defence, is limited to cases where in the course of the defence something has arisen *ex improviso* which no human ingenuity could foresee.—Rex v. Harris [C.C.A.] 774

Threatening to accuse of certain crime with intent to extort money—Use of words capable of meaning some offence not within the enactment—"Improper conduct"—Larceny Act, 1916 (6 and 7 Geo. V., c. 50), s. 29 (2) (*b*)].—The appellants were convicted under s. 29 (2) (*b*) of the Larceny Act, 1916, of threatening to accuse of a crime within that section with intent to extort money. The evidence was that they enticed a man into a compromising situation with one of themselves and then threatened to accuse him of "improper conduct." Held, that the mere fact of the words being capable of being understood to mean some offence not within the section was no defence, as it was a question for the jury what was the effect on the mind of the man on whom they were intended to operate, and as there was evidence on which the jury could properly come to the conclusion that the threat was a threat to accuse of the particular crime mentioned in the indictment; and that therefore the convictions must be affirmed.—Rex v. Stuart. Rex v. Leonard. Rex v. Maples. Rex v. Tannen. Rex v. Taylor [C.C.A.] 715

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CROWN—Department of State—Air Council—Action of tort against—Whether competent—Air Force (Constitution) Act, 1917 (7 and 8 Geo. V., c. 51), ss. 8, 9, 10].—No action of tort will lie against the Air Council for acts done in its capacity as such.—Mackenzie-Kennedy v. Air Council [C.A.] 733

Official of Crown—Wrong—Purported exercise of statutory authority—Immunity from action].—An action will not lie against a Crown official, as such, for a wrong done in purported exercise of a statutory authority.—Hutton and Others v. Secretary of State for War [Tomlin, J.] 106

Patent—Alleged user—Compensation—Action against Air Council — Whether competent—Air Force (Constitution) Act, 1917 (7 and 8 Geo. V., c. 51), s. 10 — Patents and Designs Act, 1907 (7 Edw. VII., c. 29), s. 29—Patents and Designs Act, 1919 (9 and 10 Geo. V., c. 80), s. 8].—The plaintiff Mackenzie-Kennedy, who was a consulting engineer and designer of aeroplanes, designed an aeroplane with a tail gunpit, and under a contract of July, 1916, with the Director-General of Military Aeronautics he agreed to carry out the work of its construction for the War Office, and it was alleged for the plaintiffs that it was an implied term of the contract that the specifications and designs were not to be disclosed to rival designers but were to be used only by the Directorate of Military Aeronautics, the Admiralty, and the Air Board. The plaintiffs further alleged that the Air Board disclosed the designs in 1917 to an aeroplane company, with the result that the company fitted a tail gunpit to an aeroplane of their own. In 1918 the company applied for a patent for it, and thereupon Mackenzie-Kennedy applied for a patent, which was granted, subject to a reference to the company's patent. The plaintiffs alleged that in 1917 and 1918 orders were given by the Government to the company for aeroplanes fitted with Mackenzie-Kennedy's tail gunpit and that but for the disclosure of his designs the orders must have been given to him. In an action by Mackenzie-Kennedy and his trustee in bankruptcy against the Air Council the plaintiffs claimed a declaration that Mackenzie-Kennedy's patent was valid, damages, and royalties, and a declaration that he was entitled to have compensation determined in pursuance of the Patents and Designs Acts, 1907 and 1919. Held, that the Air Council was not liable to be sued on any contract made on behalf of the Crown, and that under s. 29 of the Patents and Designs Act, 1907, as substituted by s. 8 of the Patents and Designs Act, 1919, an action was not the proper procedure, and therefore the action failed. Decision of P. O. Lawrence, J. (41 *The Times* L.R., 545), affirmed.—Rowland and Mackenzie-Kennedy v. Air Council [C.A.] 717

See also NEW SOUTH WALES.

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DANGEROUS DRUGS — Supply — Register of persons supplied — Obligation to keep — Exception — Administration by or under direct personal supervision of medical man — Dangerous Drugs Regulations, 1921, regs. 4, 9].—By reg. 4 of the Dangerous Drugs Regulations, 1921, "Except when the drugs are lawfully dispensed in pursuance of a prescription given by a duly qualified medical practitioner . . . or are supplied by a duly qualified medical practitioner or registered veterinary surgeon who dispenses his own medicines, in accordance with the conditions hereinafter specified, no person shall supply or procure or offer to supply or procure any of the drugs to or for any person in the United Kingdom who is not licensed or otherwise authorized to be in possession of the drug. . . . Provided that administration of the drugs by or under the direct personal supervision of a duly qualified medical practitioner . . . shall not be deemed to be supplying the drug within the meaning of this and the following regulations." By reg. 9, "Every person who supplies any of the drugs shall comply with the following provisions:—(*a*) He shall enter or cause to be entered in a register kept for the sole purpose all supplies of the drug purchased or otherwise obtained by him and all dealings in the drug effected by him . . . in the form and containing the particulars shown in Schedule 1 to these regulations. . . ." Held, that the word "administration" in the proviso to reg. 4 as to administration by a medical man is not confined to administration in an emergency as contrasted with a general supply, and that the words "personal supervision" are not limited to cases where the medical man is personally present when the dose is taken.—KINGSBURY v. DIRECTOR OF PUBLIC PROSECUTIONS [Div. Ct.] .. 79

DEFAMATION — Libel — Privilege—Absolute privilege — Unemployment insurance—Proceedings before Court of Referees—Letter written to official of Ministry of Labour—Whether part of proceeding before a judicial tribunal — Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 11].—A letter written by an employer to the Divisional Controller of the Ministry of Labour on the subject of an employee's claim to unemployment benefit, in regard to which the decision of the Court of Referees under the Unemployment Insurance Act, 1920, has not been promulgated, although it has been arrived at, is not absolutely privileged, and therefore is actionable, if defamatory and written with malice, inasmuch as the Court of Referees, though they have to bring a judicial mind to bear on the performance of their duties, are nevertheless acting administratively and are not a body deciding between parties to a judicial proceeding, and as consequently such a letter cannot be said to form part of the proceedings before a tribunal acting in a manner similar to the procedure of a Court of justice.—

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COLLINS v. H. WHITEWAY AND CO., LIMITED [Horridge, J.] 532

See also PRACTICE—Costs.

DIVORCE—Alimony *pendente lite*—Future instalments—Husband's assets—Restriction on power of Court to grant injunction—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 45].—The Court has no power to order that moneys accruing to a husband in the future in respect of shares held by him shall be paid into Court in respect of the future instalments of alimony *pendente lite*. Nor has the Court power, unless there is a sum due by him to be paid under an order of the Court, to grant an injunction restraining him from parting with such assets.—FANSHAWE v. FANSHAWE [Bateson, J.] 666

Connivance — Husband's petition — Collusive agreement between husband and co-respondent — Dismissal of suit — Second petition naming same co-respondent — Charges of adultery subsequent to first petition — Effect of agreement — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 178].—The petitioner filed a petition for divorce on the ground of his wife's adultery with the co-respondent, and it was disclosed to the Court that the petitioner and the co-respondent had agreed (1) that the co-respondent should pay the petitioner £2,500 damages, of which £1,750 was to be paid down and the rest later, and (2) that the petitioner should claim no further damages from the co-respondent and should put no obstacles in the way of a decree *nisi* being made absolute. The petition was therefore dismissed on the ground that the suit was collusive. After the dismissal the respondent and the co-respondent continued to live in adultery, and the petitioner, who had received the £1,750, presented a second petition against them, complaining of the adultery since the date of the former petition. Held, that the petitioner had by the agreement prevented himself from complaining of any adultery whether past or future, and that therefore he had connived at the adultery of which in his second petition he complained, and the second petition must be dismissed.—GIFFORD v. GIFFORD AND FREEMAN [Lord Merrivale, P.] 141

Custody of child — Legitimated child—Application for declaration of legitimation and for custody—Child not a party—Jurisdiction—Legitimacy Act, 1926 (16 and 17 Geo. V., c. 60), s. 1; Schedule, para. 1 (*b*)].—The unmarried parents of an illegitimate child married one another, the father being domiciled in England at the time of the marriage. Subsequently the husband obtained a decree *nisi* of divorce on the ground of the wife's adultery, and he applied that there should be inserted in the decree *nisi*, (1) a declaration that the child was the legitimated child of the parties, and (2) an order that he should be given the custody of

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the child. Held, that although upon the evidence the conditions of s. 1 of the Legitimacy Act, 1926, had been fulfilled, yet, as the child was not a party to the suit, the Court ought not to adjudicate upon the question whether the child was legitimated by the Act, since the Court was not, unless the child was a party, a "Court of competent jurisdiction" within para. 1 (*b*) of the Schedule to the Act; and that therefore the Court had, as matters stood, no power to make an order for the custody of the child.—BEDNALL v. BEDNALL AND SHIVUSSAWA [Hill, J.] 599

See also LEGITIMATION.

Husband's petition — Obligation to make alleged adulterer a co-respondent—Power of Court to grant dispensation—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 177.—GLEED v. GLEED [Lord Merrivale, P.] 678

Jurisdiction — Husband's petition — Settlement by guilty wife on children — No property within the jurisdiction—Powers of English Court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 191 (i)].—The petitioner, the husband, obtained a decree absolute for divorce against his wife, the respondent, and was awarded £1,000 damages against the co-respondent. Subsequently the respondent married the co-respondent, a domiciled Dutchman, and she was now resident in Holland. The respondent paid the damages into Court out of her separate estate, and she obtained leave to enter an appearance so that she might be heard on the question of their payment out. The petitioner, by leave, then presented a petition for an order that the respondent should make a settlement on the two children, and the respondent entered an appearance to this petition. The Registrar reported that the respondent had an income of £500 a year, mainly from foreign investments, and he submitted that the £1,000 damages should be paid out to the petitioner and that the respondent should be ordered to settle £100 a year on each child. The petitioner moved to confirm the report as to the damages and to vary it by an order on the respondent to lodge in Court £4,000 to be settled on the children. The respondent opposed the motion on the ground that the Court had no jurisdiction to make the variation asked for. Held, that the £1,000 damages ought to be paid out of Court to the petitioner, but that, as the respondent was not domiciled in England and had no property in England, and as her appearance was not entered to meet the claim made on the motion and was qualified by a denial of jurisdiction, there should be no order on the respondent to settle money on the children or to lodge money in Court for the purpose of such a settlement.—TALLACK v. TALLACK AND BROEKEMA [Lord Merrivale, P.] 467

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Maintenance — Husband's large income—Principles governing award of maintenance to wife—Matrimonial Causes Act, 1907 (7 Edw. VII., c. 12), s. 1 (1) (2)—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190 (1) (2)].—In fixing the amount of maintenance to be awarded to a wife on dissolution of marriage, the Court is not bound by any arithmetical rule to allot a definite proportion of the husband's income, or by the practice of the Ecclesiastical Courts in fixing alimony after divorce *a mensa et thoro*. Where the husband has an ample fortune over and above the needs of the matrimonial home, the maintenance to be awarded to the wife must be dependent on what is necessary to maintain her station in life. *Kettlewell v. Kettlewell* (14 *The Times* L.R., 96; [1898] P., 138) followed.—GILBEY v. GILBEY [Lord Merrivale, P.] 283

Marriage — Invalidity — Nullity — Want of formalities — French marriage—Subsequent domicile of both parties in Germany—Decree of nullity by Court of domicile—Whether conclusive].—Where a man and woman have married in a foreign country and have afterwards become domiciled in another foreign country, and the Court of their domicile has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a Court of this country where they are not domiciled cannot, in the absence of proof of substantial injustice, review the decision of the Court of the domicile.—SALVESEN OR VON LORANG v. ADMINISTRATOR OF AUSTRIAN PROPERTY [H.L.] 609

Nullity — Gretna marriage — Informality — Non-residence in Scotland for requisite period — Decree *nisi* of nullity].—BACH (OTHERWISE KOHN) v. BACH [Hill, J.] .. 493

Permanent alimony — Arrears — Husband's assets—Writ of sequestration—Power of the Court—R.S.C., Order XLIII., rr. 6, 7—Matrimonial Causes Rules, 1924, r. 79A].—Where a husband is in arrear with the payment of permanent alimony, after a decree of judicial separation has been pronounced in favour of his wife, a writ of sequestration may issue in accordance with Rule 79A of the Matrimonial Causes Rules, 1924, and the sequestrator may be ordered to realize property of the husband within the jurisdiction and apply the proceeds of sale to the payment of the moneys owing to the wife by the husband under orders of the Court arising in such proceedings. An order for payment of permanent alimony by monthly instalments is an act to be done "in a limited time" within the meaning of R.S.C., Order XLIII., r. 6, but there is a special divorce rule governing the procedure—namely, the rule above mentioned.—CAPRON v. CAPRON [Bateson, J.] 667

Petition — Service — Respondent a minor—Personal service—Matrimonial Causes Rules, 1924, r. 7].—Where the respondent to

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a divorce petition is a minor, personal service of the petition on the respondent is good service, and the appointment of a guardian *ad litem* is not necessary.—McCausland v. McCausland [Bateson, J.] 592

Restitution of conjugal rights — Judicial separation—Settlement of suit—Deed of separation — Agreement to execute—Term as to custody of child — Refusal by agreed custodian—Whether settlement prevented from being carried into effect].—The Court held that where the parties to a matrimonial suit had agreed to settle it upon certain terms, and a deed of separation had been approved to give effect to such settlement, the refusal of the husband's brother to undertake the custody of one of the children, as nominee of the husband, which custody had been agreed on between the husband and wife as one of the terms of the deed, was not a failure of such a vital term as to prevent the settlement from being carried into effect.—Willis v. Willis [C.A.] 657

Restitution of conjugal rights—Order against husband — Non-compliance—Application by wife for order to secure periodical payments—Reversionary interests of husband—Immediate order to secure—Whether competent—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 187].—Where a husband refuses to comply with an order for the restitution of conjugal rights, and the wife applies for an order on the husband to secure periodical payments to her for their joint lives, the Court has no power to order the husband to secure a part of his reversionary interests, unless and until it comes into possession or he sells them.—Allison v. Allison [Hill, J.] 823

Variation of settlements — Assurance on husband's life—Policy moneys to be paid to wife if surviving—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 192].—Gulbenkian v. Gulbenkian [Hill, J.] 267

Variation of settlements — Petition after decree *nisi* but before decree absolute — Absence of jurisdiction to entertain — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 192].—After a decree *nisi* for dissolution of marriage the Court has no jurisdiction under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, to entertain any application for an inquiry into and variation of settlements until after the decree has been made absolute.—Gilbert v. Gilbert and Boucher [C.A.] 589

Wife's petition — Husband and married woman made respondents—Decree *nisi* —Costs against both—Limitation to separate estate in case of married woman—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 177].—Pepper v. Pepper and Baker [Hill, J.] .. 1

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Wife's petition — Previous petition by husband—Finding of adultery by wife—Husband's conduct conducing—Dismissal of husband's petition—Alimony pending wife's petition — Jurisdiction of Court to order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190 (3)].—Where a wife has been found guilty of adultery on the petition of her husband for dissolution of marriage but the petition has been dismissed because the husband was found guilty of conduct conducing, and where the wife subsequently petitions for dissolution of marriage, the Court has jurisdiction to award her alimony *pendente lite*. Decision of Lord Merrivale, P. (43 *The Times* L.R., 161), affirmed.—Welton v. Welton [C.A.] 174

Wife's prayer for dissolution—Wife guilty of adultery—Discretion of Court—Grant of decree].—Grayson v. Grayson [Hill, J.] .. 225

EDUCATION—Defective child—Parent—Father a convict—Child residing with mother—Consent to child being sent to special school—Education Act, 1921 (11 and 12 Geo. V., c. 51), ss. 42, 53, 54 (1), 170 (12)].—The parent whose consent is required to be given or unreasonably withheld before a defective child can be ordered, under s. 54 (1) of the Education Act, 1921, to be sent to a special school which is not within reach of the child's residence or to a boarding school, is the parent who has *de facto* custody of the child. Hence in a case where the father of a defective child was a convict serving a term of penal servitude and the child resided with its mother, Held, that the mother was the parent for the purposes of the section.—Woodward v. Oldfield [Div. Ct.] .. 488

Non-provided school — Teacher's salary—Burnham Report — Adoption by local education authority — "Carry-over" — Payment by instalments—Alleged unsatisfactory service after adoption—Refusal to pay third instalment—Powers of local education authority].—The plaintiff was appointed head teacher of a non-provided school in 1904, and in 1921 the Burnham Report on Standard Scales of Salaries for Teachers in Public Elementary Schools was adopted by the local education authority. That report provided by clause 9 : "All teachers shall be brought to their correct positions on the standard scale adopted by the authority in the following manner. . . . (*e*) Nothing in this Report is intended to preclude an authority from dealing specially, for the purposes of the 'carry-over,' with the case of a teacher whose service has been declared to be unsatisfactory and continues to be so regarded, provided always that no teacher shall be penalised in respect of years of satisfactory service." The "carry-over" meant the difference between the salary which a teacher would have received at the date of the adoption of the report by the local education authority if throughout the teacher's service the Burnham scale had been in operation, and the salary which at that date the teacher

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was in fact receiving. The effect of the adoption of the report was that the plaintiff became entitled to an increase of salary, and it was agreed that the payment of the "carry-over" should be spread over three years. The education committee, however, refused to pay the third instalment of the "carry-over," namely, for the year ending March 31, 1924, on the ground that in 1923 the plaintiff's service had been unsatisfactory. In an action by the plaintiff against the managers and the local education authority for the third instalment, Held, that the local education authority had no power, under the terms of the report, to withhold from a teacher any part of the "carry-over" by reason of unsatisfactory service after the date of the adoption of the report, and the plaintiff was entitled to recover.—WITTS v. MACKAY AND OTHERS [Div. Ct.] 535

EMERGENCY REGULATIONS — Supply of fuel—Publication of statement calculated to restrict — Distribution—Emergency Regulations, 1926, reg. 21].—During a strike it was agreed between the colliery owners and the miners that the safety men should remain at work. Some owners posted up offers of work to miners, and certain miners, not safety men, returned to work. A board of enginemen, deputies, and miners, of which the appellant was secretary, then passed a resolution that if coal were raised for other than safety purposes all the safety men would be withdrawn; and the appellant, by direction of the board, sent copies of the resolution to the secretary of the owners' association and to the managers of certain collieries. The appellant was convicted of distributing a document containing a statement the publication of which was calculated to impede, delay, or restrict the supply or distribution of fuel, contrary to reg. 21 of the Emergency Regulations, 1926. Held, per Lord Hewart, C.J., that the document was not calculated to restrict the supply of fuel, but was merely a complaint that the agreement for preserving the pits was being broken, that it was not "distributed" by the appellant, but merely communicated, and that the matter came within the proviso to reg. 21 (1); per Salter, J., that there was a publication, and that it was calculated to stop the supply of fuel, but that the communication was "taking part in a strike" within the proviso; and per Talbot, J., that the regulation did not apply to an official communication sent by one party in a dispute to the other party. The conviction was accordingly quashed.—SMITH v. WOOD [Div. Ct.] 179

See also SHIP—Requisition.

GAMING—Betting disputes—Agreement to refer to arbitrator—Whether enforceable—Gaming Act, 1845 (8 and 9 Vict., c. 109), s. 18].—Where an agreement to refer betting disputes to a particular arbitrator is an integral part of the bargain by which the bets are made, the agreement to refer is itself a contract

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by way of gaming or wagering and is unenforceable.—JOE LEE, LIMITED v. LORD DALMENY AND OTHERS. SAME v. TATTERSALL'S COMMITTEE [Eve, J.] .. 119

Chemin-de-fer—Losses—Payment by cheque to croupier or banker—Action on cheque].—The plaintiff and other players of chemin-de-fer took it in turn to be croupier or banker. The defendant, who was one of the players, bought counters to stake, and at the end of the game, having lost £500, he gave a cheque for that amount to the plaintiff in payment of what he had lost to the plaintiff and/or other persons. In an action on the cheque, Held, that a payment to a winner at gaming, or to a person who accepted payment for winners, in the form of a cheque, was void and unenforceable, and the action failed.—RICHARDSON v. MONCRIEFFE [Roche, J.] 32

Loan—Purpose of gaming—Cheque given in exchange—Action on the loan—Gaming Act, 1710 (9 Anne, c. 14), s. 1—Gaming Act, 1835 (5 and 6 Wm. IV., c. 41), s. 1].—Where a person lends money to another in a foreign country for the purpose of gaming, the game not being illegal by the law of that country, and receives from him a cheque for the amount, the lender, though not entitled to sue the borrower on the cheque in the English Courts, may sue him in those Courts on the loan.—SOCIÉTÉ ANONIME DES GRANDS ETABLISSEMENTS DU TOUQUET PARIS-PLAGE v. BAUMGART [Shearman, J.] 278

HACKNEY CARRIAGES—Licence—Plying for hire — Omnibus — Taking up in private yard—Town Police Clauses Act, 1847 (10 and 11 Vict., c. 89), s. 45—Town Police Clauses Act, 1889 (52 and 53 Vict., c. 14), ss. 3, 4 (1)].—Section 45 of the Town Police Clauses Act, 1847, makes it an offence for the proprietor of any carriage to permit it to be used as a hackney carriage plying for hire within the prescribed distance without a licence. By s. 4 (1) of the Town Police Clauses Act, 1889, "The several terms 'hackney carriages,' 'hackney coach,' 'carriages,' and 'carriage,' whenever used in sections thirty-seven, forty to fifty-two (both inclusive), fifty-four, fifty-eight, and sixty to sixty-seven (both inclusive) of the principal Act [the Act of 1847] shall, notwithstanding anything contained in section thirty-eight of that Act, be deemed to include every omnibus." By s. 3 of the Act of 1889, "The term 'omnibus,' where used in this Act, shall include every omnibus, charabanc, wagonette, brake, stagecoach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance; but shall not include . . . any omnibus starting from outside the prescribed distance, and bringing passengers within the prescribed distance, and not standing or plying for hire within the prescribed distance." Held, that under the above

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enactments an omnibus is required to have a licence when plying for hire anywhere within the prescribed distance, even in a private yard.—CRACK v. HOLT [Div. Ct.] 231

Licensing of omnibuses—Imposition of undertaking as to fares — Appeal to Minister of Transport — Roads Act, 1920 (10 and 11 Geo. V., c. 72), s. 14 (3)].—The Corporation of H. refused to grant licences for the applicants' motor omnibuses unless the applicants gave an undertaking to charge fares within the City of H. higher than those of the corporation tramways. Their reason for requiring this undertaking was that the omnibuses were only needed for through passengers from H. to points outside the city; and that it was not in the public interest that revenue should be diverted from the tramways which provided an adequate service within the city, or that short-distance passengers should occupy the seats in the omnibuses to the exclusion of the long-distance passengers for whose benefit alone the omnibus service was permitted. The Minister of Transport made no order on an appeal by the applicants, considering that it was in the public interest that passengers should be discouraged from using the applicants' omnibuses for short distances, and that the only legal way to secure that result was some arrangement as to fares. Held, that the Minister had not taken extraneous matters into consideration merely because he proposed, by the regulation of the fares, to secure an object which he considered in the public interest.—REX v. MINISTER OF TRANSPORT—EX PARTE H.C. MOTOR WORKS, LIMITED [Div. Ct.] .. 432

Omnibus—Plying for hire—Return ticket—Omnibuses of same proprietor—Town Police Clauses Act, 1847 (10 and 11 Vict., c. 89), s. 45—Town Police Clauses Act, 1889 (52 and 53 Vict., c. 14), ss. 1-4].—A company of omnibus proprietors which had no licence to ply for hire in the district of R. issued return tickets to R. from a point which was outside R., but was in a district where they were licensed to ply for hire. On the return journey they accepted as passengers from R. only persons holding return tickets issued on one of the company's omnibuses—not necessarily the same vehicle as the one on which the passenger proposed to return. Held, that in these circumstances there was no plying for hire in the district of R. *Sales v. Lake* (38 *The Times* L.R., 336; [1922] 1 K.B., 553) followed. *Armstrong v. Ogle* (42 *The Times* L.R., 553; [1926] 2 K.B., 438) distinguished.—LEONARD v. WESTERN SERVICES, LIMITED [Div. Ct.] 131

HIGHWAYS—Bridges—Highway repairable by inhabitants at large passing over bridge—Liability to repair bridge—"Street"—Public Health Act, 1875 (38 and 39 Vict., c. 55), ss. 4, 149, 152].—In 1882 seven streets were, in the course of the development of an estate, carried across a river on iron girder bridges. These streets subsequently became highways repairable by the inhabitants at

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large. An action was commenced by the Attorney-General against the local authority for a declaration that they were liable to repair and keep in repair these seven bridges. Held, that, having regard to the fact that the word "street," as defined by s. 4 of the Public Health Act, 1875, includes (if this is not inconsistent with the context) any bridge (not being a county bridge), the plaintiff was entitled to the declaration.—ATTORNEY-GENERAL v. HORNSEY BOROUGH COUNCIL [Romer, J.] 92

Ferry—Franchise ferry—Grant—Evidence].—The Court held that a franchise ferry between South Benfleet and Canvey Island had been granted to the predecessors in title of the plaintiffs, who were in possession of the ferry. Decision of Romer, J. (43 *The Times* L.R., 58), affirmed.—LAYZELL AND ANOTHER v. THOMPSON AND OTHERS [C.A.] 332

Repair—Two streets repaired together—One apportionment of total cost—Public Health Acts Amendment Act, 1907 (7 Edw. VII., c. 53), s. 19].—Two streets situated at right angles to one another but forming a continuous road surface were repaired by a local authority under s. 19 of the Public Health Acts Amendment Act, 1907. The local authority included the expenses in a single account, and made an apportionment of the total among the frontagers of both streets. Held, that the apportionment was bad, and the local authority could not recover the amount ascertained by such an apportionment.—NASH v. GILES [Div. Ct.] 121

See also NEGLIGENCE.

HUSBAND AND WIFE—Jurisdiction of justices—Separation order—Husband's application for rescission—Time limit for proceeding—Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), ss. 1, 11—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), ss. 7, 8].—An application by a husband under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, for the discharge of an order for maintenance on the ground of adultery committed by his wife since the date of the order is a "complaint" within s. 1 of the Summary Jurisdiction Act, 1848, upon which the justices "shall have authority by law to make any order for the payment of money or otherwise." Such an application is therefore subject to the time limit of six months provided in s. 11 of the Act of 1848. The justices have no jurisdiction to discharge an order under the latter part of s. 7 of the Act of 1895 unless complaint of an act of adultery by the wife subsequent to the order is brought within six months of the time when the adultery was committed.—WALLER v. WALLER [Div. Ct.] 285

Jurisdiction of justices — Separation order discharged on ground of wife's adultery — Husband's divorce petition dismissed

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— Discharged order revived by justices — Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7 — Criminal Justice Administration Act, 1914 (4 and 5 Geo. V., c. 58), s. 30 (3)].— The decision of a Judge of Assize on a petition for dissolution of marriage that on a specified occasion the wife did not commit adultery is that of a court of record and, after the time for appeal has expired, is conclusive against all the world. Such a decision when brought to the knowledge of the justices is a new fact on which they can revive a separation order previously revoked by them on the ground of the wife's alleged adultery on the same specified occasion.— PRATT v. PRATT [Div. Ct.] 523

Maintenance—Deed of separation—Order for maintenance — Jurisdiction of justices— Wife not deprived of right to resort to justices for maintenance by deed—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 4—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51), s. 1 (1)].—A wife's right to claim and obtain an order for maintenance from a bench of justices under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, is not necessarily barred by a deed of separation which makes an allowance for her maintenance, but it must depend on the terms of the deed whether she is or is not deprived of that right.—DIGGINS v. DIGGINS [Div. Ct.] 37

Maintenance—Jurisdiction of justices—Order—Discharge—Adultery of wife—Proof—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51), s. 2].—Observations upon the administration of the jurisdiction conferred on justices by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, to discharge a maintenance order on proof of the wife's adultery.—BROADBENT v. BROADBENT [Div. Ct.] 186

Maintenance order—Discharge on ground of adultery—Arrears accrued before discharge—Recovery—Order "under this Act" —Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 6—Affiliation Orders Act, 1914 (4 and 5 Geo. V., c. 6), s. 2].—Where a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, has been discharged on the ground of the wife's adultery, she may nevertheless enforce payment of arrears accrued due down to the date of discharge and obtain an order for the attachment of her husband's income. Such an order is not an order "under this Act" within s. 6 of the Summary Jurisdiction (Married Women) Act, 1895.—OUTERBRIDGE v. OUTERBRIDGE [Div. Ct.] 33

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Wilful neglect to provide reasonable maintenance — Limit of time for proceeding not applicable—Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), s. 11 — Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), ss. 4, 8—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51), s. 1 (1)].—A complaint by a wife against her husband for wilful neglect to maintain her or her infant child need not, under s. 11 of the Summary Jurisdiction Act, 1848, be brought within six months from the time when by such neglect he caused her to live separately and apart from him, inasmuch as by s. 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the complaint may now be made notwithstanding that the neglect has not caused her to leave and live separately and apart from him. The decision in *Ellis v. Ellis* (12 *The Times* L.R., 514; [1896] P. 251) has therefore now no application.—PRICE v. PRICE [Div. Ct.] 609
See also DIVORCE.

INDIA—Action against public officer—Requirement of two months' notice — Whether subject to exception — Case of hardship or irreparable damage — Action for injunction —Question of *ultra vires*—Government of India Act, 1858 (21 and 22 Vict., c. 106), s. 65—Code of Civil Procedure (Act V. of 1908) (Indian statute), s. 80].—By s. 80 of the Indian Code of Civil Procedure, "No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description, and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left." Held, that the above provision is not *ultra vires*, as the regulation of civil procedure is not subject to s. 65 of the Government of India Act, 1858, and that it is applicable to all forms of action and to all kinds of relief, and is not subject to any exception in an action where an injunction is prayed or in cases where hardship or injury not reparable by money compensation may arise; and that therefore, where a plaint, such as is referred to, is issued before the expiration of two months from the notice required, the action is unsustainable *in limine*.—BHAGCHAND DAGDUSA GUJRATHI AND OTHERS v. SECRETARY OF STATE FOR INDIA IN COUNCIL [P.C.] 617

Hindu law — Adoption — Minor — Ancestral property of adoptive father—Rights of inheritance—Consent by natural father to infringement—Whether binding on son].—

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By Hindu law, where a natural father during his son's minority consents to the adoption of the son by another upon the terms of an arrangement whereby the adoptive father by his will limits the rights which the adoptive son, if he had been a natural son of the adoptive father, would have had in the ancestral property, the provisions of the adoptive father's will which limit the son's rights, even if the arrangement as a whole was beneficial to the adoptive son, are not binding upon him on his attaining his majority, if these provisions go beyond a mere postponement of the son's interest to a life interest of the testator's widow.—KRISHNAMURTHI AYYAR v. KRISHNAMURTHI AYYAR AND ANOTHER [P.C.] 363

Oudh—Partition suit—Affirmations before a family deity—Indian Oaths Act, 1873].—In partition proceedings in a Hindu family one of the parties (the first plaintiff) made an offer to the other party to give up such items as the other, in the presence of the family deity, might claim to own. After the admissions and denials before the deity had been recorded by Commissioners who were present the first plaintiff contested the agreement on two grounds—(1) that the condition had not been carried out, and (2) that it was not binding under the Indian Oaths Act, 1873. Judgments of the two Indian Courts affirmed and both objections rejected. What took place before the deity was evidence on oath or solemn affirmation within the meaning of section 8 of the Act, and was binding on the first plaintiff.—LALA INDAR PRASAD AND ANOTHER v. LALA JAGMOHAN DAS AND ANOTHER [P.C.] .. 536

INSURANCE (ACCIDENT)—Death—Exception—Assured not to be in charge of a vehicle—Dismounted bicyclist holding his bicycle—Whether in "charge" of a "vehicle"].—By a newspaper policy of insurance against death by accident the insurers undertook to pay £250 in case of death, "if the reader while a pedestrian . . . in a public thoroughfare be killed by accidental impact with a moving vehicle," provided that "the reader be not at the time of the accident in charge of any vehicle." An insured person who was riding a bicycle got off at the foot of a hill and having pushed it some way stopped to speak to another man and stood holding his bicycle, and an unattended motor-car came running down the hill and struck the insured person and caused his death. On a claim under the policy by the deceased man's executors, Held, that the word "vehicle" in the policy included a bicycle and as the deceased man was "in charge of" the bicycle within the meaning of those words in the policy the insurers were not liable.—HARPER AND ANOTHER v. ASSOCIATED NEWSPAPERS, LIMITED [Roche, J.] 331

Motor-car—Third-party risks—Assured drunk when driving—Manslaughter through negligence—Right to recover on insurance—Public policy].—A driver of a motor-car who is insured against third-party risks, and who through negligence, consisting in getting drunk and in driving the car while he was in that condition, has collided with another vehicle and thereby committed manslaughter, is not precluded, on grounds of public policy, from recovering on his insurance, inasmuch as in such a case the criminal act is merely negligent and not wilful.—JAMES v. BRITISH GENERAL INSURANCE COMPANY, LIMITED [Roche, J.] 354

Motor-car "to be used only for commercial travelling"—Statement incorporated and made basis of contract—Warranty or description of risk—Arbitration—Award bad on its face—Award set aside].—The respondent had insured his motor-car with the appellants by a policy which incorporated and was based on a proposal and declaration by the respondent which warranted that the motor-car was to be used only for commercial travelling. During the period covered by the insurance, the respondent's motor-car was being used to carry passengers, when it caught fire and was destroyed. Held, that the statement that the motor-car was to be used only for commercial travelling was descriptive of the risk and that the motor-car was not covered by the policy when it was being used to carry passengers. The award of the arbitrator in favour of the respondent was set aside, because it was bad on its face.—ROBERTS v. ANGLO-SAXON INSURANCE ASSOCIATION, LIMITED [C.A.] 359

See also INSURANCE (MOTOR-CAR).

INSURANCE (BURGLARY) — Misrepresentation — Concealment — Materiality — Evidence].—The appellant and his partner made to the respondent insurance company through the company's agent a proposal for insurance against burglary. One of the questions on the proposal form was, "Has any company declined to accept or refused to renew your burglary insurance?" The plaintiff and his partner answered jointly, "Yorkshire accept, but proposers refused on account of fire proposal," meaning that the Yorkshire company were willing to grant a burglary policy but refused to do so unless at the same time the assured took out a policy against fire. In fact the appellant had, before the commencement of the partnership, been refused by the Sun Company. The respondents issued the policy, and it contained a condition that any misrepresentation, suppression, concealment, or untrue averment in the answers to the questions on the proposal form should render the policy absolutely void. The partnership having been dissolved during the currency of the policy, the latter was continued for the benefit of the appellant alone. Subsequently the appellant made a claim on the policy. The respondents refused to pay on the grounds (*inter alia*)

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that the policy was avoided by misrepresentation in the answer to the question on the proposal form and by concealment of a material fact, and in an arbitration the arbitrator decided in favour of the respondents on both grounds but stated a case. Held, that there were grounds for supporting the finding of the arbitrator that the refusal of the appellant by the Sun Company was a material fact which ought to have been disclosed, and the award of the arbitrator must be affirmed. Decision of the Court of Appeal (41 *The Times* L.R., 566 ; [1925] 2 K.B., 593) affirmed.—GLICKSMAN v. LANCASHIRE AND GENERAL ASSURANCE COMPANY, LIMITED [H.L.] 46

INSURANCE (LIFE) — Policies taken out in Russia — Whether existent and enforceable —Russian law—Currency in which policy moneys payable].—Between 1903 and 1909 the plaintiffs, who were Russian subjects, effected with the defendants, an American insurance company then having a branch in Russia, certain insurances in the form of four endowment life policies and paid the premiums in Russia in roubles down to 1918. The amounts secured by two of the policies were now payable if the policies were still existent and enforceable, and it was admitted by both parties that the contracts were to be governed by Russian law. In an action claiming the amount due on the policies or the return of the premiums the defendants contended that by the laws of Russia the policies had become void, as the Russian Government had in 1919 by decree cancelled all kinds of life insurance and transferred all premiums to the Government Treasury. Uncontradicted evidence was given for the plaintiffs that by a Russian law made in 1923 the People's Commissariat of Justice was charged with the "interpretation" of existing laws and that the Commissariat had interpreted the decree of 1919 as having no application to contracts of life assurance made by Russian subjects with companies having assets which were in the United States and which were not liable to confiscation in Russia. Held (Scrutton, L.J., dissenting), that as the Court could not, by putting its own construction on the term "interpretation," make for Russia a law which the Russian judicial system did not recognize, the plaintiffs were entitled to recover on the two policies above referred to, and that judgment should be entered for the sterling equivalent of the amounts due in chervonetz roubles at the date when those amounts became due.—BUERGER AND ANOTHER v. NEW YORK LIFE ASSURANCE COMPANY [C.A.] 601

Proposal — Statement of good health— Acceptance subject to payment of first premium and to health remaining unaffected—Illness of assured—Cheque sent for premium—Acceptance by insurance company—Death of assured—Action on policy]. —On July 10, 1926, one L. sent to the defendant insurance company a proposal for

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an insurance on his life, stating on the form that he was free from disease or ailment. On July 15 the defendants sent him the following acceptance :—"I beg to inform you that the proposal made by you to this company to effect an assurance on the life of yourself (whole world) for the sum of £5,000, with profits, has this day been accepted, and if the health of the life proposed remains meanwhile unaffected, the policy will be issued on payment of the first premium as under, subject to satisfactory evidence of age being furnished. . . . The risk of the company will not commence until receipt of the first premium ; and the directors meanwhile reserve the power to alter or withdraw this acceptance." On July 20 L. became ill and on July 22 he signed a cheque for the first premium, but the cheque was not sent that day. On July 23 pneumonia was definitely diagnosed. On July 24 the cheque was sent. On July 26 the defendants received the cheque and sent the following certificate :— "I certify that the proposal made by Dr. W. Looker to effect an insurance on the life of himself for the term of whole life has been accepted by this company for £5,000, and the first quarterly premium having been paid a policy will be delivered in due course." On July 27 L. died of pneumonia, and the bank did not pay the cheque. In an action by L.'s executors on the policy, Held, that as there had been, between the proposal and the acceptance of the premium, a change in the risk, and as the acceptance was on the faith of the continued truth of the statements in the proposal, the action failed.—LOOKER AND ANOTHER v. LAW UNION AND ROCK INSURANCE COMPANY, LIMITED [Acton, J.] .. 691

INSURANCE (LOSS)—Bills of exchange—Loss or deprivation through dishonesty—Assured induced to discount bills by false representations—Dishonour of bills—Liability of assured—Whether loss within the policy].— The plaintiff was insured by two policies, subscribed by the defendant, against loss or deprivation of bills of exchange through theft and any other loss whatsoever through theft or other dishonesty. During the currency of the policies the plaintiff was induced by false representations to discount certain bills of exchange. The bills were dishonoured, and the plaintiff brought an action on the policies on the ground that he had suffered a loss through having dealt in the bills. The defendant contended that the above provision in the policies only covered accidental loss of documents or physical deprivation of the possession of documents. Held, that the plaintiff's loss was caused by dishonesty within the meaning of the policy, and he was entitled to recover. —WASSERMAN v. BLACKBURN [Roche, J.] .. 95

INSURANCE (MARINE)—Certificate of insurance—Goods consigned c.i.f.—Sale by consignee on arrival — Goods damaged—Right of action against insurers by purchaser— Condition as to notice—Liability of insurers].—The defendant company insured a

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quantity of leather, consigned c.i.f., for a voyage from New York to Tunis, by a certificate of insurance which provided: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder . . . as fully as if the property were covered by a special policy direct to the holder of this certificate." By clause 11 of the policy, "In case of loss or damage to the property hereby insured the loss shall be reported to the representative of the company, or, if there be no representative of the company, to Lloyd's agent, as soon as the goods are landed or the loss is known or expected." On the day after the arrival of the goods at Tunis the consignee sold them to the plaintiff, who found them to have been damaged by salt water. In an action by the plaintiff on the certificate of insurance the defendant company pleaded that the clause in the policy as to giving notice within a limited time had not been complied with. Held, that as it was not clear either that the certificate incorporated clause 11 of the policy or that clause 11 was a condition precedent, the plaintiff was entitled to recover. Decision of Sankey, J. (42 *The Times* L.R., 692), affirmed on a different ground.—KOSKAS v. STANDARD MARINE INSURANCE COMPANY, LIMITED [C.A.] 169

Policy — Construction — "Collision with an object"—Stranding—Bumping on rocks—Whether within the policy].—A policy of marine insurance on the hull and machinery of a steamer covered the ordinary perils of the sea and contained the following clause: "Subject to the Institute 'Free of Particular Average absolutely' time clauses as annexed, but this insurance to include damage received by collision with any object (ice included) other than water." The ship, having stranded, bumped on the rocks and damaged her bottom plates. In an action on the policy to recover the damage caused by the bumping, Held, that the contact with the rocks was a "collision with an object" within the meaning of the policy, and the plaintiffs were entitled to recover.—MANCOMUNIDAD DEL VAPOR FRUMIZ v. ROYAL EXCHANGE ASSURANCE [Roche, J.].. 103

Reinsurance—Payment on original policy—Non-liability by reason of unseaworthiness—Failure of claim against reinsurers].—The plaintiffs insured a consignment of gunpowder on a voyage and reinsured with the defendants. Both the original policy and the reinsurance policies covered perils of the sea and jettison and were expressed to be "warranted free from loss arising from . . . destruction . . . in a port of distress or otherwise." The original policy contained no admission of seaworthiness, but the reinsurance policies did contain such an admission, and they provided that the defendants would "pay as paid thereon," and that the payment should be subject to the same terms as in the original policy. The vessel carried, in addition to the gunpowder, 3,000 drums of sulphuric acid, and owing to

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heavy weather some of the drums burst and the acid disabled the machinery, with the result that the ship had to put in to a port of distress. There the required repairs could not be carried out with the gunpowder on board, and it was thrown overboard and became a total loss. The plaintiffs paid the owners as for a total loss and claimed to be reimbursed by the defendants. Held, that as the way in which the sulphuric acid was stowed and loaded affected the safety of the ship and rendered her unseaworthy, the plaintiffs were under no liability on the original policy, and therefore they could not recover from the defendants on the reinsurance policies.—FIREMAN'S FUND INSURANCE COMPANY v. WESTERN AUSTRALIAN INSURANCE COMPANY, LIMITED, AND ANOTHER [Bateson, J.] 680

Reinsurance — Slip — Construction — "On a voyage"]. — The plaintiffs, as original insurers, insured a consignment of oranges from any port in Spain to Antwerp, and, after the ship had left Valencia and had been in wireless communication with Gibraltar, they reinsured with the defendant by a slip, which referred to the fact that the ship had been in such communication with Gibraltar and which contained the words "on a voyage," meaning, according to the evidence, that the risk should attach only from a named port in the course of the voyage. The ship stranded before she reached Gibraltar, the oranges were damaged, and the plaintiffs had to pay on the policy. In an action on the contract of reinsurance, Held, that on the true reading of the slip the intention was to limit the risk to the voyage from Gibraltar, and the action failed.—EAGLE, STAR AND BRITISH DOMINIONS INSURANCE COMPANY, LIMITED v. REINER [Salter, J.].. 259

See also ARBITRATION.

INSURANCE (MOTOR-CAR) — Policies excluding risk covered by another policy — Provision for rateable contribution — Construction].—G. took out with the M. company a motor-car insurance policy covering himself and any friend driving with G.'s consent, and providing as follows:—"Condition 6.—The extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed and competent driver and not being insured under any other policy. Condition 10.—If at the happening of any accident, injury, damage, or loss covered by this policy . . . there shall be subsisting any other insurance or indemnity of any nature whatever covering the same, whether effected by the insured or by any other person . . . then the company shall not be liable to pay or contribute towards any such damage or loss more than a rateable proportion of any sum payable in respect thereof for compensation." L., who was G.'s brother-in-law, took out with the G. company a similar policy providing that "The insured will also be indemnified hereunder while personally driving a car not belonging to

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him provided . . . that there is no other insurance in respect of such other car whereby the insured may be indemnified," and that "If at the time of the occurrence of any accident loss or damage there shall be any other indemnity or insurance subsisting whether effected by the insured or by any other person the corporation shall not be liable to pay or contribute more than a rateable proportion of any sums payable in respect of such accident loss or damage." While L. was driving G.'s car with G.'s consent it had a collision and L. had to pay damages. G., as trustee for L., claimed against the M. company, and L. on his own behalf claimed against the G. company. Held, that in each policy the provision as to rateable contribution qualified the preceding clause and each company was liable to pay the claimants half the amount claimed.—GALE v. MOTOR UNION INSURANCE COMPANY, LIMITED. LOYST v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED [Roche, J.] 15

See also INSURANCE (ACCIDENT).

INSURANCE (NATIONAL) — Summary proceedings — Question of insurability—Reference to Minister — Adjournment — Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 22 (7)—National Health Insurance Act, 1924 (14 and 15 Geo. V., c. 38), s. 97 (4)].—The requirements of s. 22 (7) of the Unemployment Insurance Act, 1920, and of s. 97 (4) of the National Health Insurance Act, 1924, are imperative. Therefore if in any summary proceedings under either Act the insurability of any person becomes material, and has not been decided by the Minister, the justices must forthwith refer the question to him and adjourn the hearing pending a final decision.—WOOD v. BURKE [Div. Ct.] 582

INSURANCE (THEFT)—Jewelry—Necklets obtained from assured by woman to show to third parties—Sale by woman—Larceny by trick—Necklets obtained by assured "on approval"—Whether held "in trust"—"Responsibility" of assured—Exception in policy].—The plaintiff, a jeweller, insured against theft with the defendant and other Lloyd's underwriters jewelry which was his own property, or which he held in trust, or for which he was held to be responsible, while it was in his custody or in the custody of any person or persons to whom he might have entrusted the same on the condition of sale or return, for valuation or inspection, or for any purpose whatsoever. The policy excepted "loss by theft or dishonesty committed by . . . any customer . . . in respect of goods entrusted to him. . . ." A woman, who had previously bought from the plaintiff and paid for certain minor articles, told the plaintiff that her "husband" (a man with whom in truth she was living) wished to give her as a birthday present a pearl necklet of the value of £1,000. The plaintiff procured from London firms two necklets on

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approval, the "appro. notes" declaring that they remained the property of the senders, and he allowed the woman to take them away to show to her "husband," and the necklets were debited to that man in the plaintiff's books. Later the woman brought back one necklet, saying that her "husband" preferred the other, but that he was away, and could not pay for it until his return home. At another interview she said that her sister's fiancé wished to buy the necklet which she had returned, and she was allowed to take it away again to show it to him, the necklet being debited to him in the plaintiff's books. In fact the woman's statements about her "husband" (who knew nothing about the necklets) were all untrue, her "sister's fiancé" was a fictitious person, and she sold both the necklets through a pawnbroker. Held, that the woman's conduct constituted larceny of the necklets by a trick, since the plaintiff had never intended to pass the property in them to her, but only that she should hand them for inspection and approval to others whom only the plaintiff intended to be his purchasers and debtors, and that the goods had not been "entrusted" to a "customer" within the meaning of the exception, since there was no mutual assent to a contract of bailment, and since the plaintiff did not look on the woman as a possible purchasing customer; and therefore the action succeeded. Decision of the Court of Appeal (42 *The Times* L.R., 425; [1926] 2 K.B., 51) reversed.—LAKE v. SIMMONS [H.L.] 417

INSURANCE (UNEMPLOYMENT)—Contributions—Employer's failure to pay—Jurisdiction of justices—Limitation of 12 months' arrears—Claim to recover previous arrears—Effect of justices' order—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 22 (3) (6)].—Under s. 22 of the Unemployment Insurance Act, 1920, the jurisdiction of the justices, on a conviction for failure to pay contributions under the Act, is limited to 12 months' arrears. Held, that if the jurisdiction of the justices is invoked under that section and they make an order for payment of the 12 months' arrears, the sum paid under the order is not to be treated as a payment in satisfaction of all arrears in respect of the same employee, and other proceedings can be taken in any competent Court to recover the arrears for any period preceding the 12 months. Decision of Rowlatt, J. (43 *The Times* L.R., 378) reversed.—ATTORNEY-GENERAL v. PAINE [C.A.] 551

Excepted employments — "Agriculture"—"Horticulture" — Meaning of these expressions — Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), Schedule I., Part II. (*a*)].—By Part II. (*a*) of the First Schedule to the Unemployment Insurance Act, 1920, "agriculture" and "horticulture" are employments excepted from the Act. Held, that persons are employed in agriculture and horticulture when employed upon any operations

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done about the production, preparation, or transfer of the products of farm or garden or orchard in the best saleable condition to a first buyer or to a salesman or agent for sale if one be employed, or to a distinct business under one proprietorship. But if the industrial status and occupations of the employed persons are such that, though they are working about or in connexion with a farm or garden or orchard, they may properly be said to be essentially pursuing their own special occupations, they are not employed in agriculture or horticulture within the meaning of this rule.—In re Prior and Others [Roche, J.] .. 784

See also DEFAMATION.

INTERNATIONAL LAW—Diplomatic privilege—Action to recover rent—Entry of appearance under protest—Plea of privilege by defendant — Evidence—Consular secretary attached to German Embassy—Extent of privilege — Right of cross-examination—Intervention of Attorney-General on behalf of Foreign Office].—In an action for arrears of rent due under a lease of a dwelling-house the defendant entered a conditional appearance under protest, and pleaded that being an official of the German Embassy he was protected by diplomatic privilege. It appeared that he was a "consular secretary" formerly working at the German Consulate, but that he had been transferred to the German Embassy. The Attorney-General upon the instructions of the Foreign Office appeared and informed the Court that the defendant was recognized by the Foreign Office as being on a list comprising the suite of the German Ambassador. The plaintiff disputed the claim of privilege, and obtained an order from Shearman, J., for the cross-examination of the defendant. Held (Lord Hanworth, M.R., dissenting), that as a consul and a consular official are not within the diplomatic privilege of immunity from process, and the Foreign Office Diplomatic List was not conclusive upon the point, the question was one ultimately of fact, and the exact facts ought to be ascertained by cross-examination, to which the defendant was bound to submit. *Duff Development Company v. Government of Kelantan* (40 *The Times* L.R., 566; [1924] A.C., 797) distinguished by Scrutton, L.J.—Musmann v. Engelke [C.A.] 685

See also CONFLICT OF LAWS, DIVORCE—Marriage, and SHIP—Practice.

INTOXICATING LIQUORS—Licence—Old on-licence — Renewal — Objection by licensing justices—Ground of redundancy—Reference to compensation authority—Right of objecting justices to sit on compensation authority — Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 19].—Where licensing justices object to the renewal of an old on-licence on the ground of redundancy and refer the matter to the compensation authority under s. 19 of the

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Licensing (Consolidation) Act, 1910, they are not, by the mere fact of their objection, disqualified from sitting as members of the compensation authority and adjudicating on the question of renewal.—Rex v. Leicester Justices—Ex Parte Allbrighton [Div. Ct.] 183

Licence — Renewal — Application — Adjournment till after licence due to expire—Whether a refusal of renewal—Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 16 (1)].—The appellants, the licensee and the owners of licensed premises, applied to the respondent licensing justices on March 1, 1926, for a renewal of the licence, which was due to expire on April 4, 1926. The justices, on the ground that summonses were pending against the licensee for supplying intoxicating liquor during non-permitted hours, adjourned the application to April 12, 1926, and the appellants gave notice of appeal to quarter sessions. On March 4, 1926, the licensee was convicted, and on April 12, 1926, the licensing justices refused the renewal. At quarter sessions the appellants contended that the licensing justices had no power to adjourn the application for renewal to a date after the expiry of the licence, that the adjournment amounted to a refusal to renew the licence, and that on March 1, 1926, they had no evidence on which they could refuse the renewal. Quarter sessions held that the decision to adjourn the application to April 12, 1926, was not a refusal to renew the licence, and they dismissed the appeal but stated a case. Held, that the decision of quarter sessions was right, as the application was made within the licensing year and the licence remained in force by virtue of s. 16 (1) of the Licensing (Consolidation) Act, 1910.—Thomas and Others v. Newington Licensing Justices [Div. Ct.] 181

Tied house—Increase of duty—Apportionment by Commissioners of Customs and Excise — Tenancy entered into after the Act—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 46].—Section 46 of the Finance (1909-10) Act, 1910, which provides for the apportionment between landlords and tenants of "tied" houses of the increased licence duties imposed by that Act, does not apply to tenancies entered into after the Act came into force. So held by Lord Hanworth, M.R., and Sargant, L.J. (Scrutton, L.J., dissenting). Decision of the Divisional Court (43 *The Times* L.R., 441) affirmed.—Rex v. Commissioners of Customs and Excise—Ex Parte Pegler [C.A.] .. 772

See also LANDLORD AND TENANT.

IRISH FREE STATE—Transfer of Civil servants—Retiring allowances — Action against Attorney-General of Irish Free State—Competency—Calculation of pensions—Basis].—Wigg and Another v. Attorney-General of the Irish Free State [P.C.] .. 457

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JUSTICES — Appeal—Recognizance—Drainage expenses—Appeal by corporation—Recognizance of clerk—Appeal dismissed by Divisional Court—Leave to appeal—Whether competent—Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 3—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 31 (1) (*d*) (*f*)].—By section 31 (1) (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925 :—" (1) No appeal shall lie . . . (*d*) from the decision of the High Court or of any Judge thereof where it is provided by any Act that the decision of any Court or Judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final ; . . . (*f*) without the leave of the Divisional Court or of the Court of Appeal, from the determination by a Divisional Court of any appeal to the High Court. . . ." Held, that the Divisional Court still has a right to give leave to appeal where such a right had been given by a previous Act. Held, also, that although a corporation can enter into a recognizance by a properly authorized agent, yet where, on a case stated by justices, the appellants are a corporation, a recognizance entered into by their clerk, which does not show that it was entered into on their behalf and that it is their property which is made liable, does not satisfy the requirements of s. 3 of the Summary Jurisdiction Act, 1857. Decision of the Divisional Court (43 *The Times* L.R., 35 ; [1927] 1 K.B., 315) affirmed.—LEYTON URBAN DISTRICT COUNCIL v. WILKINSON [C.A.] 326

Certiorari — Bias — Justices' clerk a partner in firm which had acted for complainant—No personal knowledge that firm had so acted—Order quashed].—*Certiorari* will issue to quash a maintenance order made by justices when it is shown that the justices' clerk is a member of a firm of solicitors which acted for the wife at an earlier stage of the same proceedings, even though it is proved that the wife's business was conducted exclusively by a managing clerk in charge of a branch office, and that the justices' clerk was in fact quite unaware that his firm had ever acted for her. The test is not whether there is in fact bias, but whether a reasonable man concerned in the proceedings might think that the tribunal was not impartial. *Rex v. Hurst and Others, Sussex Justices—Ex parte McCarthy* (40 *The Times* L.R., 80 ; [1924] 1 K.B., 256) applied.—REX v. ESSEX JUSTICES—EX PARTE PERKINS [Div. Ct.] 415

Jurisdiction—Distress warrant—Poor rate—Weekly tenant — Summons — Failure of tenant to appear at hearing—Seizure of tenant's furniture — Act of justices in excess of jurisdiction—Error on question of fact on proper evidence — Action for trespass — Liability of justices — Justices' Protection Act, 1848 (11 and 12 Vict., c. 44), ss. 1, 2—Poor Rate Assessment and Collection Act, 1869 (32 and 33 Vict., c. 41), s. 2].—A poor rate was declared against a weekly tenant of certain premises, and a demand made for an amount in excess of the amount which the tenant was liable to pay under s. 2 of the Poor Rate Assessment and Collection Act, 1869. On the failure of the tenant to comply, a summons was issued. The tenant did not appear at the hearing, and the justices, after hearing the evidence of the overseers, issued and signed a distress warrant against the tenant's goods, which were accordingly distrained upon and sold. The tenant appealed to quarter sessions, and his appeal was allowed. He then brought an action in trespass against the justices for issuing the warrant that had authorized the distress. Held, that the justices were not liable, as they had merely come to an erroneous decision in regard to their jurisdiction on a question of fact on evidence properly before them, as distinct from a wrong decision of law in regard to such jurisdiction. *Calder v. Halket* (3 Moo. P.C., 28) applied.—PALMER v. CRONE AND OTHERS [Talbot, J.] 265

Landlord and tenant — Application under Small Tenements Recovery Act, 1838 —Concurrent jurisdiction in County Court—Practice of justices not to hear such applications — General rule — *Mandamus*].—An order in the nature of a *mandamus* to justices to hear and determine an application under the Small Tenements Recovery Act, 1838, was made absolute when it appeared that the justices had made a general rule not to hear such applications on the ground that the County Court was a more suitable forum for cases which not infrequently raise difficult questions of law.—REX v. KENT JUSTICES—EX PARTE TRIPLOW [Div. Ct.] 227

Summary jurisdiction — Conviction—Particularity—Betting Act, 1853 (16 and 17 Vict., c. 119), ss. 1, 3—Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 79 (1) (b)].—The licensee of a publichouse was convicted under s. 79 (1) (*b*) of the Licensing (Consolidation) Act, 1910, for that he ". . . unlawfully did suffer to be used his premises . . . in contravention of the Betting Act, 1853." Held, that the conviction was bad on the face of it, because it did not specify the particular contravention of the Betting Act, 1853. The defendant was entitled to demand the same particularity in proceedings under s. 79 (1) (*b*) of the Licensing (Consolidation) Act, 1910, as he would have been entitled to in a prosecution under the Betting Act, 1853, itself.—POINTON v. COX [Div. Ct.] 175

See also HUSBAND AND WIFE.

LAND DRAINAGE—Statutory body—Power to remove obstruction—No finding of justices—Trespass—Prescription—Right of action—Land Drainage Act, 1861 (24 and 25 Vict., c. 133), ss. 16 to 20, 33].—The plaintiffs were a statutory body of drainage commissioners, and the defendants were the owners of a mill with a tumbling bay or

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weir adjoining it. The defendants, as the plaintiffs alleged (and as the jury found to a lesser extent), raised the weir to a greater height than they were entitled to, with the result that adjoining meadows were flooded. The plaintiffs pulled down the alleged enhancement, and the defendants replaced it. In an action by the plaintiffs for an injunction to restrain the defendants from enhancing the weir, the defendants counterclaimed for trespass. Held, (1) that the plaintiffs, not having obtained a finding of two justices as required by s. 18 of the Land Drainage Act, 1861, were not entitled to remove the alleged enhancement and the defendants were entitled to succeed on the counterclaim; (2) that the plaintiffs had no proprietary rights entitling them to sue; (3) that in the absence of any valid order made by them under s. 33 of the Land Drainage Act, 1861, the plaintiffs had no right of action in respect of obstruction of their statutory duties. *Quære,* if they had made an order under s. 33 whether they would still have had to comply with the procedure laid down by ss. 16 to 20 of the same Act.—SALISBURY AND FORDINGBRIDGE DISTRICT DRAINAGE BOARD v. SOUTHERN TANNING COMPANY (1920), LIMITED [Salter, J.] 824

LANDLORD AND TENANT—Covenant—Lessee's covenant—Trades not to be carried on—Alehouse, beerhouse, tavern, licensed victualling — Restaurant — Wine and beer licence — Condition — Consumption only at meals].—A covenant in a lease that the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, or licensed victualler should not be carried on on the demised premises is not broken by the carrying on of a restaurant with a wine and beer on-licence subject to the condition that alcoholic liquor should only be served with meals.—LORDEN v. BROOKE-HITCHING AND OTHERS [Salter, J.] 268

Fire insurance—Demise by plaintiffs' lessors of adjoining premises for business causing increase of premium on the plaintiffs' premises — Claim against lessors].—The defendants, the owners of premises, demised them to the plaintiffs, who covenanted (*inter alia*) "not to do or suffer anything which may render any increased or extra premium payable for the insurance of the said demised premises or other premises adjacent thereto against fire or which may make void or voidable any policy for such insurance." The plaintiffs also covenanted to pay for the insurance of the premises. Subsequently the plaintiffs surrendered a part of the premises to the defendants, who then demised the surrendered part to a woodworker, with the result that the plaintiffs' payments in respect of premiums for insurance against fire were greatly increased. Held, that neither on the basis of an implied correlative obligation nor on the basis of a derogation from their grant were the defendants liable to indemnify the plaintiffs in respect of the increased premiums.—O'CEDAR, LIMITED v. SLOUGH TRADING COMPANY, LIMITED [Branson, J.] 382

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Lease—Native uncleared land—Covenant by lessee to cultivate—Felling of trees—Alleged actionable waste].—A lease for 42 years of uncleared native land in New Zealand contained a covenant by the lessee to cultivate the land in a husband-like manner and to keep it clear of noxious weeds. About three years after the grant of the lease the lessee felled the timber and sold it and then sold the lease. The reversioners, alleging that to fell the timber so early was to fell it, not for the purposes of cultivation, but with a view to making money by its sale, sued the lessee for actionable waste. Held, that as the covenant to cultivate imposed upon the lessee an obligation to cut the timber, and as the reversioners had no right to complain of the clearance being made at such an early period of the lease as was most to the benefit of the lessee, the action failed.—GARDNER v. HIRAWANU AND OTHERS [P.C.] 198

See also NEW ZEALAND.

Repairs—Liability on landlord—Disrepair—No notice by tenant to landlord—Right of landlord to enter and inspect—Damage to tenant—Non-liability of landlord for damage—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2—Housing Act, 1925 (15 Geo. V., c. 14), s. 1].—Neither s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which implies the liability of a landlord to do repairs where he has raised the rent under that section, nor s. 1 of the Housing Act, 1925, which enacts that, where the rent is less than a certain sum, there shall be implied "an undertaking that the house will be kept by the landlord, during the tenancy, in all respects reasonably fit for human habitation," imposes upon the landlord, even where he has a right to enter the premises for the purpose of inspection, any liability for damage caused to the tenant by a want of repair of which the tenant has not given him notice.—MORGAN v. LIVERPOOL CORPORATION [C.A.] 146

Restrictions — Agreement to surrender—Whether a notice to quit—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 4].—An agreement made by a tenant with his landlord for good consideration to give up possession cannot constitute a notice to quit within s. 5 (1) (*c*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted for the original section by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923), so as to entitle a landlord, who on the strength of the agreement has contracted to sell the premises, to recover possession of the same.—DE VRIES v. SPARKS [Div. Ct.] 448

Restrictions — Decontrol — Landlord coming into possession — Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1)].—By s. 2 (1) of the Rent and Mortgage Interest Re-

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strictions Act, 1923, "Where the landlord of a dwelling-house to which the principal Act [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ." Held, that in order that a dwelling-house may become decontrolled under the above provision it must have been let separately up to the time when the landlord comes into possession, and the landlord must come into possession of it as landlord.—COHEN v. GOLD [Div. Ct.] 376

Restrictions—Decontrol—Lessee in possession—Part of dwelling-house lawfully sublet—Sublease after July 31, 1923—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1)].—Section 2 of the Rent and Mortgage Interest Restrictions Act, 1923, subsection 1, provides: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act . . . then from and after the passing of this Act . . . the principal Act [*i.e.*, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] shall cease to apply to the dwelling-house: Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part. . . ." Held, that the words in this proviso, "where part of a dwelling-house . . . is lawfully sublet" refer to the time at which the question arises whether the part of the dwelling-house is decontrolled, and not to the date of the passing of the Act. Where, therefore, a tenant who was in possession of the whole of a dwelling-house on July 31, 1923, the date of the passing of the Act, and subsequently sublet four rooms in the house at a rent within the Rent Restrictions Acts, those four rooms were "sublet" within the meaning of the proviso and were protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.—DOULIN v. PARCELL [Div. Ct.] .. 140

Restrictions—Decontrol—Possession by landlord—Meaning of "landlord"—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1)].—By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1), "Where the landlord of a dwelling-house to which the principal Act [the Act of 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the

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dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ." Held, that "landlord" in the above section, as generally in the Rent Restriction Acts, includes not only an owner, freeholder, or head landlord, but also any person who has a tenant holding under him; and, accordingly, even a quarterly tenant, who has sublet on a weekly tenancy, may be a landlord for the purposes of the section.—OAKLEY v. WILSON [Div. Ct.] 521

Restrictions — Occupation of premises by tenant's family—Permission by tenant—Whether tenant protected by Rent Restriction Acts.—KREITMAN v. VIDOFSKY [Div. Ct.] 335

Restrictions — Recovery of possession — Requirement for purpose in the public interest—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 4].—GOOCH v. STRATMAN [Div. Ct.] 475

Restrictions—Tenant rent-free—Whether protected—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7)].—The Rent Restriction Acts afford no protection to a tenant who is rent-free.—BRACEY v. PALES [Div. Ct.] 69

Surrender or assignment of tenancy—By act or operation of law—Substitution of master for servant as tenant—No express notice to determine servant's tenancy—Payment of rent, rates and taxes by master—Advantage of servant—Estoppel—Statute of Frauds (29 Car. II., c. 3), s. 3].—In 1910 the defendant, a policeman, became tenant of a house, paying the rent and rates personally, receiving receipts in his own name and drawing from the police authority a grant in aid of those expenses. In 1912 an Order was made, to the knowledge of the defendant, that in future the Chief Constable would be the tenant of all houses occupied by policemen not in barracks, and that policemen should occupy the houses as servants of the police authority and not as tenants. While no express notice was given either by the defendant or by his landlord to determine the defendant's tenancy, after the date of the Order the rent of the house occupied by the defendant was paid by the police authority through the defendant, the receipts being made out in favour of the authority, and no demands for rates or taxes being made to the defendant, who paid none. Deductions were made from the defendant's pay on account of rent, except during certain periods when quarters were free. In March, 1926, the defendant retired on pension, and the plaintiff, the Chief Constable, who in January, 1926, had signed an agreement with the landlord for the tenancy of the house, obtained judgment for possession in an action in the County Court. Held, that there

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was evidence on which the County Court Judge could find that in 1912 the defendant agreed with the landlord and with the plaintiff to surrender his tenancy and in future to occupy the house as a servant of the police authority and not as a tenant, that the landlord agreed to accept the surrender and to take the plaintiff as tenant, and that the plaintiff agreed with the defendant to accept the tenancy from the landlord, to allow the occupation by the defendant as a servant, and to pay the rent, rates and taxes. The plaintiff had undertaken liabilities of which the defendant had had the advantage; and, therefore, the defendant was estopped from denying that there had been a surrender by him of his tenancy by act or operation of law or an assignment thereby of his interest to the plaintiff.—METCALFE v. BOYCE [Div. Ct.] .. 149
See also JUSTICES.

LANDS — Acquisition — Arbitration—Appeal—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 and 10 Geo. V., c. 57), s. 6 (2)].—By s. 6 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919, the decision of the High Court upon a case stated by an arbitrator under the Act is final and conclusive. Held, that the effect of this provision is that where an arbitrator states a case under the Act for the opinion of the Court and afterwards incorporates the decision of the Court in his award, and the claimants then move before a Divisional Court to have the award set aside on the ground that the decision so incorporated is wrong in law, there is no appeal from the rejection of the motion.—NORTHWOOD AND OTHERS v. LONDON COUNTY COUNCIL [C.A.] 347

Compulsory acquisition—Military purposes—Certificate by deputy-lieutenants of county—Whether judicial decision involved—Defence Act, 1842 (5 and 6 Vict., c. 94), s. 23].—The grant of a certificate by two deputy-lieutenants of a county under s. 23 of the Defence Act, 1842, that the acquisition of certain land in the county is expedient for military purposes, is not a judicial matter, and therefore, before giving the certificate, they are not bound to give the owner of the land an opportunity of being heard.—HUTTON v. ATTORNEY-GENERAL AND OTHERS [Tomlin, J.] 166
See also ARBITRATION.

LAW OF PROPERTY — New legislation — Transitional provisions — Undivided shares —Entirely subject to jointure rentcharge—Settled land — Statutory trusts — Law of Property Act, 1925 (15 Geo. V., c. 20), Schedule I., Part IV., par. 1 (2), (3) — Settled Land Act, 1925 (15 Geo. V., c. 18), s. 1 (1)].—The expression "not being settled land" in the Law of Property Act, 1925, First Schedule, Part IV., paragraph 1, sub-paragraph (2), and the expression "settled land" in the next sub-paragraph,

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indicate whether the land is or is not settled immediately before the coming into force of that Act. Therefore where on December 31, 1925, three persons were tenants in common of Blackacre, subject to a jointure rentcharge, but with an indemnity in respect of the same, they were, on January 1, 1926, entitled to sell Blackacre as joint tenants holding upon the statutory trusts within the meaning of sub-paragraph (2). Decision of Astbury, J. ([1927] 1 Ch., 509) reversed.—IN RE RYDER AND STEADMAN'S CONTRACT [C.A.] 578

LEGITIMATION — Procedure—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 188, 226; Sched. VI.—Legitimation Act, 1926 (16 and 17 Geo. V., c. 60), s. 2 (1)].—IN RE THE PETITION OF CLAYTON [Lord Merrivale, P.] 659
See also DIVORCE.

LIEN — Hire-purchase agreement — Taxicabs—Repairs—No authority to hirer to create a lien—Possession parted with for limited purpose].—The plaintiffs let three taxicabs to B. on hire-purchase agreements which provided that B. should not have authority to create a lien on the taxicabs in respect of repairs. Up to May 1, 1925, the cabs, with the consent of the plaintiffs, had been garaged at the defendants' garage and B. owed the defendants the balance of a general account for garage rent, goods supplied, and washing, cleaning, and repairing the cabs. The defendants had never been aware of the terms of the agreements between B. and the plaintiffs. On May 1, 1925, the plaintiffs terminated the agreements as B. was in arrear with his payments, but the defendants refused to hand them the cabs, asserting that they had a lien for repairs. In an action for the delivery-up of the cabs and damages for their detention, Held, that the lien might attach notwithstanding the provision that B. should not have authority to create a lien, and that, although the defendants did not have continuous possession of the cabs, yet since, in letting B. take them out to ply for hire, they parted with possession without any intention to abandon the right of lien, the action failed. Decision of Swift, J. (43 *The Times* L.R., 652), affirmed.—ALBEMARLE SUPPLY COMPANY, LIMITED v. HIND AND CO. [C.A.] 783

LOCAL GOVERNMENT—Disallowance and surcharge by auditor—Persons aggrieved—Remedies—*Certiorari*—Appeal to Minister of Health—Application for *certiorari*—Refusal—Subsequent application to Minister —Order of remittal—Jurisdiction—Poor Law Amendment Act, 1844 (7 and 8 Vict., c. 101), ss. 35, 36—Poor Law Audit Act, 1848 (11 and 12 Vict., c. 91), s. 4].—Where a party aggrieved by a disallowance or surcharge by a district auditor applies for a writ of *certiorari* to quash it and fails in his application, there is no subsequent appeal

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to the Minister of Health for an order remitting the disallowance or surcharge.—REX v. MINISTER OF HEALTH—EX PARTE DORE [Div. Ct.] 263

Gratuity to officer sanctioned by Ministry of Health—Superannuation allowance based on gratuity — Disallowance — Surcharge—Poor Law Amendment Act, 1844 (7 and 8 Vict., c. 101), s. 32—Local Authorities (Expenses) Act, 1887 (50 and 51 Vict., c. 72), s. 3—Poor Law Officers' Superannuation Act, 1896 (59 and 60 Vict., c. 50), ss. 2, 3, 12, 19].—Acting upon a recommendation of the Ministry of Health (made without statutory authority) a board of guardians paid a gratuity to a registrar of births and deaths. That payment, having been sanctioned by the Ministry, could not be disallowed by the district auditor. On the retirement of the registrar the guardians granted him a superannuation allowance based on the average of his remuneration by fees *plus* gratuity in the preceding five years. The district auditor disallowed so much of the allowance as was based on the gratuity, and surcharged it on certain guardians and ex-guardians. Held, that the district auditor was wrong in disallowing and surcharging the payment, as he was bound to treat the gratuity as forming part of the registrar's "emoluments" within the meaning of s. 19 of the Poor Law Officers' Superannuation Act, 1896. Decision of the Divisional Court (43 *The Times* L.R., 38; [1927] 1 K.B., 540) affirmed.—REX v. GRAIN—EX PARTE WANDSWORTH GUARDIANS [C.A.] 342

Poor law guardian—Alleged disqualification—Patient in hospital maintained out of rates—Payment for cost of treatment—Local Government Act, 1894 (56 and 57 Vict., c. 73), s. 46 (1) (*b*), (7)].—Decision of the Divisional Court (43 *The Times* L.R., 224) affirmed.—EX PARTE BREWSTER [C.A.] 253

Wages paid by borough council—Auditor's finding that wages were excessive—Surcharge — Discretion of council — Whether absolute—Requirement of reasonableness—Metropolis Management Act, 1855 (18 and 19 Vict., c. 120), s. 62].—In 1920 the Fulham conference of representatives of metropolitan borough councils recommended a scheme for a scale of wages to be adopted by such councils, and the appellants, the Woolwich Borough Council, adopted the scheme for employees other than those whose wages were regulated by trade union rates. The scheme established a minimum rate for the lowest grade of employees, and it did not provide for any sliding scale if any difference should arise in the cost of living. The Joint Industrial Council recommended another scheme which did provide a sliding scale according as the cost of living went up or down. The appellants then adopted the Industrial Council's scale, subject to this, that if it fell below the Fulham scale they adopted the

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latter. In 1924 the payments were greater than if the Industrial Council's scale had been strictly adhered to, and the district auditor surcharged upon the appellants those parts of the wage payments which were more than 12½ per cent. in excess of the Industrial Council's scale, the 12½ per cent. being allowed by him in respect of the appellant council's discretion in the matter. The appellant council obtained a rule *nisi* to quash the surcharge on the ground that under s. 62 of the Metropolis Management Act, 1855, they had a right to pay such wages as they might think fit. Held, that the discretion conferred by the Act must be a reasonable discretion, and the district auditor was entitled to hold the wages payments to be so excessive as to make it his duty to interfere, and the rule *nisi* must be discharged. *Roberts v. Hopwood* (41 *The Times* L.R., 436; [1925] A.C., 578) followed. Decision of the Court of Appeal (90 J.P., 197) affirmed.—WOOLWICH CORPORATION v. ROBERTS [H.L.] 576

See also POOR LAW.

LOTTERIES—Printer of tickets—Sale of complete set—Lottery to be conducted by purchaser—Printer not further interested—No lottery in existence at date of sale—Publication of proposal or scheme—Lotteries Act, 1823 (4 Geo. IV., c. 60), s. 41].—The appellant, a printer, sent to the respondent some specimen tickets for "Weekly Naps and Football Doubles" together with a printed document inviting him to purchase complete sets of tickets for various Divisions of the Football League. For example, for 10s. he would supply 231 tickets each containing the same "winning nap" on a horse race, but a different combination of two of the 22 teams in the First Division (231 being the total of possible combinations). The purpose was that the respondent should sell each of these tickets at 6d. each and should give a prize to the person whose ticket bore the names of the two teams which scored most goals on a given date. Out of the proceeds the respondent was to provide the prize or prizes, the balance being retained by him as profit. The appellant took no further share in the lottery or the proceeds beyond the original 10s. for the tickets. Held, that the appellant was rightly convicted of publishing a proposal or scheme for the sale of tickets or chances in a lottery.—RANSON v. BURGESS [Div. Ct.] 561

LUNACY—Certification—Negligence—Detention under reception order—Statute of Limitations—Limitation Act, 1623 (21 Jac. I., c. 16), ss. 3, 7—Lunacy Act, 1890 (53 and 54 Vict., c. 5), s. 331—Public Authorities Protection Act, 1893 (56 and 57 Vict., c. 61), s. 1].—The plaintiff was in 1912 certified as a lunatic by the defendant, a medical man, under s. 4 (2) of the Lunacy Act, 1890, and a reception order was then made, under which the plaintiff was detained and was taken to a licensed house. He was kept under detention until October, 1921. In an

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action brought in May, 1922, for negligence in giving the certificate the defendant denied negligence and pleaded the Limitation Act, 1623, s. 3, which bars actions on the case six years after the cause of action. The jury found that when the certificate was given the plaintiff was not of unsound mind and that the defendant did not use reasonable care, and they awarded the plaintiff damages. Held, that the action was barred by s. 3 of the Act of 1623 and the plaintiff could not rely on the protection given by s. 7 of that Act to a person who when the cause of action accrued was *non compos mentis*, inasmuch as the jury had found that at that time he was not of unsound mind. *Per* Lord Blanesburgh : The only statute of limitations applicable was the Public Authorities Protection Act, 1893, and the action was barred by the six months' limitation imposed by s. 1 of that Act, which had the effect of reducing to six months, from the date of the plaintiff's release, the limitation of twelve months imposed by s. 331 of the Lunacy Act, 1890, since the apparent total repeal of s. 331 of the Act of 1890 by the Act of 1893 was in reality only partial. Decision of the Court of Appeal (42 *The Times* L.R., 745 ; [1927] 1 K.B., 402) affirmed.—HARNETT v. FISHER [H.L.] 567

Certification — Negligence — Detention under summary reception order—Form of action—Doctor employed by relative of alleged lunatic—Duty to take care in certification—Whether certificate cause of detention—Lunacy Act, 1890 (53 Vict., c. 5), ss. 16, 330 (1)].—The defendant, a medical practitioner, was called in by the husband and/or the father-in-law of the plaintiff to examine her mental condition. He formed the view that it was serious and he sent for the relieving officer, on whose arrival he filled up a certificate under section 16 of the Lunacy Act, 1890, in which he stated that he had come to the conclusion that the plaintiff was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. The plaintiff was then taken by the relieving officer to a justice of the peace, who saw her but did not ask her any questions, and made a summary order for her reception in a mental hospital. In two days the plaintiff was released from the hospital on the ground that there was no cause for her detention. The plaintiff accordingly brought this action, in which she claimed from the defendant damages for negligent certification. The jury found that the defendant had not acted with reasonable care—his good faith was admitted—and they assessed the damages at £50. Held, that the plaintiff's action was in form an action on the case for negligence in certification causing her damage through detention in a mental hospital without just cause. On the balance of the authorities, (*a*) the defendant owed to the plaintiff the duty to take reasonable care in coming to the conclusion that she was of unsound mind, although no contractual relationship existed between them ; and (*b*), the certificate given

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by the defendant was the cause of the plaintiff's detention in the mental hospital. The plaintiff was, therefore, entitled to judgment. *Hall v. Semple* (3 F. and F., 337) ; *Everett v. Griffiths* (36 *The Times* L.R., 491 ; [1920] 3 K.B., 163 ; 37 *The Times* L.R., 481 ; [1921] 1 A.C., 631) ; and *Harnett v. Fisher* (42 *The Times* L.R., 486, 745 ; [1927] 1 K.B., 402 ; 43 *The Times* L.R., 567) examined and discussed.—DE FREVILLE v. DILL [McCardie, J.] 702

MASTER AND SERVANT — Compensation for injury by accident — Appeal — Notice — Judge's notes — Time for filing.—ASTON COAL COMPANY, LIMITED v. STANCIL [C.A.] 99

Compensation for injury by accident—Award — Incapacitated or partially incapacitated workman doing light work—Cesser of employment from economic causes—Revival of right to compensation—Workmen's Compensation Acts, 1897 to 1925]. — Where a workman, partially incapacitated by an accident during the course of his employment, obtains work in lieu of compensation, the cesser of that work entitles him to an award, even in cases where the cesser is due to the state of the labour market and would have resulted in his being unemployed in any event.—LEWIS v. GUEST, KEEN, AND NETTLEFOLD, LIMITED. WATKINS v. SAME. TUCKER v. SAME. INGRAM v. CRAWSHAY BROTHERS (CYFARTHFA), LIMITED [C.A.] 436

Compensation for injury by accident—Compensation paid during incapacity—Death resulting from injury—Sum payable to dependants—Right to deduct weekly payments—Workmen's Compensation Act, 1906 (6 and 7 Edw. VII., c. 58), Schedule I. (1) (*a*)—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), ss. 24 (2), 30].—Section 24 (2) of the Workmen's Compensation Act, 1923, which abolishes the right of the employer to deduct weekly payments made to an injured workman during his lifetime from compensation payable to his dependants upon his death so as to reduce the sum payable to the children of the workman under s. 2 of the Act, or to reduce the amount payable under the principal Act below £200, does not apply to a case where the accident happened before January 1, 1924, when the Act of 1923 came into force.—CLEMENT v. D. DAVIS AND SONS, LIMITED [H.L.] 10

Compensation for injury by accident—Complete recovery of workman—Weekly payments—Continuance till arbitration—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 14].—By s. 14 of the Workmen's Compensation Act, 1923, "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except" in certain cases. Held (Viscount Dunedin dissenting), that an employer is not

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liable *de jure* to pay compensation after the termination of incapacity, and, though he must continue weekly payments *de facto* until it has been determined in an arbitration that the incapacity has ceased, he is entitled on such determination to recover back the payments made during the assumed incapacity.—OCEAN COAL COMPANY, LIMITED v. DAVIES [H.L.] 108

Compensation for injury by accident—Dependants—Illegitimate children of wife of workman—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 2].—The House held that where a workman had been killed by accident, leaving a widow who was entitled to compensation, her two illegitimate children by another man, born some time before her marriage and partly maintained under an order upon the father, were not dependants of the deceased workman within the meaning of s. 2 of the Workmen's Compensation Act, 1923, so as also to be entitled to compensation. Decision of the Court of Appeal (42 *The Times* L.R., 292; [1926] 2 K.B., 204) affirmed.—SCOTT v. LONDON AND NORTH-EASTERN RAILWAY COMPANY [H.L.] 32

Compensation for injury by accident—Dependency—"Ordinary necessaries of life"—Meaning of expression—Whether including savings for the future—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 22—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), s. 4 (2)].—By s. 22 of the Workmen's Compensation Act, 1923, re-enacted by s. 4 (2) of the Workmen's Compensation Act, 1925, "a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." Held, that the words "ordinary necessaries of life" in this enactment do not include the provision of savings for the future. Decision of the Court of Appeal (20 B.W.C.C., 174) reversed.—WELSH NAVIGATION STEAM COAL COMPANY, LIMITED v. EVANS AND ANOTHER [H.L.] 730

Compensation for injury by accident—Industrial disease—Painter—Lead poisoning—Liability of last employer—"Employment to the nature of which the disease was due"—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), s. 8 and Schedule III., as extended by Order of February 26, 1918 [S.R. and O., 1918, No. 287]].—The appellant, a painter, claimed compensation from the respondents, a firm of builders and house decorators, in respect of disablement caused by lead poisoning. The appellant served in the Navy as a painter until 1918, and during that service contracted the disease of lead poisoning. His last employment was with the respondents from October to December, 1924, when he left owing to illness. In July, 1925, the certifying surgeon certified that he was then suffering from lead poisoning and was thereby disabled from earning his full wages at the work at which he had been employed. The certificate gave no date for the commencement of the disablement, and, accordingly, by virtue of s. 8, subs. 4, of the Workmen's Compensation Act, 1906, it was deemed to have commenced at the date of the certificate. The arbitrator was not satisfied that there was anything in the nature of the appellant's employment with the respondents that would tend to aggravate or accelerate the process of the disease so as to warrant a finding that his disablement was due to that employment and made an award in favour of the respondents. Held, that the appellant was entitled to compensation under s. 8 (1) from the respondents as being the last employers who had employed him within the twelve months immediately preceding his disablement in the employment to the nature of which the disease was due, *i.e.*, in work of the same character as that to which his disease was due, namely, lead painting, notwithstanding that he failed to prove that his disablement was due to his employment by the respondents. *Dean v. Rubian Art Pottery, Limited* (30 *The Times* L.R., 283; [1914] 2 K.B., 213), overruled. Decision of the Court of Appeal (135 L.T., 219) reversed.—BLATCHFORD v. STADDON AND FOUNDS [H.L.] 424

Compensation for injury by accident—Industrial disease—Substitution of departmental surgeon for certifying surgeon—Workman on capitation list of local medical officer—Certificate by chief medical officer—"Medical officer under whose charge the workman is placed"—*Certiorari*—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 43 (1) (*f*), 44 (3)].—By s. 44 (3) of the Workmen's Compensation Act, 1925, "In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under the foregoing provisions of this part of this Act. . . ." Under the power now contained in this subsection the Secretary of State made regulations of which the material one was: "In the application of the provisions of the said section to telegraphist's cramp, so far as regards a workman employed by the Postmaster-General, the Post Office medical officer under whose charge the workman is placed shall, if authorized to act for the purposes of the said section by the Postmaster-General, be substituted for the certifying surgeon." C., a telegraphist employed by the Postmaster-General, was on the capitation list of the local Post Office medical officer at Grimsby. She complained that she had telegraphist's cramp; in accordance with the regulations of the department, the case was referred to the chief medical officer, who had special knowledge of telegraphist's cramp. The chief medical officer certified that C. was not suffering from telegraphist's cramp. C. obtained a rule *nisi* for a *certiorari* to quash the certificate. Held,

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(1) that the chief medical officer was not the medical officer "under whose charge C. was placed," and that he was not entitled to give a certificate; (2) that the granting of a certificate was in the nature of a judicial act in respect of which *certiorari* would lie; (3) that an appeal to a medical referee under s. 43 of the Act was not equally beneficial, since the referee's concurrence with the chief medical officer's certificate would be conclusive, whereas the certificate was a nullity; (4) (*per* Avory, J.), that whether an appeal was equally beneficial or not, C., being a party aggrieved, *certiorari* would go *ex debito justitiæ* at her instance. —Rex v. Postmaster-General—Ex Parte Carmichael [Div. Ct.] 228

Compensation for injury by accident—Partial disablement—Capacity for light work—Opportunity taken away by a strike—Right to compensation—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), s. 1 (1)].—The respondents, who were employed by the appellants, a mining company, met with accidents arising out of and in the course of their employment and were paid compensation by the appellants, and afterwards, having partially recovered, were given light work at wages at least equal to what they had been earning before the accidents, but in consequence of the coal strike of 1926 the appellants were obliged to discontinue employing the respondents. On claims by the respondents for compensation the County Court Judge awarded compensation for partial disablement. Held, that although but for the strike the respondents would have continued to earn substantial sums, yet, as their loss of the opportunity of light work was caused not by their own act but by that of the workmen who went on strike, the Judge's award must be affirmed.—Hamilton v. Shelton Iron, Steel, and Coal Company, Limited. Leigh v. Same. Timmis v. Same [C.A.] 97

Compensation for injury by accident—Workman — Definition — Ex-Service man being trained in instructional factory—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), s. 13—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 9—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 3, 43].—An ex-Service man, working in a Government instructional factory and undergoing industrial training, is not a workman within the meaning of the Workmen's Compensation Acts.—Broome v. Minister of Labour [C.A.] 133

Negligence—Doctrine of common employment—Accident to servant—No finding of negligence by employers—Finding of negligence by another servant of employers—Supply of appliances].—The plaintiff, a member of the orchestra at a theatre, sued his employers for damages for injuries suffered by him by reason of a club supplied by the employers to a performer slipping from the performer's hand during a performance and striking the plaintiff. The jury (*inter alia*) found (1) that the employers were not guilty of negligence in supplying the club, (2) that the employers' stage-manager was guilty of negligence, and (3) that the employers were not negligent in employing the stage-manager. Held, on these findings, that the fact of the stage-manager's negligence being in respect of the supply of appliances did not in the circumstances exclude the application of the doctrine of common employment, and the defendant employers were not liable to the plaintiff.—Laubach v. Cooptimists' Entertainment Syndicate, Limited, and Another [Finlay, J.] 30

Negligence — Servant lent—Responsibility for negligence].—When one person lends his servant to another for a particular employment, the servant, for anything done in it, must be regarded as the servant of the man to whom he is lent, though remaining the general servant of the person who lent him.—A. H. Bull and Co. v. West African Shipping Agency and Lighterage Company [P.C.] .. 548

Truck Acts — Lancashire cotton' trade — "Standard list" of wages — Deductions for bad work — Truck Act, 1831 (1 and 2 Will. IV., c. 37), ss. 3, 23 — Truck Act, 1896 (59 and 60 Vict., c. 44), ss. 2, 9].—Section 3 of the Truck Act, 1831, provides for the payment in current coin of the realm of "the entire amount of the wages earned by or payable to any artificer . . . in respect of any labour." Section 23 permits an employer to make, and contract to make, reasonable deductions from wages in respect of certain specified matters. Section 2 of the Truck Act, 1896, prohibits an employer from making, except under certain conditions, "any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman for or in respect of bad or negligent work or injury to the materials or other property of the employer. . . ." Section 9 provides for the exemption from the provisions of the Act by order of the Secretary of State of persons engaged in certain trades, either generally or within a particular area. By order dated March 3, 1897, the Secretary of State exempted from the provisions of the Act persons engaged in the weaving of cotton in Lancashire. The appellant, a weaver of cotton in Lancashire employed by the respondents, was negligent in performing certain work and, in accordance with a custom which had long existed in the Lancashire trade, the employers deducted a reasonable sum from the "standard list" rates of wages which had been agreed between the employers' and workers' organizations as the remuneration for good, merchantable cloth, and paid her the balance as her wages. Held, that this deduction was not illegal as being in contravention of the provisions of the Truck Acts, since the implied contract between the parties was that the appellant should be paid according

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to the "standard list" subject to a fair deduction for bad work, and the deduction was made from the standard list to ascertain the wages earned and was not made from the wages earned. Decision of the Divisional Court (43 *The Times* L.R., 73; [1927] 1 K.B., 624) affirmed.—HART v. RIVERSDALE MILL COMPANY, LIMITED [C.A.] 396

Wages—Trade—Minimum wage—Mending of nets for use in employer's own business—Trade Boards Act, 1909 (9 Edw. VII., c. 22), ss. 1, 6, 9].—The word "trade" in the Trade Boards Acts, 1909 and 1918, is not confined to operations of buying and selling, but denotes any branch of work in which persons are employed commercially, provided that the employment is not casual or by a private person. Held, therefore, that the minimum wage fixed for workers in the drift net mending industry applied to workers employed solely in mending nets, the property of, and used in the business of, their employers, who were fishermen and fishing boat owners.—SKINNER v. JACK BREACH, LIMITED [Div. Ct.] 484

MEDICAL ACTS — Osteopath — Treatment — Advice—Fees—Recoverability—Medical Act, 1858 (21 and 22 Vict., c. 90), s. 32].—Section 32 of the Medical Act, 1858, though it precludes an osteopath who is not a registered medical practitioner from recovering for advice, does not preclude him from recovering for treatment and services rendered, at all events where they have not been accompanied by advice. *Hall v. Trotter* (38 *The Times* L.R., 30) followed. *Quære*, whether where advice accompanies the treatment such an osteopath can recover anything at all.—MACNAGHTEN v. DOUGLAS [Div. Ct.] 525

MERCHANT SHIPPING—Load-line—Not submerged at loading port—Heavy weather—Deck cargo — Saturation — Submersion of load-line on arrival—Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), s. 442 (1)].—By s. 442 (1) of the Merchant Shipping Act, 1894, "If any owner or master of a British ship fails without reasonable cause to cause his ship to be marked as by this Part of this Act required, or to keep her so marked, or allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line . . . he shall for each offence be liable to a fine not exceeding one hundred pounds." Held, that where the centre of the disc indicating the load-line is not submerged at the time of starting on the voyage but owing to the cargo being partly on deck and to its becoming saturated by heavy weather the centre of the disc is submerged on the arrival of the vessel at her destination, the master is liable to be convicted under the above provision.—RADCLIFFE v. BUCKWELL [Div. Ct.] .. 514

METROPOLIS—Road transport—London traffic—Restricted street—Advisory committee—Ordinary and additional members—Powers of Minister of Transport—London Traffic

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Act, 1924 (14 and 15 Geo. V., c. 34), ss. 1 (4), 7, Sched. II.].—When the Advisory Committee appointed under the London Traffic Act, 1924, is considering and reporting and advising upon matters dealt with by the Minister of Transport in virtue of s. 7 of that Act, the additional members do not form part of the committee, and cannot be directed by the Minister to do so.—MAY v. BEATTIE [Div. Ct.] 411

MINES — Amalgamation — Scheme — Application for confirmation—"National interest"—"Fair and equitable"—Mining Industry Act, 1926 (16 and 17 Geo. V., c. 28), s. 7 (2)].—Observations on the meaning of the expressions "national interest" and "fair and equitable" in s. 7 (2) of the Mining Industry Act, 1926.—IN RE DENABY AND CADEBY MAIN COLLIERIES, LIMITED, AND OTHERS [R. and C. Com.] 322

Coal — Application for right to work—Rival application—Agreement between the parties for division of area].—Where rival applicants for the right to work coal in a certain area agree to divide the area between themselves, the Court will not make an order in the terms of the agreement unless it is expedient in the national interest so to make it, and the Court may specify matters in regard to which the agreement must be modified.—IN RE J. AND J. CHARLESWORTH, LIMITED, AND HENRY BRIGGS, SON, AND CO., LIMITED [R. and C. Com.] 100

Coal-mine — Working facilities — Ancillary right — Carrying away coal—Conveyance over land outside lease—Jurisdiction to sanction—Aerial ropeway—National interest—Grant of sanction—Mines (Working Facilities and Support) Act, 1923 (13 and 14 Geo. V., c. 20)].—The erection of an aerial ropeway which the Court had originally refused to sanction (43 *The Times* L.R., 349) was now sanctioned by the Court on the production of fresh plans.—IN RE APPLICATION OF TILMANSTONE (KENT) COLLIERIES, LIMITED [R. and C. Com.] 795

Coalmines—Amalgamation of colliery companies — Scheme — Confirmation—Requirement that it should be in the national interest—Mining Industry Act, 1926 (16 and 17 Geo. V., c. 28), s. 7 (2) (*a*)].—Observations on the meaning of the expression "national interest" in s. 7 (2) (*a*) of the Mining Industry Act, 1926.—IN RE APPLICATION OF AMALGAMATED ANTHRACITE COLLIERIES, LIMITED, AND OTHERS [R. and C. Com.] 672

MONEYLENDERS—Registered name—Taking security in another name—Money-lenders Act, 1900 (63 and 64 Vict., c. 61), s. 2 (1) (*c*)].—The defendant society, which had formerly been a loan society, became incorporated as a limited company and began to carry on business as moneylenders and were registered as such, and they made an advance

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to the plaintiffs, who signed a promissory note agreeing to pay the amount to the secretary of the defendant society, which was mentioned by name in the note as the society of which he was secretary. In an action for a declaration that the transaction was void on the ground that the defendants had taken a security in a name other than their registered name, contrary to s. 2 (1) (*c*) of the Money-lenders Act, 1900. Held, that as no one could sue on the note except the secretary, the security had been taken in a name other than the defendants' registered name, and the plaintiffs were entitled to the declaration claimed.—MERTZ AND OTHERS v. SOUTH WALES EQUITABLE MONEY SOCIETY, LIMITED [C.A.] 456

Reopening transaction—Application by borrower—In "any Court in which proceedings might be taken for the recovery of money lent by a moneylender"—Jurisdiction of County Court—Moneylenders Act, 1900 (63 and 64 Vict., c. 51), s. 1 (2)].—A County Court has jurisdiction under s. 1 (2) of the Moneylenders Act, 1900, to entertain an application by a borrower from a registered moneylender to reopen a money-lending transaction only when the amount of the money lent, whether repayable by instalments or otherwise, without the addition of any claims arising under any agreement to pay interest or an amount charged for "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," is within the jurisdiction of the County Court. If, however, this condition is fulfilled, the Court may entertain the application although the moneylender has not taken any proceedings to recover the money lent and although the time has not come for taking such proceedings.—CROSSINGHAM v. PARK [Div. Ct.] 647

See also COUNTY COURT and PRACTICE.

MOTOR-CARS—Brakes—Requirement of two independent brakes—Separate brakes acting on same drum—Whether independent—Motor Cars (Use and Construction) Order, 1904, art. II. (4)].—Where a motor vehicle has two separate brakes operating separate brake blocks, the mere fact that both brakes apply their brake blocks to one and the same brake drum does not prevent the brakes from being independent brakes within art. II. (4) of the Motor Cars (Use and Construction) Order, 1904, provided that the vehicle is so constructed that the brake drum is really part of the wheel and not of the brakes.—BOWEN v. WILSON [Div. Ct.] 77

See also INSURANCE.

NEGLIGENCE—Architect—Building contract—Interim certificates — Loss to employers — Payment of same amount twice over].—The plaintiffs, a local authority, for the purpose of a housing scheme, made a contract with the builders under which the defendant was the architect. Clause 29 of the contract

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provided: "No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works." The Ministry of Health had the right to require the use of materials which the Disposals Board had for sale. While the houses were in course of erection the defendant gave interim certificates in pursuance of clause 29, and he also gave documents under which the plaintiffs paid the Disposals Board for articles supplied by the Board. Owing to the negligence of the defendant the plaintiffs had to pay both the builders and the Board for the same material, and the amount so overpaid to the builders could not be recovered from them. In an action by the plaintiffs to recover from the defendant the amount overpaid the defendant contended that he was a *quasi*-arbitrator and therefore not liable. Held, that in view of the terms of the particular contract, and in view of the course of business under it, the defendant was not, in giving the interim certificates, acting as an arbitrator or *quasi*-arbitrator, but was merely acting as agent for the plaintiffs, and was liable to pay the amount claimed.—WISBECH RURAL DISTRICT COUNCIL v. WARD [Sankey, J.] 739

Damages — Amount — Claim by widow in respect of husband's death—Widow's contributory pension—Whether to be taken into account in assessing damages—Fatal Accidents Act, 1846 (9 and 10 Vict., c. 93)—Fatal Accidents (Damages) Act, 1908 (8 Edw. VII., c. 7), s. 1—Widows', Orphans' and Old Age Contributory Pensions Act, 1925 (15 and 16 Geo. V., c. 70), ss. 1, 3].—A contributory pension payable to a widow under the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, is not a "sum paid or payable on the death of" her husband "under any contract of assurance or insurance" within s. 1 of the Fatal Accidents (Damages) Act, 1908, and the value of it must, therefore, be deducted from any damages to which she may be entitled in an action brought by her under the Fatal Accidents Act, 1846, in respect of the negligence which resulted in her husband's death.—CARLING v. LEBBON [Lord Hewart, C.J.] 454

Highway — *Cul-de-sac* — Extension — Contractor's road—Unlighted fence across it—Appearance of continuous road—Invitation to use—Accident to invitee].—The defendants, a local authority, who were carrying out road improvements, employed contractors to pull down a wall at the end of a *cul-de-sac* and to make a new road joining the old *cul-de-sac* to an existing highway. The contractors pulled down the wall and made up a section of the new road as a

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contractor's road and then closed further progress by erecting a wooden fence, but there was no night watchman or lamp to give warning of the obstruction. Between the fence and the existing highway with which the *cul-de-sac* was to be connected there was a dangerous ravine, but the lights on each side of that highway were clearly visible to anyone entering the *cul-de-sac* and might induce a stranger to suppose that there was a continuous road. The plaintiff, who was driving a motor-car at night, proceeded along the *cul-de-sac* and the contractor's road, and, not seeing the fence, crashed through it into the ravine and was seriously injured. In an action for negligence, Held, that although the place of the accident was not a highway but a private site, yet, as there was an invitation to go upon it, the defendants were liable for the consequences of putting an unexpected obstruction in the path of the invitee, and the plaintiff was entitled to recover.—OLDHAM v. SHEFFIELD CORPORATION [C.A.] 222

Practice — Personal injuries—Defendant insured—Statement of that fact to jury].—On the trial by a Judge and jury of an action for damages for personal injuries alleged to have been caused by negligence, the practice is, where the defendant is insured against liability, not to inform the jury of that fact.—ASKEW v. GRIMMER [Branson, J.] 354

Spectator on golf course—Injury by player].—The plaintiff, while she was carrying the defendant's golf clubs on a golf course, was struck with a golf club by the defendant when she (the defendant) was demonstrating a stroke to the plaintiff's brother, with whom the defendant was playing. In an action for damages for personal injuries caused by negligence the jury found that the defendant was guilty of negligence which brought about the accident, and that the plaintiff was not guilty of negligence and did not take the risk of such an accident by going on the course as a spectator, and they awarded the plaintiff damages. Held, that there was no reason why the defendant should be excused merely because the accident took place in the course of recreation rather than of work, and that, as the plaintiff had not agreed, by going on the course as she did, to take the risk of being injured by negligence, the plaintiff was entitled to judgment.—CLEGHORN v. OLDHAM [Swift, J.] 465

Vessel in dock—Condition as to sole risk of owners of vessel—Injury in lock through negligence of dock-owners' servants—Whether dock-owners protected by condition—Whether lock included in "dock."]—The defendants, who were the owners of Chelsea Dock and of a lock connecting it with the River Thames, received the plaintiffs' barge into the dock on the condition that "All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." While the barge was in the lock on its way out from the dock to the river, it was damaged through the negligence of the defendants' servants. Held, (1) that the words of the condition were not adequate to exempt the defendants from liability for the negligence of their servants, and (2) that although for some purposes, such as the jurisdiction of the dock-master, the word "dock" might include the lock, yet the condition did not clearly and unambiguously apply to the lock so as to exempt the defendants from liability.—FORBES, ABBOTT, AND LENNARD, LIMITED v. GREAT WESTERN RAILWAY COMPANY [Avory, J.] 769

See also BANKERS, CONTRACT, LUNACY, MASTER AND SERVANT, RAILWAYS, and SHIP—Salvage.

NEW SOUTH WALES—Debts due to the Crown—Claim to priority].—The Metropolitan Meat Industry Board was constituted in 1915 under an Act of the New South Wales Legislature, and it performed certain functions on behalf of the Government. It claimed from a company in liquidation sums for telephone services and sanitary and inspection fees, and submitted that the debt was one due to the Crown and had the right of priority of payment over the debts due to the general creditors of the debtor. Judgment of the Equity Judge in New South Wales affirmed, as the debt could not be recognized as due to the Crown.—METROPOLITAN MEAT INDUSTRY BOARD v. SHEEDY AND OTHERS [P.C.] 701

NEW ZEALAND — Monopolies — Offence—Restriction of dealing—Consideration given to another person—Whether including party's own agent—"Contrary to the public interest"—Question of fact—Commercial Trusts Act, 1910 (New Zealand statute) (1 Geo. V., No. 32), ss. 3, 5].—By s. 3 of the Commercial Trusts Act, 1910 (New Zealand statute), "Every person commits an offence who, either as principal or agent, in respect of dealings in any goods, gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person" (*a*) Shall deal exclusively with any person or class of persons; (*b*) Shall not deal with any person or class of persons; (*c*) Shall restrict dealings with any such person or class; (*d*) Shall be, or become, a member of a commercial trust; or (*e*) Shall act under the direction of any commercial trust with regard to the sale, purchase or supply of goods. By s. 5, "Any person who conspires with any other person to monopolize wholly or partially the demand or supply in New Zealand or any part thereof of any goods, or to control wholly or partially the demand or supply or price in New Zealand or any part thereof of any goods, is guilty of an offence if such monopoly or control is of such a nature as to be contrary to the public interest." Held, that s. 3

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applies only to cases where the consideration is given or the promise is made to another party to the dealing and has no application to the case of an advantage given or promised by one of the parties to the dealing to his own agent. Held, further, that in the absence of a statutory definition of the classes of monopoly or control that are to be deemed contrary to the public interest the question whether a particular monopoly or control was contrary to the public interest was in the circumstances a question of fact.—CROWN MILLING COMPANY, LIMITED, AND OTHERS v. THE KING [P.C.] 233

See also LANDLORD AND TENANT—Lease.

PARTNERSHIP — Dissolution—Notice by one partner to determine partnership—Death of that partner before receipt of notice by other partner—Whether partnership dissolved by notice or by death—Partnership Act, 1890 (53 and 54 Vict., c. 39), ss. 32, 33 (1)].—By section 32 of the Partnership Act, 1890, "Subject to any agreement between the partners a partnership is dissolved . . . (*c*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership. In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is mentioned, as from the date of the communication of the notice." By section 33 (1), "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner." Held, that where a partner sends by post a notice to the other partner to determine the partnership as from the date of the notice and dies before the other partner receives the notice, the partnership is dissolved not by the notice but by the death of the partner sending it, inasmuch as the statutory dissolution by notice is not brought about until receipt of the notice. In such a case, therefore, the surviving partner has the rights which by the terms of the partnership he is to have on the death of a partner during the partnership.—MCLEOD v. DOWLING [Russell, J.] 655

See also BILLS OF EXCHANGE.

PENSIONS — Qualification — "Resident"—Meaning of expression—Widows' Orphans' and Old Age Contributory Pensions Act, 1925 (15 and 16 Geo. V., c. 70), s. 23 (1)].—Consideration of the meaning of "resident" in s. 23 (1) of the Widows' Orphans' and Old Age Contributory Pensions Act, 1925.—WEBSTER AND OTHERS v. MINISTER OF HEALTH [Div. Ct.] 36

See also NEGLIGENCE—Damages.

POOR LAW—Derivative settlement—Father of pauper living but having no settlement—Mother not "widowed"—Reversion to birth settlement—Divided Parishes and Poor Law

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Amendment Act, 1876 (39 and 40 Vict., c. 61), s. 35].—A pauper whose father is living, but is an alien with no settlement in this country, cannot take a derivative settlement from his or her mother under s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, because the mother is not "widowed." In these circumstances—which appear to be a *casus omissus*—the pauper, in the absence of a settlement acquired by residence, retains the settlement of birth.—NORWICH UNION v. HENSTEAD UNION [Div. Ct.] 553

Settlement — Illegitimate child—Child under 16 years of age—Marriage of mother—Residence of child in parish for 11 years — Removability—Settlement—Divided Parishes and Poor Law Amendment Act, 1876 (39 and 40 Vict., c. 61), ss. 34, 35].—The mother of an illegitimate child married, and she and her husband subsequently acquired a settlement in a parish in the Wycombe Union. At the time of the marriage the child, then aged 3½ years, went to live in a parish in the Barton-upon-Irwell Union, and lived there for 11 years. She then lived for four years at various places, and at the end of that period she became chargeable to the Wycombe Union. Held, that up to the time of the mother's marriage the child had the settlement of her mother; that the mother's marriage made no difference; that the child was never at any time irremovable from the aforesaid parish in the Barton-upon-Irwell Union; and that, therefore, the child had never acquired a settlement in that parish by residence plus irremovability. The third paragraph of section 35 of the Divided Parishes and Poor Law Amendment Act, 1876, dealing with derivative settlements, does not apply to a child under 16 years of age, whether the child is legitimate or illegitimate. Decision of the Court of Appeal (42 *The Times* L.R., 349; [1926] 2 K.B., 3) affirmed.—WYCOMBE GUARDIANS v. BARTON-UPON-IRWELL GUARDIANS [H.L.] 89

See also LOCAL GOVERNMENT.

PRACTICE — Assignment of chose in action — Set-off available against assignor — Judgment obtained against assignor—Action by assignee—Whether set-off still available to defendant — Merger].—In an action by a plaintiff who sued as assignee of the vendor of a business to recover instalments of the purchase money owing by the defendant as purchaser, the defendant claimed the right to set-off the amount to which he was entitled as against the vendor for damages for certain breaches of warranty by the vendor under the same contract of sale. After the assignment, but before notice of it had been given to the defendant, the defendant had proceeded to obtain first an interlocutory, and subsequently a final judgment against the assignor (the vendor). The plaintiff contended that the defendant could no longer rely on the set-off, on the ground that there had been a merger of the original

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liability of the assignor in the judgment. Held, that the doctrine of merger did not apply, as neither were the parties to this action the same as the parties to the judgment, nor was the remedy of the same kind, since what had been a weapon of offence in the hand of the defendant against the assignor was merely a weapon of defence as regards the plaintiff's claim. The defendant, therefore, was entitled to avail himself of the set-off as against the assignee in the same manner in which he could have used it against the assignor. *Price v. Moulton* (10 C.B., 561) and *Young v. Kitchin* (3 Ex.D., 127) applied.—LAWRENCE v. HAYES [Div. Ct.] 379

Costs — Appeal — House of Lords — Appeal for costs — Competency — Order as to costs founded on error of law].—The rule of the House of Lords as to appeals for costs, while it prevents the House from entertaining an appeal for costs on the mere ground that the discretion of the Court has been wrongly exercised, does not prevent it from entertaining such appeal on the ground that the order is founded on an error of law. So held by the majority of their Lordships, Viscount Sumner and Lord Shaw of Dunfermline dissenting.—DONALD CAMPBELL AND COMPANY, LIMITED v. POLLAK [H.L.] .. 495

Costs — County court — Moneylenders' action — Harsh and unconscionable transaction — Excessive interest — Transaction reopened—Reduction of claim—Discretion to deprive plaintiffs of costs—County Courts Act, 1888 (51 and 52 Vict., c. 43), s. 113—Moneylenders Act, 1900 (63 and 64 Vict., c. 51), s. 1 (1)].—In an action by moneylenders in the county court for money lent and interest, where the Judge is satisfied that the transaction was harsh and unconscionable and the interest excessive, and where, after reopening the transaction, he gives judgment for the plaintiffs for a reduced amount, he has a discretion to deprive the plaintiffs of costs.—TEMPERANCE LOAN FUND v. ERWOOD [Div. Ct.] 530

Costs — Defamation—Contemptuous damages — Plaintiff's costs — Court's discretion — Principle on which rule is to be applied — Meaning of "good cause" for costs not following event — Action oppressive or one that should not have been brought — Relevant matters before issue of writ may be considered—Order LXV., rule 1.—MARTIN v. BENSON [McCardie, J.] 247

Costs—Taxation—Claim and counterclaim—Dismissal of both, with costs—Apportionment of costs].—Where in an action there are both a claim and a counterclaim arising out of the same contract, and, except with regard to the amount of the respective damages, all the substantial contentions on either side are common to both claim and counterclaim and judgment is given for the defendant, with costs, on the claim, and for the plaintiff, with costs, on the counterclaim, the costs of the litigation

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must be apportioned between the parties, and it is for the Taxing Master in his discretion to say what in his opinion is a fair apportionment as between the plaintiff and the defendant. *Christie v. Platt* ([1921] 2 K.B., 17) approved and followed. *Wilson v. Walters* ([1926] 1 K.B., 511) dissented from.—CONTINENTAL CONTRACTORS, LIMITED v. MEDWAY OIL AND STORAGE COMPANY, LIMITED [C.A.] 830

Costs—Trial without a jury—Refusal of Judge to give costs to successful party — Exercise of discretion—Appeal—Whether competent—Supreme Court of Judicature Act, 1873 (36 and 37 Vict., c. 66), s. 49—Supreme Court of Judicature Act, 1890 (53 and 54 Vict., c. 44), s. 5—Rules of the Supreme Court, Order LXV., Rule 1].—Where on a trial without a jury a Judge of the High Court, with the deliberate intention of exercising his discretionary powers as to costs under section 49 of the Supreme Court of Judicature Act, 1873, and section 5 of the Supreme Court of Judicature Act, 1890, has refused to give the successful party his costs and in so refusing has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, and where the Judge has refused leave to appeal, the Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by those enactments from entertaining an appeal from it.—DONALD CAMPBELL AND CO., LIMITED v. POLLAK [H.L.] .. 787

See also DIVORCE.

Interpleader—Trial of action or issue—Appeal—Common Law Procedure Act, 1860 (23 and 24 Vict., c. 106), s. 17—Appellate Jurisdiction Act, 1876 (39 and 40 Vict., c. 59), s. 20—Rules of the Supreme Court, Order LVII., Rules 11, 13].—Although no appeal lies in an interpleader matter where a decision has been given by a Judge in a summary manner, yet where, instead of deciding the matter summarily, the Judge directs the trial of an action or issue, an appeal lies from the judgment given on the trial, whether such trial has been held with or without a jury.—REPUBLICA DE GUATEMALA v. NUNEZ [C.A.] 187

Jury — Verdict for plaintiff before hearing all the evidence for the defence — Discharge of jury — Discretion of Judge].—Where a jury, before hearing all the evidence for the defence, finds a verdict for the plaintiff, it is in the discretion of the Judge to decide whether the jury should be discharged or whether the case should be continued before the same jury.—DE FREVILLE v. DILL [C.A.] 431

Poor persons—Costs—Admission to sue or defend as a poor person — Change in financial position before hearing — No obligation on poor person to inform the Court—R.S.C., Order XVI., rr. 22-31 H].—Observations on the omission, from the Poor

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Persons Rules, of an obligation on a person admitted to sue or defend as a poor person to inform the Court that his income or assets have undergone a change which would take him out of the class of persons for whom the Poor Persons Rules were intended.—COOPER v. MIRRON AND ANOTHER [McCardie, J.] .. 683

Short Cause list—Moneylender's action—Disputed claim—Rules of the Supreme Court, Order XIV., Rule 8].—In a moneylender's action properly brought before the Judge or Master at Chambers on a specially indorsed writ supported by an affidavit in proper form the Judge or Master still retains the full jurisdiction, under Order XIV. of the Rules of Court, to direct a disputed claim for interest, alleged to be excessive, to be sent to the Short Cause list for trial, but that jurisdiction ought to be exercised very sparingly and only in simple and plain cases. *Bennett v. Stubbs* ([1926] 1 K.B., 272) not followed.—GLASKIE v. WATKINS [C.A.] 314

Special case—Alternative awards—No view expressed by arbitrators—Right to begin—Party claiming damages].—PATRICK AND CO. v. RUSSO-BRITISH GRAIN EXPORT COMPANY, LIMITED [Salter, J.] 724

Striking out claim—Representative action—Unregistered association — Trustees joined as defendants—Claim against trustees—Order XXV., r. 4].—The plaintiffs brought an action of contract against certain members of an unregistered association, who were sued as representing the general body of members, and against the trustees of the property of the association. The plaintiffs by their statement of claim asked (*inter alia*) for an order directing the trustees to pay the sum claimed and the costs of the action out of the property of the association. On an application to strike out the names of the trustees as defendants on the ground that so far as they were concerned the statement of claim was frivolous and vexatious, Held, that the plaintiffs were entitled in a representative action to insert this particular form of claim against the trustees, and the application must be refused.—IDEAL FILMS, LIMITED v. RICHARDS AND OTHERS [C.A.] .. 7

See also COUNTY COURT, NEGLIGENCE, SHIP, and TRADE UNIONS.

PRACTICE NOTE.—SONATON PAL v. GALDSTOUN [P.C.] 224

PRINCIPAL AND AGENT—Double commission—Hotel broker].—A hotel broker, who is acting as the vendor's agent for reward, is not entitled to enter into a second agency of the like kind on behalf of the purchaser, unless this arrangement is assented to with full knowledge by the original principal.—FULLWOOD v. HURLEY [C.A.] 745

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PRIVATE STREET WORKS—Apportionment—Exemption of burial ground "attached" to place of worship—Physical attachment or contiguity required—Private Street Works Act, 1892 (55 and 56 Vict., c. 57), s. 16].—The exemption from liability for the expenses of private street works given by s. 16 of the Private Street Works Act, 1892, to a burial ground "attached" to a "place appropriated to public religious worship which is for the time being by law exempt from rates for the relief of the poor" extends only to a burial ground in physical attachment or contiguity to the building, and does not include a burial ground at a distance "attached" to the place of worship in the functional sense that it is owned and maintained by the congregation of the place of worship for their members.—HOLY LAW SOUTH BROUGHTON BURIAL BOARD v. FAILSWORTH U.D.C. [Div. Ct.] 519

Objection to proposed works—Application by local authority to justices—To be made before works are executed — Private Street Works Act, 1892 (55 and 56 Vict., c. 57), ss. 7, 8].—When an objection is lodged to proposed works under s. 7 of the Private Street Works Act, 1892, the local authority must apply under s. 8 to the justices to determine the objection before the works are executed. After the works are completed, the justices have no jurisdiction to determine an objection under s. 7.—FAULKNER v. HYTHE CORPORATION [Div. Ct.] 55

PRIVY COUNCIL APPEALS — Concurrent findings of fact—General rule against interference — Exceptions].—The general rule, that on an appeal to the Judicial Committee of the Privy Council the Board will not examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact, is not confined to Indian appeals but will be applied to all the judicatures from which an appeal lies to the Judicial Committee. Although an exception may be made to the rule in the case of a miscarriage of justice, yet the words "miscarriage of justice" in this exception mean only such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense judicial procedure at all. The application of the rule may, however, be prevented by showing that the finding of one of the Courts was so based on an erroneous proposition of law that, if that proposition be corrected, the finding disappears.—ROBINS v. NATIONAL TRUST COMPANY, LIMITED, AND OTHERS [P.C.] .. 243

PROBATE — Executor—Appointment of holder of office — Person entitled to probate — Whether holder at date of will or of testator's death.—IN THE ESTATE OF JONES, DECEASED [Hill, J.] 324

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PROHIBITION — Ecclesiastical Court — Order made without jurisdiction—Vicar alleged to have committed an ecclesiastical offence—General citation—Non-appearance of vicar—Order for costs against him in his absence—Right of appeal against order—Delay in applying for writ—Prohibition not refused]. —Prohibition will issue in respect of an order of an Ecclesiastical Court made without jurisdiction, notwithstanding that an appeal lay from such order to a higher Ecclesiastical Court and thence to the Privy Council.—REX v. NORTH—EX PARTE OAKEY [C.A.] 60

RAG FLOCK—New cloth—Excess of chlorine—Freedom from impurities — Offence — Rag Flock Act, 1911 (1 and 2 Geo. V., c. 52), s. 1—Rag Flock Regulations, 1912 (S.R. and O., 1912, No. 578), Art. 1].—The test of cleanliness of rag flock, provided by Art. 1 of the Rag Flock Regulations, 1912, is exclusive, and if the permitted amount of chlorine is exceeded an offence is committed whether the rag flock is otherwise pure or not, and whether it is made from new or old material.—BALMFORTH v. CHADBURN [Div. Ct.] 122

RAILWAYS—Passenger's luggage—Hand luggage — Responsibility of railway company — Exception—Loss through negligence of passenger—Onus of proving such negligence]. —The plaintiff, who had a third-class ticket by the defendant railway company's line, got a porter to put his suit-case in a first-class compartment and travelled in another part of the train, third class, with some friends whom he found on the train. At the end of the journey the plaintiff's suit-case could not be found. In an action against the railway company for its value, Held, that as the railway had failed to discharge the onus of proving that the loss of the hand luggage arose by reason of the negligence of the passenger, the plaintiff was entitled to recover.—VOSPER v. GREAT WESTERN RAILWAY COMPANY [Div. Ct.] 738

Rates — Transitional period till appointed day—Power to reduce rates and then raise them within maximum—Railways Act, 1921 (11 and 12 Geo. V., c. 55), s. 60].—Under s. 60 of the Railways Act, 1921, which applies to the transitional period between August 15, 1921, and the day to be appointed by the Railway Rates Tribunal for the coming into force of the new rates to be approved by the Tribunal, the rates in existence on August 15, 1921, are maximum rates, and the railway companies are entitled to reduce them, and to raise them again, without applying to the Tribunal, if by so doing they do not exceed the maximum. Decision of the Court of Appeal (43 *The Times* L.R., 49) affirmed.—TATE AND LYLE, LIMITED v. LONDON AND NORTH-EASTERN RAILWAY COMPANY AND LONDON MIDLAND AND SCOTTISH RAILWAY COMPANY [H.L] .. 134

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Standard charges—Ancillary business—Dock undertaking—Consideration of amount of dock charges—Railways Act, 1921 (11 and 12 Geo. V., c. 55), s. 58 (4)].—By s. 58 (4) of the Railways Act, 1921, "When fixing the charges necessary to produce the standard revenue, the Tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal, and if in the opinion of the Tribunal the company is not making, or has not taken reasonable steps to enable it to make, adequate charges in respect of any such business, the Tribunal shall, in fixing the charges under this part of this Act, take into account the revenue which would be produced by any such business if adequate charges were in operation." Held, that under this provision, where a railway company is carrying on a dock undertaking as an ancillary business, the conclusive test as to what is railway service and what is dock service is not whether the service has been performed within the territorial ambit of the dock undertaking, but the Railway Rates Tribunal has to take into consideration the different operations which make up the business of a dock undertaking and for which separate charges are made, and the Tribunal may come to the conclusion that some of the charges are subject, and some are not subject, to its jurisdiction.—IN RE THE RAILWAYS ACT, 1921—EX PARTE MANCHESTER SHIP CANAL COMPANY AND DOCK AND HARBOUR AUTHORITIES ASSOCIATION [C.A.] 301

RATING — Assessment area—Scheme—Proportion of different classes of members—Scheme providing actual number of representatives of each authority—Rating and Valuation Act, 1925 (15 and 16 Geo. V., c. 90), ss. 16 (2), 17 (4), 67 (1)].—A scheme for the constitution of an assessment area under the Rating and Valuation Act, 1925, may specify the total number of members and the number to be allotted to each rating authority, board of guardians, and county council, and is not confined to specifying the total number and the proportion between the different classes of authorities, so as to leave the authorities themselves to agree upon the number of members to be allotted to each authority of each class. Observations on the powers given to the Minister of Health by s. 67 (1) of the Act.—REX v. MINISTER OF HEALTH—EX PARTE WORTLEY RURAL DISTRICT COUNCIL [Div. Ct.] 482

Fishery — Licensee of fishing rights — No deed of grant—Non-liability of licensee to be rated—Rating Act, 1874 (37 and 38 Vict., c. 54), ss. 3, 6].—A person who has an exclusive licence to fish a river, but who holds no deed of grant of the fishing rights, is not liable to pay rates thereon.—SWAYNE v. HOWELLS AND ANOTHER [Div. Ct.] .. 14

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Sewer rate—Non-payment—Distress—Costs—Distress (Costs) Act, 1817 (57 Geo. III., c. 93), s. 1—Distress (Costs) Act, 1827 (7 and 8 Geo. IV., c. 17)—Sewers Act, 1833 (3 and 4 Will. IV., c. 22), s. 55].—The power given to Commissioners of Sewers by s. 55 of the Sewers Act, 1833, to levy the costs of a distress is limited in the cases of distress for sums under £20 by the provisions of the Distress (Costs) Acts, 1817 and 1827.—REX v. NORFOLK JUSTICES—EX PARTE PORTER [Div. Ct.] 53

Statutory body—Mine drainage—Power to levy rate—Mortgage of future rates—Cessation of drainage works—Survival of rating powers—South Staffordshire Mines Drainage Acts, 1873 to 1923].—A body of Commissioners was created by statute for the purpose of underground and surface drainage of a mining area with power to levy rates upon occupiers of mines. Power was also given them to borrow money upon mortgage of the produce of future rates, and this power was exercised. Owing to financial and other difficulties the Commissioners ceased to carry on drainage operations in 1919. In 1926 they levied a rate upon the defendants as occupiers of mines in their area. In an action by the Commissioners for the amount of the rate, Held, that they were entitled to levy the rate notwithstanding the cessation of drainage operations. Decision of MacKinnon, J. (43 *The Times* L.R., 471), affirmed.—SOUTH STAFFORDSHIRE MINES DRAINAGE COMMISSIONERS v. ELWELL AND SONS [C.A.] 775

RESTRAINT OF TRADE—Agreement by servant not to compete with employer after termination of employment—Limits of time and area—Protection of employer's trade interests—Validity].—The defendant was employed by the plaintiff, a tailor, as manager and cutter, for 12 months certain, the employment being thereafter terminable by one week's notice on either side, under a written agreement which provided (*inter alia*) that "after a determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or . . . be employed in any capacity by any person, firm or company carrying on a business similar to that of the employer in Snow-hill, Birmingham, or within a half-mile radius of Aston Cross, Birmingham, or Bristol-road, Birmingham." Held, that the limit of area, as well as the limit of time, applied to all the promises, and therefore it was not necessary to consider any question of severability; and that having regard to the fact that the defendant was an experienced cutter and was well known in certain districts of Birmingham, and to the necessary opportunities that he had of influencing customers, the covenant was not unreasonable to protect the employer's trade interests, and was not invalid as being in undue restraint of trade. Decision

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of the Divisional Court (43 *The Times* L.R., 153; [1927] 1 K.B., 637) affirmed.—PUTSMAN v. TAYLOR [C.A.] 392

"Stop" list—Motor Trade Association—Alleged infringement of price regulations—Publication of name of alleged infringers in "stop" list—Interim injunction refused].—The plaintiffs had been members of the Motor Trade Association, of which the members were not permitted to sell certain motor-cars except at certain prices. The association sent a person to buy a car from the plaintiffs, and, on the ground that their price regulations had been infringed by the transaction, and that the plaintiffs refused to pay a sum in the nature of a fine to the association's indemnity fund, the association caused the name of the plaintiffs to be published in their "stop" list so as to prevent the plaintiffs from obtaining supplies of goods from dealers or manufacturers. In an action against the officials of the association the plaintiffs applied for an interim injunction to restrain them from publishing the name of the plaintiffs in the "stop" list. Held, on the authority of *Ware and De Freville, Limited v. Motor Trade Association and Others* (37 *The Times* L.R., 213; [1921] 3 K.B., 40), that there was no *prima facie* case for granting an injunction, and the action must go to trial.—AUTO-MART (LONDON), LIMITED v. CHILTON AND OTHERS [Clauson, J.] 463

REVENUE—Customs—Cinematograph films—Emulsionized celluloid sheets in rolls—Width of 3ft. 9in.—Whether dutiable—Films 9½ millimetres wide—Imposition of duty on films "of standard width of 1⅜ inches"—Customs Consolidation Act, 1876 (39 and 40 Vict., c. 36), s. 17—Finance Act, 1925 (15 and 16 Geo. V., c. 36), s. 3 (1)].—The effect of s. 17 of the Customs Consolidation Act, 1876, is that duty is payable under s. 3 (1) of the Finance Act, 1925, on films of the width of 9½ millimetres for use in a toy cinematograph. But emulsionized celluloid sheets in the form of rolls 3ft. 9in. wide, although when cut and otherwise treated they could be used in a cinematograph, are not necessarily "cinematograph films" within s. 3 (1) of the Finance Act, 1925, and therefore on importation may not be chargeable with Customs duty under that enactment. Judgment of Talbot, J. (42 *The Times* L.R., 760), reversed on the first point and affirmed on the second.—PATHÉ OF FRANCE, LIMITED v. HARRIS. SAME v. MANSBRIDGE [C.A.] 251

Estate duty—Property passing on death—Principal value—Method of assessing duty—Right of beneficiary to apportionment of duty—Finance Act, 1894 (57 and 58 Vict., c. 30), ss. 1, 2 (1) (*b*)].—By his will the testator left Brook House, of which he had a lease expiring in 1995, to Mrs. C. for life, and on her death to Lady L. for life. Mrs. C. died in 1925. The testator directed that the rent, rates and taxes, outgoings, and cost of repairs of Brook House should always be

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paid by his trustees out of the income of his residuary estate. The summons asked by whom the estate duty payable at Mrs. C.'s death on account of the annual benefit, agreed at £5,000 a year, conferred on the person for the time being entitled to Brook House was to be paid, and secondly how it was to be assessed. Held, that on the death of Mrs. C. the property which passed was the right to the benefit of the annual sum of £5,000 ; that the estate duty on the property must be borne by the person to whom the property passed, but on equitable terms ; that in the first instance the estate duty should be paid out of residue, and the residue be recouped by a policy being taken out on the life of Lady L. for such an amount as would at her death produce a sum equal to the duty and be vested in the trustees ; and that the interest on the estate duty and the policy premiums should be retained and paid by the trustees in each year out of the £5,000.—IN RE CASSEL—PUBLIC TRUSTEE v. MOUNTBATTEN [Russell, J.] 743

Estate duty—Succession duty—Trust established in England as result of foreign disposition—Application of foreign law by English Courts in administration—Trust funds abroad—No direction in disposition to establish trust in England—Succession Duty Act, 1853 (16 and 17 Vict., c. 51), s. 2—Finance Act, 1894 (57 and 58 Vict., c. 30), s. 2 (2)—Finance Act, 1925 (15 and 16 Geo. V., c. 36), s. 24].—Under the will in English form of a testator domiciled in Hong-kong his residuary property, subject to an annuity to his widow, was left on trust for his son for life with the remainder to his son's two sons. The tenant for life died domiciled in Hong-kong, which was also the domicil of his sons. Previously the tenant for life had wished to borrow money and the lenders had insisted on English trustees being appointed. Later, it was discovered that the tenant for life, who had been sole trustee, had drawn wrongfully on capital, and against his wish applications for directions regarding the administration of the trust were made to the English Court of Chancery, and the sons, who were infants, became wards of Court. At the time of the death of the tenant for life the trust property was situated abroad. Held, that the property other than the annuity to the widow was subject to estate duty, since section 2 of the Succession Duty Act, 1853, applied to the case of a trust established in this country as the result of a foreign disposition in the administration of which trust the Courts of this country might have to apply foreign law, although investments representing the trust fund were abroad and the trust was not established in this country pursuant to directions in the disposition itself. *Dicta* of Lord Cranworth, L.C., in *Wallace v. Attorney-General* (L.R. 1 Ch., 1) explained. *Attorney-General v. Campbell* (L.R. 5 H.L., 524), *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106 ; [1901] 1 K.B., 123), *In re Cigala's Settlement Trusts* (7 Ch.D., 351), and *Thompson*

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v. Birch ([1876] W.N., 177) applied. Held, further, that the property in question was not liable to succession duty since s. 24 of the Finance Act, 1925 (which enacts that a succession shall be deemed to arise on the happening of the death by reason of which the successor becomes entitled in possession to the succession or to the receipt of the income or profits thereof), is not retrospective.—ATTORNEY-GENERAL v. BELILIOS AND OTHERS [Rowlatt, J.] 669

Excess profits duty—Requisition of goods—Compulsory sale—Assessability of profit—Finance (No. 2) Act, 1915 (5 and 6 Geo. V., c. 89), ss. 38-45].—The profit resulting from the compulsory sale involved in a requisition under Regulation 2B of the Defence of the Realm Regulations is assessable to excess profits duty. The goods were requisitioned in 1918 and a sum of money was then paid on account as compensation. The balance was awarded in 1921 by the War Compensation Court—a tribunal created by the Indemnity Act, 1920—but on the principle of Regulation 2B. Held, that the change of Court did not alter the date when the right to payment arose, and that this balance, which was net profit, was a profit of the year when the goods were requisitioned. Decision of the Court of Appeal (42 *The Times* L.R., 609) affirmed.—NEWCASTLE BREWERIES, LIMITED v. INLAND REVENUE COMMISSIONERS [H.L.] 476

See also INCOME-TAX.

Income-tax—Association for mutual insurance—Surplus funds—Whether assessable].—A mutual insurance association was formed, its sole activity being the indemnity of its members, who were coal-owners, against liability for compensation in respect of fatal accidents to workmen. The association formed a general fund by making calls upon members proportionate to the wages paid in their works for the time being, and the balance of the ordinary call fund was transferred to a reserve fund, into which any extraordinary calls were also paid. A member, on retirement, was entitled to get back in cash a proportion of his share in the above reserve fund, but, apart from this, members had no right at all to the cash in the reserve fund, though the interest accruing on the reserve fund could be used in diminution of members' calls. Held, that the surplus funds of the association were not assessable to income-tax, as the association was mere machinery for the purpose of enabling subscribing members to insure themselves. *New York Life Insurance Company v. Styles* (5 *The Times* L.R., 621 ; 14 App. Cas., 381) applied. Decision of the Court of Appeal (42 *The Times* L.R., 703 ; [1927] 1 K.B., 33) affirmed.—JONES v. SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCIATION, LIMITED [H.L.] 725

Income-tax—Award by Royal Commission—Government user of patented invention—Income Tax Act, 1918 (8 and 9

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Geo. V., c. 40)].—The House held that income-tax was payable on sums awarded by the Royal Commission on Awards to Inventors, it appearing that the sums in question were in fact the aggregate of royalties for Government user of a patented invention and not a capitalized sum in lieu of royalties. Decision of the Court of Appeal (42 *The Times* L.R., 685) affirmed.—CONSTANTINESCO v. THE KING [H.L.] . 727

Income-tax—Capital sales and sales producing income—Distinction].—The appellant and a partner converted their partnership as drapers into a private limited company in which they were the sole shareholders. The Commissioner of Taxes claimed that the amount of £15,025, which was the difference between the value of their stock-in-trade as shown in their last balance-sheet and the value at which it was computed when the company took it over, was a profit assessable to income-tax. Held, that if a business was one purely of buying and selling, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income-tax, but that in the present case there was merely a slump transaction. The Crown was not entitled to take a bookkeeping entry as conclusive evidence of the existence of a profit, and the sum in question was not assessable to income-tax.—DOUGHTY v. COMMISSIONER OF TAXES [P.C.] 207

Income-tax — Carrying on trade—Successive adventures—Additional assessment — When made—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 125 (2)].—During the Lancashire cotton "boom" of 1919, the appellant, in company with other persons, engaged in the operation known as "turning over" a cotton mill, *i.e.*, acquiring a controlling interest in the mill, organizing its administration and finances, and re-selling it. The operation was successful, and the appellant was asked to join, and did join, several further syndicates engaged in "turning over" other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923. Held, that though each adventure of "turning over" a mill was not a trade, the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade by him. Held, also, that the assessment was in time, having been made by the Additional Commissioners within the three years allowed by s. 125 (2) of the Income Tax Act, 1918. The subsequent steps need not be within that time.—PICKFORD v. QUIRKE. PICKFORD v. INLAND REVENUE COMMISSIONERS [Rowlatt, J.] .. 659

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Income-tax — Case stated — Transmission to High Court—Seven days from receipt—Appellant inspector moved to another district—Delivery of case at his old office—Period for transmission—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 149 (1) (*d*)].—Where an inspector of taxes requires the Special or General Commissioners of Income Tax to state a case, and is then moved to another district, it is not necessary for them to deliver the case to that inspector personally, but it is sufficient if the case be sent to the office to which he was attached; and the period of seven days fixed by s. 149 (1) (*d*) of the Income Tax Act, 1918, as the period within which the case must, after being received, be transmitted to the High Court, then begins to run.—GRAINGER v. SINGER [Rowlatt, J.] 591

Income-tax—Charity—Bequest of residue—Payment of income by executors before ascertainment of residue—Claim of repayment of income-tax—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*)].—A testator devised his residuary estate on trust for the appellants, who were a society established for charitable purposes only and were entitled to exemption from income-tax on their income from investments. Pending the completion of the administration the executors paid to the trustees for the appellant society certain sums on account of income. The appellants claimed repayment of income-tax, but the Inland Revenue Commissioners refused repayment so far as related to income received by the executors before the date when the residue was ascertained. Held, that as the income when it was received was the income only of the executors and the money paid to the charity was only a sum equal to the income payable to the charity as a matter of equitable bookkeeping in due course of administration, the appellants were not entitled to the repayment claimed.—MARIE CÉLESTE SAMARITAN SOCIETY OF THE LONDON HOSPITAL v. COMMISSIONERS OF INLAND REVENUE [Rowlatt, J.] 23

Income-tax—Charity—Boarding-house at reduced charges—Claim to exemption—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*)—Finance Act, 1921 (11 and 12 Geo. V., c. 32), s. 30].—By a declaration of trust "a home or place of residence" was founded and endowed, "where persons requiring temporary rest and change of air for the benefit of their health may obtain the same." About half the income of the home came from payments from visitors, who included convalescents, persons needing rest and change, and holiday applicants. On a claim by the trustees for exemption from income-tax on the ground that the trust was established for charitable purposes only, Held, that since, on the construction of the trust deed, there was throughout an overriding charity which fulfilled the character of a charitable convalescent home, the trustees were entitled to the exemption claimed. Decision of

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Rowlatt, J. (43 *The Times* L.R., 52), reversed.—Inland Revenue Commissioners v. Trustees of Roberts Marine Mansions [C.A.] 270

Income-tax—Clerk in employment of county council — Assessment for 1921-22 under Schedule E — Schedule D the proper Schedule—Alteration of law by statute—Schedule E made proper Schedule—Subsequent additional assessment for 1921-22 under Schedule E—Whether statute retrospective—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 125—Finance Act, 1922 (12 and 13 Geo. V., c. 17), s. 18].—The appellant, a clerk in the employment of a county council, was assessed in December, 1921, to income-tax for 1921-22 under Schedule E, though at that time he ought to have been assessed under Schedule D. On July 20, 1922, the Finance Act, 1922, was passed, and that statute by s. 18 (1) made Schedule E the proper Schedule and provided by subsection (6): "The provisions of subsection (1) and subsection (3) of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income-tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two, in respect of any employment (other than that of a weekly wage-earner employed by way of manual labour) under any public department, or under any company, society or body of persons or other employer mentioned in Rule 6 of the Rules applicable to Schedule E." In September, 1922, owing to a revision of the appellant's salary and bonus, an additional assessment under Schedule E was made on the appellant for 1921-22 under s. 125 of the Income Tax Act, 1918. In fact the appellant had already paid more under Schedule E than if he had originally been properly assessed under Schedule D on figures including the revised salary and bonus. Held (Lord Atkinson dissenting), that s. 18 (6) of the Finance Act, 1922, had not the retrospective effect of validating the additional assessment under Schedule E. Decision of the Court of Appeal ([1925] 2 K.B., 728) reversed.—Ingle v. Farrand [H.L.] .. 279

Income-tax — Company—Residence—Management abroad—Whether resident in this country—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Cases IV. and V.].—Although a company, which is registered in this country but has its control and management abroad, resides where it is controlled and managed, yet it does not reside there exclusively, but it necessarily resides in this country so as to be liable to income-tax, because it is obliged by law to perform in this country certain duties which cannot be performed abroad, such as having a registered office and keeping a register of shareholders. Decision of Rowlatt, J. (43 *The Times* L.R., 70), affirmed.—Todd v. Egyptian Delta Land and Investment Company, Limited [C.A.] 275

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Income-tax—Company resident in England—Business carried on abroad—No foreign profits remitted to England—Power of control in England—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case I.].—The appellants, who were insurance and reinsurance brokers and agents in London, had an office in Paris for the purpose of direct insurance on behalf of companies for which it acted as agents, and the appellants in some cases represented the same companies in London and in Paris. A resident director of the appellants had the sole conduct of the Paris business under a power of attorney. The results of the Paris business were incorporated in the appellants' balance-sheets, but no part of the French profits was remitted to London. Held, that as the power of attorney did not, except as against third parties, divest the directors in London of their power of control over the French business, the appellants were assessable to income-tax under Case I., of Schedule D on the whole of their profits, including those of the Paris office.—B. W. Noble, Limited v. Mitchell [Rowlatt, J.] .. 102

Income-tax—Excess profits duty—Profits of trade — Syndicate for development of patented invention — Agreement with foreign company for grant of licence and option of purchase — Exercise of option of purchase for sum in cash—Whether a profit of trade or the realization of a capital asset—Finding of Special Commissioners reversed—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case I.].—A syndicate formed to work and develop a group of English and foreign patents carried on business mainly by granting licences to manufacturers at royalties. Certain foreign manufacturers, however, refused to take licences, unless they were also given an option of purchase exercisable within a given period. The syndicate entered into a contract with an American company to grant them a licence to use and work the syndicate's American patents, with an option of purchase thereof. The company exercised its option of purchase and paid to the syndicate the sum of £15,898 for the purchase of the American patents out and out. The syndicate having been assessed to income-tax and excess profits duty upon this sum, the Special Commissioners found that the profits made on the sale of patents were profits of the company's trading, and Rowlatt, J., affirmed their decision. Held (Scrutton, L.J., dissenting), that the Special Commissioners had misdirected themselves in law, and their finding must be reversed. The sale of the American patent rights was not a profit of circulating capital, but the transmutation of a capital asset into money, and was therefore not assessable to income-tax or excess profits duty. *Collins v. Firth-Brearley Stainless Steel Syndicate* (133 L.T., 616) applied.—Rees Roturbo Development Syndicate, Limited v. Commissioners of Inland Revenue. Same v. Ducker [C.A.] .. 796

Income-tax — Exemption — "Resident"—"Ordinarily resident"—Meaning of ex-

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pressions—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 46 ; Sched. C, Rule 2 (*d*)].—Consideration of the meaning of the expression "ordinarily resident" in Rule 2 (*d*) of Schedule C of the Income Tax Act, 1918, and of the expression "resident" in s. 46 of the same Act.—LEVENE v. INLAND REVENUE COMMISSIONERS. LYSAGHT v. SAME [C.A.] 337

Income-tax—Foreign securities, stocks and shares, and other foreign property—Whether foreign possessions—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Case V., rule 2].—A testator, who was a citizen of the United States, left his property to trustees in that country to be applied to the use of his daughter for life. The fund constituted under the will consisted of "foreign Government securities, foreign stocks and shares, and other foreign property." The appellant, who resided in England, married the testator's daughter, and was assessed to income-tax on the income under Schedule D. The trustees of the fund were a New York company, which was entitled to payment for its services, and the estate had been fully administered. The income was subject to American income-tax. It was admitted at the Bar that the income was not remitted to this country but was paid into a New York bank to the order of the testator's daughter, less the trustees' commission and the American income-tax. By Schedule D of the Income Tax Act, 1918, residents in the United Kingdom are taxable under that Schedule on all property, wherever situate, except that by rule 2 of Case V. of that Schedule tax on income from foreign possessions other than stocks, shares, or rents, is to be computed only on so much as is actually received in this country. The Special Commissioners of Income Tax decided that the assessment was good, but stated a case. Held (Viscount Sumner and Lord Blanesburgh dissenting), that as the estate had been fully administered the right of the respondent's wife, if American law was the same as English law, was not merely a right to the balance sum left after deducting the commission and American income-tax, but she was entitled in equity to the dividends, and the right was not a foreign possession, other than stocks, shares, or rents, within rule 2 of Case V., and the case must be referred back to the Special Commissioners to state, (*a*) The particulars of the "foreign government securities, foreign stocks and shares, and other foreign property" sufficiently to show first, which of them were, in their opinion, "securities" within Case IV., rule 1, and, secondly, which of them were, in their opinion, "stocks, shares or rents" under Case V., rule 1, and thirdly, which were, in their opinion, "possessions out of the United Kingdom other than stocks, shares, or rents" under Case V., rule 2, and (*b*) which of those they had assessed on the income of the year of assessment and which on the average of the three preceding years ; and (*c*) that the sums paid into the New York bank had not been in

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whole or in part remitted to the United Kingdom. Decision of the Court of Appeal (42 *The Times* L.R., 594 ; [1927] 1 K.B., 109) reversed.—BAKER v. ARCHER-SHEE [H.L.] 758

Income-tax—Income accumulated for benefit of a person contingently — Beneficiary having only a life interest — Claim to relief—Meaning of "benefit"—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 25].—By s. 25 of the Income Tax Act, 1918 :—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as "the aggregate yearly income") is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him" [a sum calculated as therein mentioned]. Held, that the words "for the benefit of" include a case where the accumulations of income are added to the capital of a trust fund in which the beneficiary has only a life interest and where therefore the accumulations never pass to the beneficiary.—DALE v. MITCALFE [Rowlatt, J.] 481

Income-tax—Payments out of profits not brought into charge—Deduction of tax—Liability of person deducting to account to Inland Revenue Commissioners—Housing scheme — Money borrowed by borough council — Interest — Deduction of tax—Council owning profitable undertaking —Interest paid out of council's general fund — Indemnity of council against loss on scheme — Council's liability to account for sums deducted — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), All Schedules Rules, r. 21].—By Rule 21 of the All Schedules Rules of the Income Tax Act, 1918, "(1) Upon payment of any . . . annual payment charged with tax under Schedule D, . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax. . . . (2) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much . . . as is not paid out of profits or gains brought into charge . . . and every such amount shall be a debt due from him to the Crown. . . ." Under the Housing of the Working Classes Act, 1890 to 1919, and the Metropolis Management Act, 1855, the respondents, a metropolitan borough council, assigned to

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the London County Council all rates authorized to be raised by the respondents under the Metropolis Management Act, 1855, or the London Government Act, 1899, to secure money advanced by the London County Council. The money so raised was used by the respondents in connexion with the construction of flats for the working classes in pursuance of a scheme prepared by them under s. 1 of the Housing, Town Planning, &c., Act, 1919. In making payments of interest on the sums advanced the respondents deducted income-tax under Rule 21 of the All Schedules Rules of the Income Tax Act, 1918. The interest was paid out of the general fund in the hands of the respondents, into which fund were paid all profits or gains whether derived from a housing scheme or from elsewhere. The respondents had only one banking account, out of which all payments, including the interest, were made and into which all receipts, including the profits and gains derived from the respondents' electricity undertaking, or otherwise, were paid. No special fund in respect of any housing scheme was maintained. It was admitted that the respondents possessed profits or gains brought into charge to income-tax sufficient for the payment of interest on the sums advanced, apart from any revenue derived under any housing scheme. Held, that as none of the respondents' profits and gains other than the receipts of the housing scheme contributed to the payment of the interest, and as the respondents had, under the Housing Acts, an indemnity against loss on the scheme, the respondents were liable under Rule 21 to account to the Commissioners of Inland Revenue for the amount of the deductions.—DICKSON v. HAMPSTEAD BOROUGH COUNCIL [Rowlatt, J.] 595

Income-tax — Professional footballer—Transfer to different club—Payment of a sum as accrued benefit — Assessability].—The respondent was employed to play football for a club in return for payment, and, on his being transferred in accordance with the rules of the Football Association to another club, he was given by the first-named club a sum of £650 as accrued benefit. Held, that the payment was neither a gift nor compensation for loss of employment, but was really remuneration for services and was therefore assessable to income-tax.—DAVIS v. HARRISON [Rowlatt, J.] 623

Income-tax — Profit or gain — Professional cricketer's benefit—Proceeds—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule E.].—The House (Lord Atkinson dissenting) held that the proceeds of a professional cricketer's benefit match did not, in the circumstances, constitute an income, profit, or gain assessable to income-tax, since they were a personal gift and not remuneration. Decision of the Court of Appeal (42 *The Times* L.R., 514; [1927] 1 K.B., 90) reversed.—SEYMOUR v. REED [H.L.] 584

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Income-tax — Profits — Deductions — Business expense—Payment to retiring director —Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Cases I. and II., rule 3 (*a*)].—The Court held that a payment by a company to a director in order to induce him to retire, in circumstances in which the other directors had come to the conclusion that it was essential in the interests of the company that he should retire, was a business expense deductible from the company's profits for purposes of income-tax. Decision of Rowlatt, J. (43 *The Times* L.R., 100), affirmed.—MITCHELL v. B. W. NOBLE, LIMITED [C.A.] 245

Income-tax—Profits of trade—Gigantic deal in linen—Completion of transaction within a year—"Annual" profits—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Cases I. and VI.].—The appellant, who was an agricultural machinery merchant, bought a gigantic consignment of linen and set to work to make people buy it, and he succeeded in selling it within a year by organizing a vast activity for that purpose. He was assessed to income-tax under Schedule D on his profits on the sale of the linen, and on appeal to the Special Commissioners he contended that he did not carry on any trade in connexion with linen, that the transaction was an isolated one, and that the profit was not an annual profit chargeable to income-tax. The Special Commissioners held that in exercising these activities the appellant was for the time being carrying on a trade the profits of which were chargeable to income-tax. Held, that there was evidence on which the Special Commissioners could find the transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year of assessment was enough to make the profits "annual" within Case VI. of Schedule D, and the decision of the Special Commissioners must be affirmed. Decision of the Court of Appeal (42 *The Times* L.R., 233; [1926] 1 K.B., 550) affirmed.—MARTIN v. LOWRY. SAME v. INLAND REVENUE COMMISSIONERS [H.L.] .. 116

Income-tax—Public school—Claim of allowance—Absence of elements of permanence—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. A, No. VI., r. 1 (*c*)].—The appellants, a limited company, owned and carried on a high-class secondary school managed by Governors who were partly elected by the shareholders and partly nominated by the Crown. By the company's articles no profit was to be divided amongst members. Practically the whole of the receipts of the company arose from fees paid for pupils. The appellants claimed under Schedule A, No. VI., rule 1 (*c*), of the Income Tax Act, 1918, an allowance on the ground that the school was a public school. Held, that the elements of permanence connoted by the word "foundation" were part of the essence of a public school, and as these elements were absent the appellants were

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not entitled to the allowance claimed.—BIRKENHEAD SCHOOL, LIMITED v. DRING [Rowlatt, J.] 48

Income-tax — Schedule A — House let in apartments—Weekly tenancies—Basis of assessment—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule A, No. VII., Rule 8].—Where a house is let in a number of apartments or tenements on weekly tenancies, the correct method of arriving at the annual value of the entire house or tenement for the purpose of charging the landlord to income-tax under No. VII., Rule 8, of Schedule A of the Income Tax Act, 1918, is to ascertain what the value of each of the separate tenements would be if they were let by the year and to add the values together, making the permitted deductions from the total. It is not allowable either (*a*) to estimate what a hypothetical tenant would give for the whole house on the basis that he could re-let it in tenements at weekly rents, nor (*b*) to add together the weekly rents and multiply by 52 and then allow a discount for contingencies.—WILLIAMS v. SANDERS [Rowlatt, J.] 663

Income-tax — Schedule D — Deductions—Machinery and plant—Wear and tear — Obsolescence — Solicitor's law-books — Whether included in "plant"—Finance Act, 1925 (15 and 16 Geo. V., c. 36), s. 16].—The word "plant" in s. 16 of the Finance Act, 1925, which extends to professions the allowance granted to traders under Schedule D of the Income Tax Act, 1918, for the wear and tear and obsolescence of machinery and plant, does not include a solicitor's books which he consults for professional purposes.—DAPHNE v. SHAW [Rowlatt, J.] 45

Income-tax—Schedule D—Profits of trade—Three years' average not applicable—Period over which average to be taken—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Cases I. and II., Rule 1 (2)].—The appellant firm began a new business on March 1, 1919, and made up their first account on December 31, 1919. On March 1, 1920, they sold the business to the appellant company, which decided to make up its accounts to March 31 in each year and accordingly made up an account for three months ending March 31, 1920. It was agreed that the assessment to income-tax, Schedule D, for the year ending April 5, 1920, ought to be apportioned between the firm and the company. Held, that under Rule 1 (2) of the rules applicable to Cases I. and II. of Schedule D the liability to income-tax for the year ending April 5, 1920, should be based on a fair and just average, for a year, of the profits from March 1, 1919, to April 5, 1919, without bringing in any profits of the year of charge at all. Decision of the Court of Appeal (42 *The Times* L.R., 479; [1926] 2 K.B., 289) reversed.—CLARE AND HEYWORTH v. BETTS [H.L.] 387

Income-tax — Trading profits — Deduction—Multiple shops—Control by head office—

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Shops opened and closed as demanded by business as a whole—Difference between cost of fitting new shops and receipts from sale of equivalent second-hand fittings from closed shops—Capital expenditure—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Case I.].—A trading company, carrying on business through a number of branch shops which were all subject to control by the head office, followed a policy of opening and closing branch shops as was demanded by the business as a whole. Held, that the difference between the cost of new fixtures, fittings and utensils for the new shops and the receipts from the sale of equivalent second-hand fixtures, &c., from the shops that were closed was a capital expenditure and was not a revenue expenditure which could be debited to the trading account of the company to ascertain the profits which were assessable to income-tax.—EASTMAN'S, LIMITED v. SHAW [Rowlatt, J.] 549

Income-tax — Water authority — Interest on stock and debentures — Deduction and retention of tax—Whether interest paid out of profits not brought into charge—Liability to account for tax—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), All Schedules Rules, Rules 19, 21].—The profits of the Metropolitan Water Board are assessable under Schedule A, No. III., Rule 3, of the Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. The accounts of the Board for the year ending March 31, 1922, showed a loss, and therefore no assessment was made on the Board under Schedule A, No. III., for the year ending April 5, 1923. The accounts for the year ending March 31, 1923, showed a profit of over two millions, out of which the Board paid over one million interest on water stock and debentures, deducting and retaining the income-tax thereon. On an information claiming that under Rule 21 of the All Schedules Rules the Board was liable to account to the Commissioners of Inland Revenue for the amount of the tax so deducted, the Board contended that the interest paid for the year 1922-23 was payable out of profits brought into charge for 1922-23 within Rule 19 of the All Schedules Rules and was in fact paid out of the profits for 1922-23, and that, although the income-tax for 1922-23 was to be measured by the profits of the preceding year, the profits for 1922-23 had been brought into charge, and Rule 21 did not apply. Held, that as the Board had been assessed at zero under Schedule A for 1922-23, the interest had not been paid out of profits brought into charge, and the Crown was entitled to succeed.—ATTORNEY-GENERAL v. METROPOLITAN WATER BOARD [Rowlatt, J.] 656

Stamp duties—Receipt forms issued by bank to customers—Availability for payment either to customer or to holder—Limitation to sums under £2—Whether subject to the same stamp duty as cheques—Stamp Act, 1891 (54 and 55 Vict., c. 39), s. 32].—The appellant bank introduced a

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scheme by which their customers could obtain free of charge a book of receipts containing forms which, when filled up, could be presented by a customer for payment at a branch of the bank or could be handed to a tradesman or other creditor in settlement of a debt and then presented by him for payment. The receipt forms were available only for the payment of sums under £2 and the bank contended that the forms did not require to be stamped with a 2d. cheque stamp. Held, that as such a document "entitled" the recipient, within the meaning of s. 32 of the Stamp Act, 1891, to payment of the sum mentioned, it was subject to the same stamp duty as a cheque.—MIDLAND BANK, LIMITED v. COMMISSIONERS OF INLAND REVENUE [Rowlatt, J.] 754

Supertax—Arrears of interest on bonds—Several years' arrears paid in one sum—Whether income of year in which payment was made—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 5 (3) (*c*)].—Where a taxpayer purchases bearer bonds on which the interest for several years is in arrear and his purchase confers upon him the right to the arrears, and several years' arrears are subsequently paid to him in one sum, the whole of that sum forms for the purpose of supertax, under s. 5 (3) (*c*) of the Income Tax Act, 1918, part of his income for the year in which payment was received.—LEIGH v. INLAND REVENUE COMMISSIONERS [Rowlatt, J.] 528

Supertax — Infant — Income of his trust property — Sums paid by trustees for maintenance—Accumulation of balance—Accumulations "receivable by infant"—Infant's liability to super-tax—Liability of trustees and guardian to make super-tax returns—Representative assessments—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 72 (2) (5) (6)—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), ss. 5 (3) (*c*), 7 (2) (5) (6), 161, All Schedules Rules, Rule 4].—Where trustees of a settlement set apart certain sums annually for the maintenance of an infant beneficiary and allow the balance of the income to accumulate, the income that is being accumulated is "receivable" by the infant within the meaning of s. 5 (3) (*c*) of the Income Tax Act, 1918, and he is liable to be assessed to super-tax in respect of it. But representative assessments to super-tax cannot be made upon the trustees or the guardian of the infant beneficiary, either in respect of the actual total income of the infant, or in respect of a total income limited, as regards the particular trustee or guardian, to that income with which the trust or guardianship is concerned. So Held by the Court on the first point, and by the Court on the second point as regards the guardian, and by Lord Hanworth, M.R., and Scrutton, L.J., as regards the trustees. But Held by Sargant, L.J. (dissenting), that the words of section 72 (6) of the Finance (1909-10) Act, 1910, or the equivalent words in section 7 (6) of the Income Tax Act, 1918, are wide enough to

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enable such assessments to be made upon trustees. Decisions of Rowlatt, J. (43 *The Times* L.R., 157; [1927] 1 K.B., 594), affirmed.—INLAND REVENUE COMMISSIONERS v. PAKENHAM AND OTHERS. INLAND REVENUE COMMISSIONERS v. COUNTESS OF LONGFORD [C.A.] 835

Supertax—Occupation of family mansion—Permission of trustees—Annual value of house — Whether to be included in occupant's income — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. A].—The Court held that the occupant of a family mansion, under the terms of a will by which trustees were given general powers of management of the real estate and a discretion to admit to the mansion the present occupant or certain members of his family during his lifetime, must be regarded as being in occupation under the will, and that the profits and gains representing the annual value of the house formed part of his income for purposes of supertax.—TOLLEMACHE v. INLAND REVENUE COMMISSIONERS [Rowlatt, J.] 58

SAFEGUARDING OF INDUSTRIES — Dyestuffs — Synthetic organic colouring matter —Prohibition of import—Artists' colours—Small proportion of prohibited matter — Commercial impossibility of use for other purposes—Whether within the prohibition—Dyestuffs (Import Regulation) Act, 1920 (10 and 11 Geo. V., c. 77), ss. 1, 2 (1)].—Section 1 of the Dyestuffs (Import Regulation) Act, 1920, which prohibits the importation except under a licence granted in accordance with s. 2 (1), of "all synthetic organic dyestuffs, colours and colouring matters," includes in the prohibition artists' colours which are enclosed in toy paint-boxes and which contain a proportion of synthetic organic colouring matter, even though the proportion is so small that it would not pay to extract it and use it for any other purpose.—WHYTE, RIDSDALE AND CO., LIMITED v. ATTORNEY-GENERAL [Astbury, J.] 142

SALE OF FOOD AND DRUGS—Extract of meat and malt wine—No fixed standard of quality — Analyst's certificate — Duty of Court to fix standard—Sale of Food and Drugs Act, 1875 (38 and 39 Vict., c. 63), s. 6—Wholesaler charged with aiding and abetting retailer—Not present at sale—No evidence of knowledge of composition of article sold].—Where an article of food or a drug has no recognized standard of quality, it is the duty of the Court before which a person is charged with supplying that article or drug not of the nature, substance and quality demanded by the purchaser, and to his prejudice, to fix a standard in the sense of considering whether the article supplied must be held to fall below a reasonable minimum, whatever it might in fact be. Where an analyst's certificate is before the Court, and is uncontradicted, the Court ought to act upon it, if it asserts that the

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article is deficient. A wholesaler who supplies an article to a retailer for re-sale cannot be convicted of aiding and abetting if he is not present when the re-sale takes place, nor in the absence of evidence that he knew the composition of the article.—BOWKER v. WOODROFFE. BOWKER v. PREMIER DRUG COMPANY, LIMITED [Div. Ct.] 516

SALE OF GOODS—Auction—Conditions of sale —"Lot to be taken away . . . the day after sale"—"All lots uncleared . . . shall be re-sold"— Refusal by buyer to clear lots — Whether re-sale obligatory upon auctioneers].—Certain goods were put up for sale by auction, the conditions of sale printed on the auctioneers' catalogue providing: "The lot to be taken away and paid for . . . the day after sale," and "upon failure of complying with the above conditions . . . all lots uncleared within the time aforesaid . . . shall be re-sold." A purchaser, through his own negligence, bid for a lot for which he had not intended to bid, and the lot was knocked down to him. He afterwards endeavoured to persuade the auctioneers to put up the lot for sale again, but they declined. Upon his refusing to pay, an action for the purchase price was brought by the auctioneers, and the purchaser contended that under the conditions of sale it was obligatory upon the auctioneers to re-sell the lot in question, and that he could be charged only with any deficiency upon re-sale. Held, that the words "all lots uncleared . . . shall be re-sold" did not impose any obligation upon the auctioneers, but merely conferred upon them an option of re-selling at their discretion, and that the auctioneers were entitled to recover the full price at which the lot was knocked down to the purchaser.—ROBINSON, FISHER AND HARDING v. BEHAR [Div. Ct.] 66

Goods sold to Turkish customers—Contracts still executory at outbreak of war—Delivery of goods to customers after outbreak of war—Payment received in piastres by seller's agents—Claim by seller against his agents for sterling—Agency of necessity—Conversion—Damages —Treaty of Lausanne, 1923, Art. 84—Treaty of Peace (Turkey) Act, 1924 (14 Geo. V., c. 7)—Treaty of Peace (Turkey) Order, 1924].—The defendant bank, a Turkish subject, was at the outbreak of war between this country and Turkey holder of sight bills drawn in sterling for the purchase price of goods consigned by the plaintiff from Manchester to his customers in Beyrout which had arrived in Beyrout before the outbreak of war and were subsequently delivered to the purchasers against payment to the bank in piastres. At the conclusion of the war the defendant bank claimed to be entitled to pay to the plaintiff an amount in sterling which represented the then value of the piastres which they had received in payment for the goods. The plaintiff, on the other hand, claimed to be entitled to be paid the

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sterling amounts of the bills at sight. Alternatively he claimed damages for conversion. Held, (1) that the effect of the outbreak of war was to dissolve both the mandate to deliver the goods which were in the custody of the defendant's branch at Beyrout to the plaintiff's customers in Turkey and to collect the face value of the sight bills; (2) that under the conditions in which they found themselves the Beyrout branch had not become agents of necessity; and (3) that as that branch had taken for a former principal's goods moneys which they had no right either to demand or to receive the defendant bank was liable to the plaintiff for damages for conversion.—JEBARA v. OTTOMAN BANK [C.A.] 369

See also CONTRACT and SHIP—Sale.

SHIP — Bill of lading — Short delivery—Claim by indorsees of bills of lading].—In an action for freight by shipowners against indorsees of bills of lading the defendants counterclaimed for short delivery. The shipowners denied short delivery, and contended that in any event the indorsees of bills of lading had no right to sue. Held, on the facts, that the defendants had failed to prove the alleged short delivery, and the counterclaim must therefore fail. Consideration of the question whether the indorsees of bills of lading could sue in respect of missing cargo was thus rendered unnecessary, and the question was left undecided.—NORTH SHIPPING CO., LIMITED v. JOSEPH RANK, LIMITED [Roche, J.] .. 82

Charterparty—Arbitration clause—Balance of freight — Short delivery — Charterers' admission of balance due for freight—Counterclaim for short delivery — Right of shipowners to recover admitted balance — Counterclaim barred by arbitration clause].—The plaintiffs chartered their ship to the defendants to carry grain, the charterparty providing that all disputes should be referred to arbitration and that the claimant's arbitrator must be "appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred." Before completion of discharge the defendants made various payments to the plaintiffs on account of freight, and on final discharge the plaintiffs claimed that £568 was still owing for freight. The defendants admitted that £416 was still owing for freight, but they set up a counterclaim for £581 for short delivery and refused to pay the £416 until their counterclaim was met. Neither party referred the matter to arbitration, and more than three months after final discharge the plaintiffs brought an action for £568 balance of freight and the defendants counterclaimed £581 for short delivery. Held, that though the plaintiffs could not recover the £568 as the claim for it ought to have been taken to arbitration, yet they could recover the £416 about which there had never been any dispute, but that the counterclaim, as it was always in dispute,

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was barred by the arbitration clause.—Bede Steam Shipping Company, Limited v. Bunge y Born, Limitada, S.A. [MacKinnon, J.] 374

Charterparty — Bill of lading — Construction of clauses—Cargo of sugar in bags—Discrepancy between bill of lading number and out-turn tally—Meaning of "error"—Proof by inference excluded]. — The claimants chartered a ship from the respondents, the owners, to convey a cargo of sugar from Cuba to a British port, the charterparty providing that mate's receipts should be signed for each parcel and that bills of lading in accordance therewith should be signed by the master, and "Quantity stated on bills of lading to be conclusive evidence as to number of bags of sugar shipped unless error or fraud can be proved." The mate signed receipts and the master signed bills of lading in accordance with the receipts. The bills of lading provided that "the carrier shall not be concluded as to the correctness of statements herein of . . . quantity." The bags discharged at Greenock were found to be short of the number in the bills of lading, and a claim by the charterers against the shipowners in respect of the shortage went to arbitration. No fraud was alleged, and the arbitrator held that there was no evidence how the discrepancy arose and that under the conclusive evidence clause in the charterparty the shipowners were liable in the absence of proof of some definite error in the bills of lading or tallies otherwise than by inference from the fact that all the bags shipped were discharged, and he made an award in favour of the charterers. Held, that variations of the bill of lading from the charterparty were of no account, and that on the conclusive evidence clause in the charterparty the shipowners could not escape liability by giving evidence from which a mistake might be inferred but they must prove a mistake in the mate's receipts so that it could be seen how the mistake arose, and therefore the award must be upheld.—Royal Commission on Sugar Supply v. Hartlepools Seatonia Steamship Company, Limited [MacKinnon, J.].. 542

Charterparty—"Cargo to be brought to and taken from alongside the steamer"—Meaning of "alongside"—Custom of port of Hull].—The plaintiffs, as shipowners, chartered a steamer to the defendants to carry a cargo of timber from the Baltic to Hull. The charterparty contained a clause as follows: "Cargo to be loaded and discharged with customary steamship dispatch . . . according to the custom of the respective ports. . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." The steamer arrived at Hull in due course. One customary mode of discharging a timber cargo at the port of Hull was to erect a staging from the ship's side to a line of rails on which bogies ran, and to place the timber on the bogies. The nearest rail was some distance away from the side of the quay.

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On the refusal of the defendants to carry the timber to the bogies, the plaintiffs did the work and claimed to recover the cost from the defendants. The defendants proved that by the custom of the port of Hull the cost of placing the timber on the bogies was to be borne by the shipowners. Held, that the custom relied on by the defendants was inconsistent with the language of the charterparty, that the word "alongside" was not proved to have acquired any conventional meaning in the timber importing trade at Hull, and that the plaintiffs were therefore entitled to recover. *The Turid* (38 *The Times* L.R., 423; [1922] 1 A.C., 397) followed. Decision of the Court of Appeal (42 *The Times* L.R., 69) affirmed.—W. N. Hillas and Company, Limited v. Rederi Aktiebolaget Acolus [H.L.] .. 67

Charterparty—Dead freight—Charterers' obligation to load full cargo—Failure—Ship's call at port to load other cargo — Delay — Deviation — Mitigation of damages].—The plaintiffs, who were shipowners, chartered a steamer to the defendants to bring a cargo of sugar from Java to Europe, the defendants binding themselves to load a full and complete cargo. A clause of the charterparty provided: "The steamer has liberty to deviate and proceed to and from one or more ports or places in Java in any order . . . to tow and assist vessels in distress, and to deviate for the purpose of saving life or property." The defendants were not able to load a full cargo, and the steamer left with the quantity loaded, and, without the defendants' consent, she called at Alexandria on the voyage and took in oil cake to fill up, the loading of the cake occupying about five days. In an action by the shipowners against the charterers for dead freight the defendants pleaded that by loading the cake at Alexandria the steamer had deviated from the course of the voyage and the plaintiffs had broken the charter contract and had lost their right of action against the defendants for not loading a full cargo. The plaintiffs alleged that they had loaded the cake in order to mitigate damages. Held, that it was an implied term of every charterparty that, if the charterers failed in their duty to load, the shipowners had a right to take in other cargo to fill the vacant space, provided that to do so was reasonable in the circumstances, the test being whether it would diminish the damages for which the charterers would otherwise be liable, and that, as the loading of the cake must be taken to have been in mitigation of the damages, and as there was therefore no delay unauthorized by the implied term, there was no deviation, and the plaintiffs were entitled to succeed.—Wallems Rederi Aktieselskab v. Wm. H. Muller and Co., Batavia [McKinnon, J.] 330

Charterparty—Demurrage—Owners bunkering ship during demurrage time—Claim for demurrage during non-working hours of bunkering days].—Where, after a chartered

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ship had come on demurrage, the owners withdrew her from her loading position into a position in which they could put bunkers into her, demurrage was held not to run against the charterers during the bunkering days. *Budgett and Co. v. Binnington and Co.* (7 *The Times* L.R., 15 ; [1891] 1 Q.B., 35), and *Cantiere Navale Triestina v. Handelsvertretung der Russ. Soz. Föd. Soviet Republik Naphtha Export* (41 *The Times* L.R., 355 ; [1925] 2 K.B., 172) distinguished.—In re Ropner Shipping Company, Limited, and Cleeves Western Valleys Anthracite Collieries, Limited [C.A.] 384

Charterparty—Discharge—Total expense paid by shipowners—Mistaken belief as to effect of custom — Settlement with charterers on this basis—Subsequent judicial decision as to real effect of custom—Partial liability of charterers—Action by shipowners against charterers to recover charterers' share of expense].—The plaintiffs, as owners, chartered a steamer to the defendants to bring to West Hartlepool a cargo of pit props, to be "taken from alongside at the charterers' risk and expense as customary." The custom at West Hartlepool varied according as the discharge was to be into railway wagons or on to the quay. In this case the discharge was into railway wagons, and the props, after being swung over the wagons by a crane, had to be stowed in the wagons. The plaintiffs and the defendants settled accounts on the basis that the plaintiffs were liable for the whole cost of discharge, but afterwards it was held in *The Rensfjell* (40 *The Times* L.R., 458) that by the custom at West Hartlepool from the moment when the cargo was released from the sling the cost of handling it and stowing it in the wagons fell on the charterers. The shipowners, therefore, in this action sought to recover from the charterers such share of the cost of discharge as ought to have been borne by the latter, the claim being for breach of contract in not providing the men to stow the cargo, and alternatively for money paid to the defendants' use. Held, that as both parties believed it to be the duty of the plaintiffs to provide the men for stowage and therefore the defendants had not committed a breach of contract, and as the plaintiffs had made a voluntary payment under the mistaken belief that they were liable to make it, the action failed.—Aktieselskabet Dampskibs Steinstad v. W. Pearson and Co. [MacKinnon, J.] 531

Charterparty — Freight — Discount — Computation].—The plaintiffs, as owners, chartered a steamer to the defendants by a charterparty which, after providing for the rate of freight, contained the clause : "The said freight, less advances, if any, to be paid on unloading and right delivery of the cargo in cash, but if ordered outside the United Kingdom to discharge, in London concurrent with discharge, but, in any case, subject to two months' discount at 5 per cent. per annum." A further clause provided : "Money for steamer's ordinary disbursements, not exceeding one-fourth of estimated freight, to be advanced, if required by the captain, at the port of loading by the charterers . . . to be indorsed on bills of lading, if required, and deducted from the freight at settlement." Held (Lord Hanworth, M.R., dissenting), that the 5 per cent. discount was to be calculated not on the whole amount of the freight but on that amount less advances for disbursements.—Kokusai Kisen Kaisha v. Louis Dreyfus and Co. [C.A.] 131

Collision—Navigation round points or sharp bends—Port of London River By-Laws, 1914-1926, By-law 36]. — By-law 36 of the Port of London River By-Laws, 1914-1926, provides :—"Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her." Held, that the by-law imposes on the vessel navigating against the tide two duties, (*a*) to ease her speed, and (*b*), if necessary, to stop her engines and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her. The question whether it is necessary to stop and wait is one of seamanship, and depends upon the particular facts of each case.—The Backworth [Hill, J.] .. 644

Definition—Pontoon with crane—Adaptability for navigation].—The Court held that a pontoon with a crane fixed on it was not a "ship or vessel" within the rules of an indemnity association, on the ground that the quality of adaptability for navigation was not sufficiently present to bring it within the meaning of these words in the rules. Decision of Roche, J. (42 *The Times* L.R., 724) affirmed.—Merchants' Marine Insurance Company, Limited v. North of England Protecting and Indemnity Association [C.A.] 107

Practice—Service out of jurisdiction—Collision—Inlets of the sea—Bristol Channel—R.S.C., Order XI., r. 1 (*ee*)].—A collision occurred in the Bristol Channel, about midway between the English and Welsh coasts, a little to the eastward of a line drawn from Bull Point in Devon to Port Eynon Head in Gower, Glamorgan, between the plaintiffs' steamship Cornish Coast and the defendants' steamship Fagernes. At the place in question the channel is 20 miles wide. The Fagernes, an Italian ship, was sunk, and in those circumstances the plaintiffs, being unable to proceed for their damage *in rem*, brought an action of tort against the Italian owners *in personam*, and obtained an order giving leave to serve notice of the writ out of the jurisdiction on the ground that the action was founded on a tort committed within the jurisdiction. The defendants thereupon moved to have this order set aside, on the ground (*inter alia*) that the collision occurred outside British territorial waters

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and therefore the Court had no jurisdiction. The Judge hearing the motion held that the collision occurred in a part of the Bristol Channel over which the English Courts had jurisdiction, because the waters of that part of the channel were *inter fauces terræ* and were deemed by the common law to be part of the territory of the State which owned the land on both sides, and that therefore the order giving leave to serve notice of the writ out of the jurisdiction must stand. On the hearing of an appeal the Attorney-General informed the Court of Appeal that the Crown did not claim the part of the Bristol Channel where the collision occurred as being within the territorial jurisdiction of the King. Held, that in view of the information given to the Court by the Attorney-General and of the absence of evidence of any effective occupation the order giving leave to serve notice of the writ out of the jurisdiction must be set aside. Appeal from decision of Hill, J. (42 *The Times* L.R., 621 ; [1926] P., 185), allowed.—The FAGERNES [C.A.] 746

Requisition — Cargo — Government order not to discharge—Detention of ship—Ultimate requisition of cargo—Compensation for detention—Emergency Regulations, 1921, regs. 9, 11, 25].—The suppliants were the owners of a steamer which, in March, 1921, was chartered from them to bring a cargo of coal from Sunderland to London. The steamer arrived at Rotherhithe on April 1, but on April 2, before she could begin to discharge, a Customs official gave directions that, by reason of the coal strike, the cargo was not to be discharged. The ship was detained until April 21, when the Government requisitioned the coal. She was then ordered by the Board of Trade to take the coal to Erith, and to discharge it there. The discharge was completed on April 23. The suppliants claimed damages for detention of the ship and asked for (*a*) a declaration that she was requisitioned by a Government Department, and that they were entitled under reg. 25 of the Emergency Regulations, 1921, to compensation for 21 days' detention, and (*b*) a declaration that they were entitled to compensation at common law. Held, that the order not to discharge was not a requisition of the ship, and that the suppliants were entitled under the Regulations to compensation for a requisition of the ship for only two days, namely, April 22 and 23, and that a mere negative prohibition did not carry with it any claim to compensation at common law.—W. FRANCE FENWICK AND CO., LIMITED v. THE KING [Wright, J.] .. 18

Sale — Goods — Specific performance—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), ss. 4, 62 (1)].—A ship comes within the description of "goods" in the Sale of Goods Act, 1893, since by s. 62 (1) "'goods' include all chattels personal other than things in action and money." Under s. 52 of the Act the Court may direct specific performance of the sale of a ship.—BEHNKE v. BEDE SHIPPING COMPANY, LIMITED [Wright, J.] 170

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Salvage — Duties of contracting parties—Salvage prevented by negligence of crew of ship—Damages].—The masters of the plaintiffs' tugs orally contracted with the master of a steamship—which after stranding and sustaining great damage had refloated on the flood tide—to render salvage services to the ship by towing her to a named spot and beaching her. Owing, however, to the negligence of the servants of the shipowners in failing to slip, at the proper moment, an anchor by which the steamship was being held, the tugs were unable to perform the contractual services, and the vessel again went aground. Held, that there was an implied obligation on each party to the contract to act with ordinary skill and care in carrying out his share of the combined work, and that the plaintiffs, having been prevented by the negligence of the shipowners' servants from performing the contract, were entitled to recover *in personam* against the shipowners, as damages, the amount which but for such negligence they would have earned under the contract.—THE VALSESIA [Hill, J.] 144

Salvage—Lloyd's salvage agreement, "No cure no pay"—Maritime lien—Arrest under foreign jurisdiction—*Saisie conservatoire*—No maritime lien under foreign jurisdiction—Sale of ship by syndic (trustee) in bankruptcy of owner in Egypt—Arrest of ship, after sale, in this country].—The plaintiffs, a firm of salvage contractors, by a writ *in rem* claimed salvage for services rendered by them to the defendants' steamship under the terms of a salvage agreement in Lloyd's Standard Form, known as "No cure no pay," signed by the master. The agreement expressly provided that in the event of security not being given by the owners of the ship and cargo the salvors should be entitled to take steps to enforce their maritime lien. After the salvage services the ship was arrested in Constantinople, but she was released upon her owner undertaking that she would proceed forthwith to Alexandria and there submit to re-arrest until such time as security was provided. The vessel duly sailed from Constantinople, but before her arrival at Alexandria her owner had become bankrupt in Egypt, and the ship, on reaching the Egyptian port, was seized by his syndic or trustee in bankruptcy, and by that official sold, in the bankruptcy proceedings, to the defendants, free from encumbrances. An order obtained by the plaintiffs for a *saisie conservatoire* of the ship, in accordance with Egyptian law, was therefore ineffective. The plaintiffs proceeded to arbitration in accordance with the terms of Lloyd's agreement, and having obtained an award in the absence of the shipowners, entered a claim in the bankruptcy in Egypt for the amount of the award. The syndic, however, opposed the claim on the ground that the master had no authority to sign the salvage agreement, and that matter was now pending in the Egyptian Courts. No maritime lien or right *in rem* is recognized by Egyptian law, or conferred by a *saisie conservatoire*. After

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being sold by the syndic the ship came within the jurisdiction of the English Courts, and she was thereupon arrested by the plaintiffs in an action *in rem*. On a motion by the defendants to set aside the writ in that action, Held, that the sale by the syndic was not a sale of the *res*, as a sale on a judgment in an action *in rem*, which would confer a title free from encumbrances, but was merely a sale of the interest of the bankrupt owner, and therefore a sale *cum onere*, and could not discharge the maritime lien of the salvors; that the salvors' maritime lien had not been discharged by the signing of the salvage agreement, because although Lloyd's salvage agreement was a bargain to arbitrate, the contract itself was based on the owner of the salved property providing security in the terms of the contract, and the salvors' lien could only be defeated if the whole of the salvage agreement was carried out; and that, in fact, security never had been provided in the terms of the agreement, and the plaintiffs were therefore entitled to maintain an action and assert their maritime lien.—THE GOULANDRIS [Bateson, J.] 308

Salvage—Services rendered by request—No actual benefit resulting therefrom—Award—S.O.S. calls for assistance].—Wireless signals for assistance made by the defendants' steamship were picked up by the plaintiffs' steamship, which was then asked by wireless to give towage services for a daily rate of remuneration. The plaintiffs declined to assist except on a salvage basis, and finally the defendants' steamship wirelessed "Accept your offer for assistance." Thereupon the plaintiffs' steamship steamed some 120 miles to the defendants' steamship, deviating for the purpose from her own course, but, although she was after a time able to make fast, the tow-ropes soon parted, and the plaintiffs' vessel resumed her voyage by mutual arrangement without having rendered any really beneficial service. Subsequently the defendants' ship was towed into port by other salvors. Held, that although merely responding to an S.O.S. call for assistance would not of itself necessarily give a claim to salvage remuneration, yet where a ship was definitely requested by wireless to come to the aid of a disabled vessel and do what she could to assist her, and she did go to the assistance of the disabled vessel, she was entitled to a salvage award, even although, as events turned out, she was not able to confer much, if any, benefit. Decision of Bateson, J. (42 *The Times* L.R., 720; [1926] P., 205), affirmed.—THE STIKLESTAD [C.A.] 118

Seaworthiness—Warranty—Bad stowage].—The plaintiffs employed the first defendants, who were lightermen, to provide barges to convey wood pulp from a ship at Erith to Farncombe and to stow the pulp in the barges. The first defendants employed the second defendants, who were stevedores, to do the stowage. The quantity of pulp put on board one of the barges was in excess

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of her capacity, and the result was that cracks in her upper structure admitted water and she sank while still alongside the ship and the pulp became a loss. In an action for damages the Judge at the trial held that the first defendants were liable, as the bad stowage, making the barge in question unfit to undergo the ordinary perils which might arise at all stages of the work contracted for, was a breach of the warranty of seaworthiness, but that the second defendants were not liable, as they had no knowledge of the capacity of the barge and had merely acted according to the instructions of the first defendants. On an appeal by the first defendants, Held, that there was evidence to support the Judge's finding against the first defendants, and the appeal failed. Decision of Roche, J. (42 *The Times* L.R., 744), affirmed.—ALBERT E. REED AND CO., LIMITED v. PAGE, SON, AND EAST, LIMITED, AND ANOTHER [C.A.] 272

Ship repairers—Dockowners—Damage by fire in dry dock—Ship undergoing repairs—Limitation of liability—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 and 64 Vict., c. 32), s. 2].—By s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, "(1) The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . performs any duty or exercises any power . . . (4) For the purpose of this section the term 'dock' shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks. . . ." The defendants' steamship, while undergoing repairs by the plaintiffs in the plaintiffs' dry dock at Blackwall, sustained damage by fire, the outbreak of which was found to be due to the negligence of the plaintiffs' servants employed in the repairs. The plaintiffs therefore claimed a declaration that as dockowners they were entitled under s. 2 of the Act of 1900 to a decree limiting their liability. Held (Lord Wrenbury and Lord Blanesburgh dissenting), that though the work in which the negligence occurred, giving rise to the liability of the plaintiffs in the present case, was work done by the plaintiffs in the capacity of ship repairers and not in the capacity of dry dock owners, s. 2 applied and the plaintiffs were entitled to limit their liability. Decision of the Court of Appeal (42 *The Times* L.R., 708; [1927] P., 47) affirmed.—THE RUAPEHU [H.L.] .. 402

Title—Russian ship—Soviet decree for nationalization—Sale by Soviet Government to Italian company—Right to possession].—The plaintiff company was a Russian ship-

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owning company, and by a Russian decree made in 1918 the company's property was nationalized and it passed to the Soviet Republic, provided that the Soviet Republic took possession of it. The plaintiff company's business having been moved to France in 1919, the French Courts appointed an administrator, and to this office the plaintiff B. ultimately succeeded. In 1922 one of the plaintiff company's ships was laid up at an English port, and the master handed her over to the London representatives of the Soviet Government, and in 1924 she was sold on behalf of that Government to the defendants, an Italian company. In an action claiming that the plaintiffs were the lawful owners of the vessel and that possession should be given to them, the evidence was that the decree did not transfer property which was not within the jurisdiction of the Soviet Republic, and the Trial Judge came to the conclusion that it was not proved that the ship was within the territory of the Soviet Republic at the time of the decree. Held, that the defendant company had failed to establish a title superior to that of the plaintiff B., and that the latter had a sufficient possessory title to maintain the action against the defendant company and was entitled to possession. Decision of Hill, J. (43 *The Times* L.R., 210; [1927] P., 122), affirmed.—THE JUPITER [C.A.] 741

See also CANADA.

TITHES—City of London—Rate prescribed by statute—Exemption from prescribed rate—Premises for which less paid before Act—Onus of proof—37 Henry VIII., c. 12].—By the Act 37 Henry VIII., c. 12, and a decree made pursuant to it and having the force of a statute, the lessees of houses and all other hereditaments (with certain immaterial exceptions), situated in the City of London, are liable to pay a tithe of 2s. 9d. for every rent of 20s. by the year, "and so above the rent of 20s. by the year . . . by the rate aforesaid." The decree contained a proviso that in the case of premises in respect of which less sums had been accustomed to be paid for tithes before 1545, the date of the Act, the premises should be exempted from the prescribed rate. In an action by the owners of tithes against the occupiers of premises in the City for tithe at the rate prescribed by the statute, Held, that the onus was on the defendants to prove that the tithe paid before 1545 in respect of the premises was less than the sum prescribed by the statute, but that they had discharged that onus, and the action failed. Appeal from decision of Tomlin, J. (43 *The Times* L.R., 91) allowed.—BUSBY v. AVGHERINO [C.A.] 367

Tithe rent charge—Separate hereditament—"Issuing out of the land"—Conveyance of land in general words—Whether passing title in the tithe arising out of the land conveyed—Tithe Act, 1836 (6 and 7 Will. IV., c. 71), ss. 67, 71].—A conveyance of land in general words does not pass the

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title in the tithe rent charge arising out of the land. Tithe does not belong to or appertain to the premises, and it is not something which an owner of premises has in, to, or on the premises. It is a separate hereditament the title to which does not pass in the absence of special words in the conveyance. *Chapman v. Gatcombe* (2 Bing. N.C., 516) followed.—PUBLIC TRUSTEE AND OTHERS v. CHANCELLOR OF THE DUCHY OF LANCASTER AND ANOTHER [C.A.] 163

TRADE MARKS—Assignment—Connexion with goodwill—Trade Marks Act, 1905 (5 Edw. VII., c. 15), s. 22].—The principle that an English trade mark can be assigned only in connexion with the goodwill of the business concerned in the goods for which it has been registered is not satisfied where the owner of the trade mark, being a person who manufactures the goods abroad, assigns it to his sole wholesale agents in England together with the goodwill of the business of importing the goods into England and selling them in this country. In such a case the assignment is invalid unless made in connexion with the goodwill of the manufacturing and vending business of the assignor, and the trade mark, unless the assignment is so made, becomes deceptive in the hands of the assignee and is liable to be expunged from the register.—LACTEOSOTE, LIMITED v. ALBERMAN [Clauson, J.] 336

Registration — Distinctiveness — Red lines woven into canvas fire hose—Goods manufactured for export only—Trade Marks Act, 1905 (5 Edw. VII., c. 15), s. 9 (5)—Trade Marks Act, 1919 (9 and 10 Geo. V., c. 79), s. 7].—Application was made to register as a trade mark for canvas fire hose three red lines or stripes woven into the hose. The mark had been used by the applicants for many years in connexion with woven fire hose which they manufactured and marked in this country for export, but they had never used, and did not intend to use, the mark in this country otherwise than by attaching it to goods manufactured for export, the applicants' reason for desiring registration here being to facilitate registration in other countries, and the grounds of their application being that the mark was in itself distinctive and that it had not been used by others. The applicants called evidence to show that the mark had come to be identified with their goods in America and Germany, and they offered at the hearing to submit to a limitation confining the use of the mark to goods for export to the United States and Canada. The Registrar refused the application on the ground that, though the identical arrangement of coloured lines had not been used in this country, the mark was not adapted to distinguish the applicants' goods, in view of the use of one or more lines by other manufacturers in the same trade in this country to denote quality or ownership, as distinguished from origin. Held, that there was no ground for interfering with the discretion of the Registrar on the question of distinctiveness and that

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therefore the registration of the mark, if for use in this country, was rightly refused, and that it did not become registrable by reason of the applicants' having consented to a condition that they would use it only in certain countries abroad. Decision of the Court of Appeal (41 *The Times* L.R., 527; [1925] Ch., 693) reversed.—GEORGE BANHAM AND CO., LIMITED, AND OTHERS v. F. REDDAWAY AND CO., LIMITED, AND ANOTHER [H.L.] .. 138

Registration — Invented word — Similarity—Calculated to deceive].—An application by a Liverpool oil merchant to register the invented word "Nuvol" as a new mark in respect of illuminating, heating, and lubricating oils was opposed by the Standard Oil Company of New Jersey, who had registered the invented word "Nujol" as a trade mark in respect of medicinal preparations for human use and had for several years past sold in this country under that name a preparation of refined paraffin, and was refused by the Registrar. Held, that the applicant had failed to discharge the onus which was upon him of showing that the proposed trade mark was not calculated to deceive. Decision of Court of Appeal (43 R.P.C., 313) affirmed.—MCDOWELL v. STANDARD OIL COMPANY (NEW JERSEY) [H.L.] 592

TRADE NAME—Passing off—Jaeger clothing—Change of meaning of word "Jaeger"—Confusion—Injunction].—A limited company was formed in England, over 40 years ago, for the sale of Jaeger sanitary clothing and bedding. At that time the word "Jaeger" as applied to such goods meant goods made in accordance with the principles enunciated by Professor Gustav Jaeger—*i.e.*, goods made of animal fibre. The company's business was carried on subject to agreements entered into between the company and Professor Jaeger and certain German companies. In 1925 the plaintiff company, which consisted of members of Professor Jaeger's family who had been introduced into the business formerly carried on by him, opened a retail shop in London, and in 1926 they commenced an action against the defendant company for a declaration that they were entitled to use the word "Jaeger" upon and in connexion with articles of clothing and analogous goods and to carry on business in the sale of such goods under the style of Prof. Dr. G. Jaeger, provided that they took reasonable precautions to distinguish their goods from those of the defendants. The defendants by their counterclaim sought an injunction to restrain the plaintiffs from passing off their business or goods as those of the defendants by the use of the name "Jaeger" or otherwise. Held, that the meaning of the word "Jaeger," as applied to goods of this nature, had ceased in this country to be descriptive and had come to denote the goods of the defendants; that the plaintiffs were entitled to the declaration, qualified, however, by the insertion, after the word

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"Jaeger," of the words "as part of their business name"; and that the defendants were entitled to the injunction which they sought by the counterclaim.—PROFESSOR DR. G. JAEGER v. THE JAEGER COMPANY, LIMITED [Romer, J.] 220

TRADE UNIONS—Political objects—Expenditure of general funds on such objects—Statutory provision for making of rules—Alleged breach of statutory restrictions—Complaint to Registrar as to breach of rules—Cause of action—Trade Union Act, 1913 (2 and 3 Geo. V., c. 30), ss. 1, 3 (1) (3)].—By s. 3 (1) of the Trade Union Act, 1913, restrictions are imposed on the application of the funds of a trade union for the political objects specified in subsection (3), unless the furtherance of those objects has been approved as an object of the union and by a resolution of the nature mentioned in subsection (1) and unless rules approved by the Registrar of Friendly Societies are in force providing that any payments in furtherance of those objects are to be made out of a particular fund, referred to in the Act as the political fund of the union. It is also provided that any member may, by appropriate notice, obtain exemption from any obligation to contribute to the political fund; and no prejudice, disability, or disadvantage is to attach to the non-contributing member by reason of his claiming that exemption. A valid resolution was passed by the defendant trade union under the section, and rules approved by the Registrar of Friendly Societies providing for the matters referred to in subsection (1) were in force. In an action by a non-contributing member against the union for an alleged breach of the statutory restrictions by expending part of their general funds on the political objects to which the section applies, Held, that as the conditions precedent imposed by the section had been complied with, the statutory restrictions had ceased to operate, and the action failed, the plaintiff's only cause of action (if any) being for a breach of the rules. *Semble*, where a non-contributing member has made to the Registrar of Friendly Societies under s. 3 (2) a complaint of a breach of the rules and the Registrar has dismissed the complaint, such member has no cause of action for the breach of the rules which was the subject of the complaint to the Registrar.—FORSTER v. NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN AND CLERKS [Eve, J.] .. 199

Representative action against members—Requirement of common interest—Definition of trade union — Trade Disputes Act, 1906 (6 Edw. VII., c. 47), s. 4 (1)—Trade Union Act, 1913 (2 and 3 Geo. V., c. 30), ss. 1 (2), 2—Rules of the Supreme Court, Order XVI., r. 9].—The plaintiffs, who were motor-car dealers and agents, brought an action against the defendants, sued on their own behalf and on behalf of all other members of the Motor Trade Association, an unregistered trade union,

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having as its object the imposing of restrictive conditions on the conduct of the motor trade. The claim was substantially for conspiracy. No member of the Association incurred any liability beyond payment of his subscription, and each member was expressly exempted from liability for the acts of the officers and the other members. The Association was a shifting body, some entering and some leaving it. On the defendants' application the Master made two orders, (1) dismissing the action against the defendants in a representative capacity on the ground that the claim was not sustainable in law, and (2) amending the writ and subsequent proceedings by striking out the words which stated that the defendants were sued on behalf of the Association. Held, that since the persons to be represented had no common interest with the defendants, as required by Order XVI., r. 9, the orders of the Master were right. Held, further, that the immunity conferred by s. 4 (1) of the Trade Disputes Act, 1906, upon trade unions, "whether of workmen or masters," in respect of torts, is not confined to unions of workmen or masters, but extends to any union which has the object of imposing restrictive conditions on the conduct of a trade, since such an object is a "statutory object" under s. 1 (2) of the Trade Union Act, 1913, and the definition of "trade union" in s. 2 of the Act of 1913, as including "any combination . . . the principal objects of which are under its constitution statutory objects," applies to a trade union under the Act of 1906. Decision of Fraser, J. (43 *The Times* L.R., 477), affirmed.—HARDIE AND LANE, LIMITED v. CHILTON AND OTHERS [C.A.] 709

TREATY OF PEACE — Debt incurred before outbreak of war — Austrian creditor — Norwegian debtor — Action by creditor incompetent—Treaty of Peace Order, s. 7].—The defendant, a Norwegian subject, living in England, incurred a debt to the plaintiffs, an Austrian company, before the outbreak of war. After the Treaty of Peace the plaintiffs sued the defendant for the amount. The Judge in chambers made an order striking out the claim, on the ground that the only right to sue for the debt was in the Administrator of Austrian property. The plaintiffs appealed. It was admitted on their behalf that any money recovered by them would be subject to the provisions of the Peace Treaty and the charge thereby created. Held (*per* Lord Hanworth, M.R., Scrutton, L.J., dissenting), that although the claim was against a neutral subject, yet, as s. 7 of the Treaty of Peace Order made the debt payable to the Administrator and transferred to him all the rights of the creditors, the plaintiffs had no right to bring the action. As the two members of the Court differed, the order of the Judge in chambers stood.—JOSEF INWALD ACTIENGESELLSCHAFT v. PFEIFFER [C.A.] 399

Enemy property—Retention and liquidation by Allied Powers—Austrian company—

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Change of nationality—Transfer to that of Czechoslovakia—Exemption of individual citizens—Whether company entitled to same exemption—Treaty of St. Germain-en-Laye, Arts. 53, 70, 249 (*b*)].—A company which at the date of the dissolution of the Austrian Empire was a national of that Empire, and which by Arts. 53 and 70 of the Treaty of St. Germain-en-Laye became *de jure* a national of Czechoslovakia, is not liable to have its property rights retained and liquidated by the Allied Powers under Art. 249 (*b*) of the Treaty, and is in the same position in that respect as an individual citizen similarly circumstanced.—BOHEMIAN UNION BANK v. ADMINISTRATOR OF AUSTRIAN PROPERTY [Clauson, J.] 356

TRUSTEES—Profit from trust—Rule prohibiting—Valuation of estate—Work performed by trustee's employers—Resulting profit to trustee].—The defendant, who was in the employment of a firm of stockbrokers, on the terms of half-commission for work introduced, was one of the two trustees of a will, and on the death of the testator these stockbrokers were employed, at the suggestion of the defendant, to value the testator's securities, and they paid to the defendant half the fees so earned by them, the defendant not taking, however, any part in the work or in fixing the fees. In an action against the defendant by the other trustee to make the defendant accountable to the trust estate for the money so received, Held, that as the defendant, though he honestly believed himself to be entitled to do what he had done, had increased his remuneration by virtue of his trusteeship, the rule that a trustee may not make any profit out of his trust applied to the case, and the action succeeded.—WILLIAMS v. BARTON [Russell, J.] 446

VACCINATION — Register—Search—Additional information required by subsequent Act—Whether right of search impliedly abolished—Vaccination Act, 1867 (30 and 31 Vict., c. 84), s. 24—Vaccination Act, 1871 (34 and 35 Vict., c. 98), s. 6—Vaccination Act, 1898 (61 and 62 Vict., c. 49), s. 2—Vaccination Act, 1907 (7 Edw. VII., c. 31), s. 1].—The provision of s. 24 of the Vaccination Act, 1867, which gives a right to search the vaccination register has not been impliedly repealed by the subsequent Vaccination Acts requiring information to be inserted in the register beyond the information required by the Act of 1867.—REX v. SOUTHWARK VACCINATION OFFICER—EX PARTE GOVERNORS OF PEABODY DONATION FUND [Div. Ct.] 492

VENDOR AND PURCHASER — Receipt for purchase-money — Power to give — Sole trustee of Darkest England Scheme—Surplus revenue—Temporary investment in land—Sale—"Settlement"—"Capital money"—Whether signatures of two trustees required—Settled Land Act, 1925 (15 Geo. V., c. 18),

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ss. 29, 94, 95].—The sole trustee of the Darkest England Scheme, connected with the Salvation Army, is not precluded by anything in the Settled Land Act, 1925, from being able alone to give a valid receipt to the purchasers of land in which surplus revenue of the scheme has been temporarily invested. The deed poll constituting the scheme is not made a "settlement" by the Act, and the purchase-money on such a sale is not "capital money" within the Act and is not thereby required to be paid to at least two trustees.—IN RE BOOTH AND THE SOUTHEND-ON-SEA ESTATE COMPANY'S CONTRACT [Astbury, J.] 334

WATERWORKS — Liability of undertakers—Threatened injury to property—Right of owners to bring *quia timet* action—Waterworks Clauses Consolidation Act, 1847 (10 and 11 Vict., c. 17), s. 27].—Section 27 of the Waterworks Clauses Consolidation Act, 1847, does not merely save the right of the owners of property injured by the authorized waterworks to bring a common law action for damages, but leaves the undertakers liable to all legal proceedings which before the Act were open to such owners for protection against damage or injury arising from the works, whether such damage or injury is actual or threatened. It is therefore open to the owners of property threatened with injury by the authorized works to bring a *quia timet* action to restrain the undertakers from doing an act which threatens to injure such property.—GRAIGOLA MERTHYR COMPANY, LIMITED v. SWANSEA CORPORATION [Tomlin, J.] 600

WILL—Construction—Charity—Gift of residue—Probable surplus — General charitable intention—Whether an intestacy as to surplus not immediately required].—A testator, who died in 1916, by his will made in 1913 left the residue of his personal estate on certain trusts for the benefit of the inhabitants of a small village, the trustees being directed to make loans without interest to the poor and deserving, no loan to exceed £100, no borrower to receive more than one loan, and the period for repayment not to exceed nine years. The testator directed that any surplus should be invested from time to time by the Charity Trustees. So far as could be foreseen there was bound to be a surplus as the number of possible borrowers was small and the residue was valued at about £20,000. Held, that as there was a general intention on the part of the testator to devote the residue to charity, and as it was conceivable, though not probable, that all the loan fund might be required, there was no intestacy as to the surplus not immediately required for the purposes of the charity.—IN RE MONK—GIFFEN v. WEDD [C.A.] 256

Construction — Condition against marrying a blood relation — Avoidance — Probable prohibition of marriage—Public policy].—A testator left his residuary estate to his son

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for life, with remainder to his son's children provided that he did not marry a blood relation; and there was a gift over in the event of the son's doing so. Held, that the proviso was not annexed to the gift of the life interest, and that the condition as to the defeat of the interest of the son's children, in the event of the son's marrying a blood relation, was void on grounds of public policy, as leading to a probable prohibition of marriage, since it would be almost impossible to ascertain definitely that any particular woman was not a blood relation.—IN RE LANYON—LANYON v. LANYON [Russell, J.] 714

Construction — Specific bequest — All rights in connexion with play—Contract to sell film rights—Executory at testator's death—Sale completed by executors—Whether legatee entitled to the purchase-money].—A testator, who was the absolute owner of the copyright in English of a play, made a specific bequest of "all my rights to or in connexion with the play." Before the testator's death his agent accepted the offer of a company to purchase the film rights in English-speaking countries for £1,500. The testator's executors assigned these film rights to the company in consideration of the payment of that sum. Held, that the donee of the specific bequest was entitled to the £1,500.—IN RE BANCROFT—BANCROFT v. BANCROFT [Russell, J.] 591

Construction—Specific legacy—"My piano"—Sale of article after date of will—Subsequent purchase of similar article—Wills Act, 1837 (1 Vict., c. 26), s. 24].—A testatrix, who at the time when she made her will had an ordinary piano that had been converted into a player-piano, made in her will a bequest of "my piano." The testatrix afterwards bought a new motor player-piano, and the old piano was sold and removed from her residence, and was not in her possession at her death. Held, that as the particular piano bequeathed had been sold before the death of the testatrix the specific legatee was not entitled to the motor player-piano.—IN RE SIKES—MOXON AND ANOTHER v. CROSSLEY AND OTHERS [Clauson, J.] 57

Probate — Motion to exclude clauses—Alleged offensiveness—No defamation of an individual—Motion refused.—IN THE ESTATE OF CAIE [Hill, J.] 697

Probate — Non-discovery for 20 years—Possession by executrix — Discovery after death of executrix—Suspicion from fact that executrix did not put will forward — No suspicion attaching to document itself — Onus of proof as to revocation—Judgment pronouncing for will].—By a will which was made in 1890, and in which the attestation clause was in order, the testatrix appointed E. M. D. executrix, the sole beneficiary under the will being A. M. D., an illegitimate daughter of E. M. D. In 1900 the plaintiff married A. M. D. In 1905 the testatrix died,

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and, the will not having come to light, letters of administration as on an intestacy were granted to her brother. Although by 1908 E. M. D. knew of the testatrix's death, she did not propound the will. In April, 1924, E. M. D. died. In July, 1924, the testatrix's brother died, leaving a will making the defendant his sole legatee, and in 1925 the defendant, in the month of March, was appointed administratrix *de bonis non*. Also in 1925, more than a year after the death of E. M. D., the plaintiff discovered the will of 1890 in a desk that had belonged to E. M. D. In October, 1925, the plaintiff's wife died. The plaintiff then propounded the will of 1890 as the personal representative of his deceased wife, and he asked for a revocation of the grant of administration *de bonis non*. The defendant put the plaintiff to the proof of the testatrix's knowledge and approval of the contents of the will and claimed that the grant of letters of administration *de bonis non* be handed out to her (the defendant). Held, that although from the conduct of E. M. D. in not putting the will forward there might be a suspicion that there must have been some condition subsequent under which the will, though in itself a valid testamentary document, ceased to be effective, yet, as no suspicion attached to the will itself or to its terms, and therefore the fact of execution was sufficient proof of the testatrix's knowledge and approval of its contents, and as the burden of proving revocation was on the defendant and had not been discharged, there must be judgment pronouncing for the will and revoking the

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grant of administration *de bonis non*.—In re Musgrove Deceased—Davis v. Mayhew [C.A.] 648

Seaman's will — Writing on eggshell—Wills Act, 1837 (1 Vict., c. 26), s. 11].—The defendant's husband, who was a pilot on the Manchester Ship Canal, executed a will in ordinary form in 1920, and after his death in 1925 the defendant found in his bedroom on the top of a wardrobe an empty eggshell on which was written in her husband's handwriting, in indelible ink, "17—1925. Mag. Everything i possess.—J.B." The initials of the name of the defendant's husband were "J.B." and he always called her "Mag." The plaintiffs, as executors, propounded the will of 1920, and the defendant, alleging that the will of 1920 had been revoked by her husband's true last will, made in 1925 while at sea—namely, the writing on the eggshell—claimed a grant of letters of administration with the will of 1925 annexed. Held, (1) that without the aid of evidence from extrinsic circumstances the writing on the eggshell could not be deemed to be a testamentary disposition, (2) that it was not proved to have been made at a time when the testator's position corresponded to that of a soldier *in expeditione*, and the Court must pronounce against the alleged will of 1925 and in favour of the will of 1920.—Hodson and Another v. Barnes (Barnes and Others Intervening) [Lord Merrivale, P.] 71

See also PROBATE.